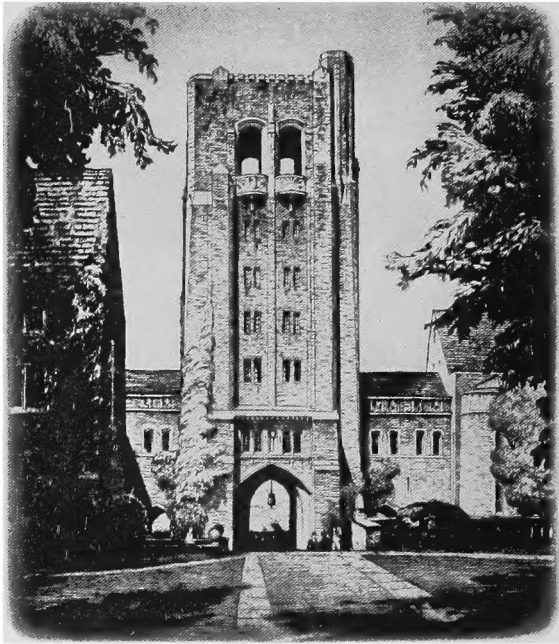


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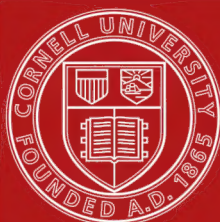
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A TREATISE
ON THE
LAW OF EMINENT DOMAIN
IN THE
UNITED STATES

BY
JOHN LEWIS

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CHAPTER XI.

ACQUISITION OF PROPERTY BY AGREEMENT, PRESCRIPTION OR DEDICATION.

§ 287a. **The subject generally.**—It is manifest that the subject of this chapter could not be fully treated without, practically, writing a treatise upon the subjects of contracts and real property. It may be said, once for all, that agreements made between the owners of land and persons and corporations vested with the power of eminent domain, are governed by the same general rules of law as other similar agreements.¹ It seems appropriate that the subjects mentioned in the chapter heading should find a place in a treatise of this sort, but as they are rather incidental or collateral to the exercise of the eminent domain power, a brief treatment is all that can be justified.

§ 288. **The power to obtain property by agreement.**—In case of private corporations clothed with the power of eminent domain, unless they are restricted by their organic law or by statute, they may undoubtedly acquire by purchase whatever they may condemn.² Frequently, if not

¹ In *Phillips v. Thompson*, 1 Johns. Ch. 131, referring to such a contract, it is said: "The nature and form of the contract is not defined in the act, and it must be understood to mean a contract valid by the existing laws of the land. The statute, most certainly, did not intend any unnecessary interference with established principles. The owner must be a person of competent age and ability to contract, and the contract, to be binding, must have the requisite form and substance. It must be subject to the same rules and

construction as all other contracts of the same nature," p. 144.

² *Pierce on Railroads*, p. 130; *Page v. Heineberg*, 40 Vt. 81, 85; *Hill v. Western Vermont R. R. Co.*, 32 Vt. 68; *Nicoll v. New York & Erie R. R. Co.*, 12 N. Y. 121; *Oregon etc. R. R. Co. v. Oregon steam Nav. Co.*, 3 Or. 178. In *Page v. Heineberg*, the court say: "At common law corporations generally have the legal capacity to take a title in fee to real property, some of the cases holding that it is incident to every corporation. This has

usually, the failure to agree with the owner of the property desired, is made a condition precedent to the exercise by such corporations of their compulsory powers.³ This is equivalent to an express power to purchase.⁴ In the case of municipal corporations and those acting on behalf of the public, there is no power to agree unless it is given by statute, either expressly or by implication.⁵ Such corpora-

been long and well settled, unless in a case where a corporation purchases and undertakes to hold real property for purposes wholly outside and foreign to the object of its creation, or unless restricted by its charter or by statute."

³ Post, § 301 et seq.

⁴ *Draper v. Williams*, 2 Mich. 536.

⁵ *Hyde Park v. Spencer*, 118 Ill. 446; *Trester v. City of Sheboygan*, 87 Wis. 496, 58 N. W. Rep. 747; *Brunes v. Cote* St. Louis, 2 Montreal L. Q. B. 103; *Chicago v. Hayward*, 176 Ill. 130, 52 N. E. Rep. 26; 2 Dill Munic. Corp. 562 et seq.; *Trester v. Sheboygan*, above cited, was a suit by a taxpayer to enjoin the city from paying certain notes which the city had given for part of the price of lots purchased for a street. The court held that the city had no power to make the purchase and granted the relief. In the opinion it is said: "There is a question of public policy which naturally suggests itself as having an important bearing on this subject. The manner by which the city may acquire new streets is specifically and elaborately laid down in its charter. Hasty, ill-advised, or corrupt action is most carefully guarded against. A jury must

pass upon the fundamental question of necessity. The interests of the landowner are thus effectually guarded as against the city, while at the same time this same provision protects the taxpayers against the governing body by making it impossible for it to take land for a street, and spend or mortgage the corporate funds, in the absence of the decision of a disinterested jury. The object is plain. Streets which are not dedicated to the public voluntarily by the landowner are to be acquired in one certain and specific way. The provisions are wholesome. They protect the private owner as well as the taxpayer, and we can have no doubt but that by necessary implication they prevent the acquiring of streets by purchase, as has been here attempted. The power to so acquire streets has neither been expressly granted, nor is it fairly or reasonably to be implied, nor is it in any respect essential to the declared objects and purposes of the corporation. We have been referred to no authorities bearing directly on the question, nor have we been able to find any. We have therefore treated it as a question arising under general principles."

tions and public agents must pursue strictly the mode pointed out by law.⁶ The public having through the legislature pointed out how property shall be acquired, and how the amount of compensation and damages shall be ascertained for property taken by the public for public use, the agents of the public should not be allowed to depart from the course so laid down.⁷ Such a construction of a statute will be favored as will authorize the acquisition of property by agreement.⁸ When a public corporation has power to acquire property by agreement, it will also have authority to enter into all necessary and proper stipulations for the purpose of carrying out the power.⁹

§ 289. Who are competent to agree or convey. — As already observed, contracts made between the owners of property and those vested with authority to condemn the same for public use are subject to the same general rules and principles as though the power to condemn did not exist. The parties must be competent to contract and able to convey the interest or bind the property in the manner proposed. The deed or contract must be executed with the formalities required by law.¹⁰ A deed from a mortgagor conveys only his interest and is subject to the mortgage.¹¹

⁶ *Hanlon v. Supervisors of Westchester*, 57 Barb. 383; *McCann v. Otoe Co.*, 9 Neb. 324; *Paret v. Bayonne*, 39 N. J. L. 559.

⁷ *Ibid.*, and see further upon this subject: *People v. Supervisors of Richmond County*, 20 N. Y. 252; *Noyes v. Chapin*, 6 Wend. 461; *Griggs v. Foote*, 4 Allen 195; *State v. Board of Public Works*, 42 Ohio St. 607.

⁸ *Mobile v. Richardson*, 1 Stew. & Por. 12.

⁹ *Sanitary District v. Lee*, 79 Ill. App. 159.

¹⁰ *Louisville etc. R. R. Co. v. Stephens*, 96 Ky. 401, 29 S. W. Rep. 14; *Phillips v. Thompson*, 1 Johns. Ch. 131.

¹¹ *Jackson v. Centerville etc. R. Co.*, 64 Ia. 292; *Liverman v. Roanoke etc. R. R. Co.*, 109 N. C. 52, 13 S. E. Rep. 734; *Wade v. Hennessey*, 55 Vt. 207. In this case the mortgagor deeded a right of way to a railroad company. The money received was actually paid to the mortgagee on his debt, though he did not know the source from whence it came. On a bill to foreclose it was held that the company took no more than any other purchaser would have done and could make no defense but what the mortgagor could have made. See also *Price v. Weehawken Ferry Co.*, 31 N. J. Eq. 31.

The deed or contract of a life tenant does not bind the reversioner.¹² But the life tenant may authorize any use of the land which does not injure the inheritance.¹³ A deed of a right of way by a husband over land which is the separate property of his wife is invalid.¹⁴ But the husband may make a valid grant of a right of way through lands belonging to him and occupied as a homestead.¹⁵ A deed of a tenant in common does not bind his co-tenant.¹⁶ But in such case a partition will be so made, if possible, as to allot to the grantor the part on which the burden has been placed.¹⁷ An agent to negotiate sales of land cannot convey a right of way to a railroad company.¹⁸ A release of damages by a married woman in which her husband did not join was held to be invalid in Pennsylvania.¹⁹ In South Carolina it has been held that a trustee to manage real estate for the benefit of others could give a valid license to a railroad company to occupy a right of way during the trusteeship.²⁰ A deed

¹² *Bentonville R. R. Co. v. Baker*, 45 Ark. 252; *Hope v. Norfolk & Western R. R. Co.*, 79 Va. 283; *Chicago & Alton R. R. Co. v. Goodwin*, 111 Ill. 273; *Bradley v. Missouri Pacific R. R. Co.*, 91 Mo. 493; and see *Austin v. Rutland R. R. Co.*, 45 Vt. 215; *Gorrill v. Toledo etc. R. R. Co.*, 4 Ohio C. C. 398.

¹³ *Chicago & Alton R. R. Co. v. Goodwin*, 111 Ill. 273.

¹⁴ *Galveston C. & Santa Fe Ry. Co. v. Donahoo*, 59 Tex. 128; *Texas & P. Ry. Co. v. Durrett*, 57 Tex. 48.

¹⁵ *Randall v. Texas Central Ry. Co.*, 63 Tex. 586; *Chicago etc. R. R. Co. v. Titterington*, 84 Tex. 218, 19 S. W. Rep. 472; *Chicago & South Western R. R. Co. v. Swinney*, 38 Ia. 182. But in *Conboy v. Kansas City etc. R. R. Co.*, 42 Kan. 658, 22 Pac. Rep. 719, it is held that the husband cannot bind the homestead by an agree-

ment to convey a right of way through his farm. And in *Cowan v. Southern R. R. Co.*, 118 Ala. 354, 23 So. Rep. 754, a deed by the husband of a right of way through the homestead was held to be void and he was allowed to maintain a bill to set it aside.

¹⁶ *Edridge v. Rochester City etc. R. R. Co.*, 54 Hun 194; *Hill v. Glendon etc. Mfg. Co.*, 113 N. C. 259, 18 S. E. Rep. 171; *Charleston etc. R. R. Co. v. Leech*, 39 S. C. 446, 17 S. E. Rep. 994.

¹⁷ *Charleston etc. R. R. Co. v. Leech*, 39 S. C. 446, 17 S. E. Rep. 994.

¹⁸ *Gulf etc. R. R. Co. v. Poin-dexter*, 70 Tex. 98, 7 S. W. Rep. 316.

¹⁹ *Delaware etc. R. R. Co. v. Burson*, 61 Pa. St. 369; see *Colorado Cent. R. R. Co. v. Allen*, 13 Col. 229, 22 Pac. Rep. 605.

²⁰ *Tutt v. Port Royal & Augusta Ry. Co.*, 16 S. C. 365; and

by a guardian of a right of way through the land of his ward, unless pursuant to a regular sale according to the statute and approved by the court, is void.²¹ Administrators cannot give a valid consent to the lay-out of a highway over lands of their intestate.²² But it has been held that executors with a power of sale may do so.²³ Those representing corporations, and others desiring to acquire property, must have due authority, or their acts will not bind their principals.²⁴ In this respect the general laws of agency apply. The president of a railroad company has no power by virtue of his office to grant a right of way across the yards of his company to another railroad company.²⁵ A deed on behalf of a corporation must be duly authorized.²⁶ Sometimes provision is made for acquiring the rights of infants by contract. In such cases the statute must be pursued.²⁷ A deed from a lessor does not bind his lessee.²⁸

§ 289a. **Validity of deeds and contracts: Frauds, public policy, consideration.**—Contracts for right of way and the like may be impeached for fraud the same as all other contracts, and such fraud may be shown by parol evidence.²⁹ Where an owner of a farm is induced to agree to give a right of way through his farm on the representation that

see *Georgia etc. R. R. Co. v. Scott*, 38 S. C. 34, 16 S. E. Rep. 185, 839.

²¹ *State v. Comrs.*, 39 Ohio St. 58; *Indiana, Bloomington & Western R. R. Co. v. Brittingham*, 98 Ind. 294; *Indiana, Bloomington & Western Ry. Co. v. Allen*, 100 Ind. 409.

²² *Rush v. McDermott*, 50 Cal. 471.

²³ *Thompkins v. Augusta & Knoxville R. R. Co.*, 21 S. C. 420.

²⁴ *Central Mills Co. v. New York & New England R. R. Co.*, 127 Mass. 537; *Reynolds v. Dunkirk & State Line R. R. Co.*, 17 Barb. 613; *Gulf etc. R. R. Co. v.*

Jones, 82 Tex. 156, 17 S. W. Rep. 534.

²⁵ *Pennsylvania R. R. Co.'s Appeal*, 80 Pa. St. 265.

²⁶ *Macon etc. R. R. Co. v. Riggs*, 87 Ga. 158, 13 S. E. Rep. 312.

²⁷ *Louisville etc. R. R. Co. v. Blythe*, 69 Miss. 930, 11 So. Rep. 111; *Midland Counties R. R. Co. v. Oswin*, 1 Collyer 74.

²⁸ *Chattanooga etc. R. R. Co. v. Brown*, 84 Ga. 256, 10 S. E. Rep. 730.

²⁹ *Grand Tower etc. R. R. Co. v. Walton*, 150 Ill. 428, 37 N. E. Rep. 920; *Knowles v. Norfolk & S. R. R. Co.*, 102 N. C. 381, 9 S. E. Rep. 4.

the location will be changed from the line surveyed to another less injurious, and the road is built according to the survey, which the company never intended to abandon, the false representation will avoid the contract.³⁰ Fraud cannot be implied from the fact that a railroad company surveyed two lines across the plaintiff's farm, one of which would be much more injurious than the other, whereupon the plaintiff gave a deed of the latter route.³¹ It is held that the grant of an exclusive right of way for a use of a public nature, such as a railroad,³² or pipe line,³³ or telegraph,³⁴ is against public policy and void, so far, at least, as the exclusive feature is concerned. Where railroad companies are required by law to fence their tracks, a conveyance of right of way on the promise of the company to fence the same is without consideration, and the grantor may have compensation assessed for the land conveyed.³⁵

³⁰ *Grand Tower etc. R. R. Co. v. Walton*, 150 Ill. 428, 37 N. E. Rep. 920. And see *Windle v. Crescent Pipe Line Co.*, 186 Pa. St. 224.

³¹ *Guess v. South Bound R. R. Co.*, 40 S. C. 450, 19 S. E. Rep. 68.

³² *Kettle Riv. R. R. Co. v. Eastern R. R. Co.*, 41 Minn. 461, 43 N. W. Rep. 469.

³³ *West Virginia Trans. Co. v. Ohio Riv. Pipe Line Co.*, 22 W. Va. 600.

³⁴ *Western Union Tel. Co. v. American Union Tel. Co.*, 65 Ga. 160; *Western Union Tel. Co. v. Burlington etc. R. R. Co.*, 3 McCrary 130; S. C. 11 Fed. Rep. 1; *Western Union Tel. Co. v. Am. Tel. Co.*, 9 Biss. 72; *Western Union Tel. Co. v. B. & O. Tel. Co.*, 19 Fed. Rep. 660; *Western Union Tel. Co. v. B. & O. Tel. Co.*, 23 Fed. Rep. 12; *Baltimore & O. Tel. Co. v. Western Union Tel. Co.*, 24 Fed. Rep. 318;

Pacific Postal Tel. Cable Co. v. Western Union Tel. Co., 50 Fed. Rep. 493; *Mercantile Trust Co. v. Atlantic & Pac. Tel. Co.*, 63 Fed. Rep. 910; see *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1. Contra: *Western Union Tel. Co. v. Atlantic & P. Tel. Co.*, 7 Biss. 367; *Canadian Pac. R. R. Co. v. Western Union Tel. Co.*, 17 Can. Sup. Ct. 151.

Some other phases of public policy are involved in the contracts litigated in the following cases: *Texas & P. R. R. Co. v. City of Marshall*, 136 U. S. 393, 10 S. C. Rep. 846; *City of New Haven v. New Haven & D. R. R. Co.*, 62 Conn. 252, 25 Atl. Rep. 316; *Pacific R. R. Co. v. Seely*, 45 Mo. 212; *Dix v. Shaver*, 14 Hun 392.

³⁵ *Shortle v. Terre Haute & I. R. R. Co.*, 131 Ind. 338, 30 N. E. Rep. 1084.

§ 289b. **Delivery and acceptance.**—A deed may be delivered with a reservation that it shall not be used or take effect except upon certain conditions, and this may be shown by parol.³⁶ If the conditions are not fulfilled, the deed is void.³⁷ A deed or contract is not effective until accepted by the grantee or promisee, but after acceptance the grantee is bound by the provisions of the deed, whether he has signed it or not.³⁸ A grantee who takes the benefit of a deed or contract is estopped to deny acceptance of same.³⁹ One accepting a deed or contract procured by an agent is bound by the representations and promises made by the agent in procuring the same.⁴⁰

§ 290. **Construction and sufficiency of the description in deeds and contracts.**—It is a general rule, that a deed in which the description of the property attempted to be conveyed is so uncertain that the property cannot be ascertained or located, is void.⁴¹ Upon this principle a deed, conveying a right of way through a tract of land, without any description by which it can be located, will be inoperative.⁴² But a deed of a right of way ninety-nine feet wide, being forty-nine and one-half feet on each side of the center line of a railroad as it should be finally located through a described tract of land, was held to be good, and to be binding upon a subsequent grantee of the grantor therein

³⁶ *Humphreys v. Richmond & D. R. R. Co.*, 88 Va. 431, 13 S. E. Rep. 985.

³⁷ *Ibid.*

³⁸ *Harlan v. Logansport Nat. Gas. Co.*, 133 Ind., 323, 32 N. E. Rep. 930; *St. Louis etc. R. R. Co. v. Ruddell*, 53 Ark. 32, 13 S. W. Rep. 418; *Preston v. Liverpool etc. R. R. Co.*, 5 H. L. Cas. 605; *Scottish N. E. R. R. Co. v. Stewart*, 3 Macq. 382.

³⁹ *Louisville etc. R. R. Co. v. Taylor*, 96 Ky. 241, 28 S. W. Rep. 666. See *St. Louis etc. R. R. Co. v. Ruddell*, 53 Ark. 32, 13 S. W. Rep. 418.

⁴⁰ *Chattanooga etc. R. R. Co. v. Davis*, 89 Ga. 708, 15 S. E. Rep. 626; *Morris etc. R. R. Co. v. Green*, 15 N. J. Eq. 469.

⁴¹ *Washburn on Real Prop.* (3d ed.) p. 331.

⁴² A deed simply conveying a certain number of acres out of a larger tract was held void in Illinois. *Shackleford v. Bailey*, 35 Ill. 491. But a similar deed was held good in Texas, and it was also held that the grantee could select the number of acres out of any part of the tract. *Wofferd v. McKinna*, 23 Tex. 36, 45.

having notice of the deed.⁴³ Such a deed was held to be void in Maine.⁴⁴ A bond or agreement to convey a right of way to be afterwards selected is undoubtedly good, and may be enforced.⁴⁵ An agreement was made as follows: "Know all men by these presents: That I, Lewis W. Ross, of Lewiston, Fulton County, Illinois, in consideration of one dollar to me in hand paid by the Peoria and Hannibal Railroad Company, the receipt of which is hereby acknowledged, do hereby agree to release and convey unto said company the right of way for said railroad over any land, or town lots owned by me, in Fulton County, Illinois, except those having buildings on the line, and to execute and deliver to the said company a proper release and conveyance of the same as soon as the said road is located. In testimony whereof, I have hereunto subscribed my name and affixed my seal, this 26th day of June, A. D. 1854.

"LEWIS W. ROSS, (Seal)"

After the P. & H. Co. had partially built its road over Ross' land, its property and franchises passed by mesne conveyances to the defendant, which completed it. It was held that the latter company could compel a specific performance of the contract.⁴⁶ And so, where a right of way or other easement is granted by deed without fixed and definite limits, the practical location and use of such way or easement by the grantee under his deed, acquiesced in by the grantor, operate as an assignment of the right and are deemed to be that which was intended to be conveyed by the deed and are the same in legal effect as if the location so selected and used had been fully described by the

⁴³ *Burrow v. Terre Haute & Logansport R. R. Co.*, 107 Ind. 432.

⁴⁴ *Hall v. Pickering*, 40 Me. 548; see also *Barlow v. Chicago, Rock Island & Pacific R. R. Co.*, 29 Ia. 276.

⁴⁵ *Conwell v. Springfield & North Western R. R. Co.*, 81 Ill. 232. This was an agreement by

Conwell to convey to the railroad company the right of way for its railroad over any lands owned by Conwell in Mason County, Ill. See also *Hill v. Western Vermont R. R. Co.*, 32 Vt. 68; *Macon & Augusta R. R. Co. v. Bowen*, 45 Ga. 531.

⁴⁶ *Ross v. Chicago, Burlington & Quincy R. R. Co.*, 77 Ill. 127.

terms of the grant.⁴⁷ And when an indefinite grant of that sort has been once located and defined by actual user, no enlargement or extension of the right can afterwards be made by the grantee, though such enlargement or extension might have been included in the original location.⁴⁸ Thus, where the right to lay and maintain a pipe across land of the grantor was granted to a railroad company, and a pipe was afterwards laid down, it was held that the company could not afterwards either lay a larger pipe or change its location.⁴⁹ So where, under grant of a right of way not exceeding one hundred feet in width, a railroad company took possession of and used less than one hundred feet, it was held that it could not, years after, occupy the balance of the hundred feet.⁵⁰ The grant of a right of way, not specifying the width, is not to be construed as a grant of the maximum width which might be condemned.⁵¹ Where a right of way is conveyed over a tract of land for a railroad as located or to be located, and the location is made elsewhere, the company cannot, nineteen years after, locate a switch track on the grantor's land under the grant.⁵² A

⁴⁷ *Bannon v. Angier*, 2 Allen, 128; *Onthank v. Lake Shore & Michigan Southern R. R. Co.*, 71 N. Y. 194; *Warner v. Railroad Co.*, 39 Ohio St. 70; *Nashville etc. R. R. Co. v. Hammond*, 104 Ala. 191, 15 So. Rep. 935; *Indianapolis etc. R. R. Co. v. Reynolds*, 116 Ind. 356, 19 N. E. Rep. 141; *Indianapolis etc. R. R. Co. v. Lewis*, 119 Ind. 218, 21 N. E. Rep. 660; *Ft. Wayne etc. R. R. Co. v. Sherry*, 126 Ind. 334, 25 N. E. Rep. 898; *Lake Erie & W. R. R. Co. v. Ziebarth*, 6 Ind. App. 228, 33 N. E. Rep. 256; *Vicksburg etc. R. R. Co. v. Barrett*, 67 Miss. 579, 7 So. Rep. 549; *Delaware etc. R. R. Co. v. Newton Coal Min. Co.*, 6 Luzerne Leg. Reg. Rep. 21; *Columbus etc. R. R. Co. v.*

Williams, 53 Ohio St. 268, 41 N. E. Rep. 261; *Pennsylvania R. R. Co. v. Pearsoll*, 173 Pa. St. 496, 34 Atl. Rep. 226; *Olive v. Sabine etc. R. R. Co.*, 11 Tex. Civ. App. 208, 33 S. W. Rep. 139.

⁴⁸ *Ibid.*

⁴⁹ *Onthank v. Lake Shore & Michigan Southern R. R. Co.*, 71 N. Y. 194.

⁵⁰ *Warner v. Railroad Co.*, 39 Ohio St. 70.

⁵¹ *Nashville etc. R. R. Co. v. Hammond*, 104 Ala. 191, 15 So. Rep. 935; *Indianapolis etc. R. R. Co. v. Reynolds*, 116 Ind. 356, 19 N. E. Rep. 141; *Ft. Wayne etc. R. R. Co. v. Sherry*, 126 Ind. 334, 25 N. E. Rep. 898.

⁵² *Lake Erie etc. R. R. Co. v. Ziebarth*, 6 Ind. App. 228, 33 N.

grant, according to a location made, will not follow a change of location.⁵³ Where a right of way is granted through a farm "provided the road runs at back of garden," the company cannot run through the garden.⁵⁴ Parol evidence is admissible, as in other cases, to aid in applying the description to the subject matter.⁵⁵

§ 291. The title or estate conveyed, or which may be acquired. —Where the right to acquire property by purchase exists, a fee may be acquired in the absence of any limitation.⁵⁶ And this is true though the grantee could acquire only an easement by condemnation.⁵⁷ A bond or agreement to convey, however, in the absence of any specification of the estate to be conveyed, is satisfied by the conveyance of such an interest as would be acquired by condemnation.⁵⁸ The right to purchase the fee implies the right to purchase any less estate. The conveyance of a *right of way* conveys an easement only,⁵⁹ and a deed purporting to convey a fee-

E. Rep. 256. And see Nashville etc. R. R. Co. v. Hammond, 104 Ala. 191, 15 So. Rep. 935.

⁵³ King v. Norfolk & W. R. R. Co., 90 Va. 210, 17 S. E. Rep. 868.

⁵⁴ Knoxville etc. R. R. Co. v. Beeler, 90 Tenn. 548, 18 S. W. Rep. 391. For a description held good see Denver etc. R. R. Co. v. Lockwood, 54 Kan. 586, 38 Pac. Rep. 794.

⁵⁵ Hoffman v. Port Huron, 102 Mich. 417, 60 N. W. Rep. 831; Eastman v. St. Anthony Falls W. P. Co., 43 Minn. 60, 44 N. W. Rep. 882; Hanlon v. Union Pac. R. R. Co., 40 Neb. 52, 58 N. W. Rep. 590; Thompson v. Southern Cal. Motor Road Co., 82 Cal. 497, 23 Pac. Rep. 130, 1 Am. R. R. & Corp. Rep. 181.

⁵⁶ Page v. Heineberg, 40 Vt. 81; State v. Brown, 27 N. J. L. 13; Holt v. Somerville, 127 Mass. 408; Nicoll v. New York & Erie R. R.

Co., 12 N. Y. 121; Heath v. Barmore, 50 N. Y. 302; Yates v. Van De Bogert, 56 N. Y. 526.

⁵⁷ Heath v. Barmore, 50 N. Y. 302.

⁵⁸ Hill v. Western Vermont R. R. Co., 32 Vt. 68. In case of doubt there is a tendency to construe deeds as vesting the same estate as would have been acquired by a condemnation. United States Pipe Line Co. v. Delaware etc. R. R. Co., 62 N. J. L. 254; Smith v. Hall, 103 Ia. 95.

⁵⁹ Roushlang v. Chicago etc. R. R. Co., 115 Ind. 106, 17 N. E. Rep. 198; Cincinnati R. R. Co. v. Geisel, 119 Ind. 77, 21 N. E. Rep. 470; Smith v. Holloway, 124 Ind. 329, 24 N. E. Rep. 886; Jones v. Van Bochove, 103 Mich. 98, 61 N. W. Rep. 342; Blakely v. Chicago etc. R. R. Co., 46 Neb. 272, 64 N. W. Rep. 972; Reichenbach v. Wash. Short Line R. R. Co., 10

simple has been held to vest only an easement.⁶⁰ The rights acquired by a deed, the uses which may be made of the property,⁶¹ and the duration of the estate⁶² are treated elsewhere.⁶³

§ 292. Conveyances upon condition: Whether provisions of deed will be construed as conditions or covenants. —The general doctrine in regard to conditions applies to the conveyances now under consideration. "No precise technical words are required to make a condition precedent or subsequent. The construction must always be founded on the intention of the parties. The same words have been construed both ways, and much has been made to depend on the order of time in which the conditions are to be performed. If the act or condition required does not necessarily precede the vesting of the estate, but may accompany or follow it, and if the act may be as well done after as before the vesting of the estate, or if, from the nature of the act to be performed and the time required for its performance, it is evidently the intention of the parties that the estate shall vest, and the grantee perform the act after taking possession, then the condition is subsequent."⁶⁴ Where a right of way is granted in consideration of the construction and operation of a railroad upon a certain line, the construction and maintenance of the road is a condition subsequent, and the land reverts if the road is abandoned.⁶⁵ Nor can the right of way so granted be used for

Wash. 357, 38 Pac. Rep. 1126;
Fletcher v. Great Western R. R.
Co., 29 L. J. Exch. 253.

⁶⁰ Chouteau v. Mo. Pac. R. R.
Co., 122 Mo. 375, 22 S. W. Rep.
458, 30 S. W. Rep. 299.

⁶¹ Shoemaker v. Cedar Rapids
etc. R. R. Co., 45 Minn. 366, 48 N.
W. Rep. 191; O'Neal v. City of
Sherman, 77 Tex. 182, 14 S. W.
Rep. 31; Blakely v. Chicago etc.
R. R. Co., 46 Neb. 272, 64 N. W.
Rep. 972.

⁶² Davis v. Memphis etc. R. R.
Co., 87 Ala. 633, 6 So. Rep. 140.

⁶³ Post, chap. 25.

⁶⁴ Underhill v. Saratoga &
Washington R. R. Co., 20 Barb.
455. To same effect Parmelee v.
Oswego & Syracuse R. R. Co., 6
N. Y. 24; Nicoll v. New York &
Erie R. R. Co., 12 N. Y. 121.

⁶⁵ Cleveland, Columbus etc. R.
R. Co. v. Coburn, 91 Ind. 557;
Savannah etc. R. R. Co. v. At-
kinson, 94 Ga. 780, 21 S. E. Rep.
1010.

a substantially different road running in a different direction.⁶⁶ Where the grant is in consideration of the doing of something which is merely incidental to the main purpose, it will not be construed as a condition, but as a mere promise upon which the usual remedies may be had. Thus H granted the right of way to a railroad company, in consideration of five dollars and the location of a depot on his land. The grantee entered but did not locate the depot as agreed. It was held not a condition, and that the only remedy was for specific performance or damages.⁶⁷ So where the grant was of the right of way to a railroad company with a provision that the company should fence it after it was built or construct crossings, cattle guards or ditches.⁶⁸ But the grant of a right of way, provided the company locates a depot within a certain distance, creates a condition by the express language of the grant.⁶⁹ If the deed is expressly made subject to certain conditions or undertakings,⁷⁰ or if the deed provides for a forfeiture for a failure to comply with the agreements or undertakings,⁷¹ then the provisions will be construed as conditions.

§ 292a. Construction of, and compliance with, conditions: Forfeitures.—A deed for public uses and a contract

⁶⁶ *Crosbie v. Chicago*, Iowa & Dakota Ry. Co., 62 Ia. 189.

⁶⁷ *Hubbard v. Kansas City*, St. Joseph etc. R. R. Co., 63 Mo. 68; *Chicago etc. R. R. Co. v. Titerington*, 84 Tex. 218, 19 S. W. Rep. 472; and see *Kansas Pacific Ry. Co. v. Hopkins*, 18 Kan. 494; *Hooper v. Savannah & Memphis R. R. Co.*, 69 Ala. 529; *Yost v. Schuylkill Nav. Co.*, 125 Pa. St. 152, 17 Atl. Rep. 256.

⁶⁸ *Hornback v. Cincinnati etc. R. R. Co.*, 20 Ohio St. 81; *Lake Erie & W. R. R. Co. v. Priest*, 131 Ind. 413, 31 N. E. Rep. 77; *Peden v. Chicago etc. R. R. Co.*, 73 Ia. 328, 35 N. W. Rep. 424; *Stillwell v. St. Louis etc. R. R.*

Co., 39 Mo. App. 221; *Roanoke Investment Co. v. Kansas City etc. R. R. Co.*, 108 Mo. 50, 17 S. W. Rep. 1000; and see *Matson v. Port Townsend etc. R. R. Co.*, 9 Wash. 449, 37 Pac. Rep. 705.

⁶⁹ *Taylor v. Cedar Rapids & St. Paul R. R. Co.*, 25 Ia. 371; see also *Williamson & Farboro R. R. Co. v. Battle*, 66 N. C. 540.

⁷⁰ *May v. City of Boston*, 158 Mass. 21, 32 N. E. Rep. 902; *New York etc. R. R. Co. v. City of Providence*, 16 R. I. 746, 19 Atl. Rep. 759; *Mills v. Seattle etc. R. R. Co.*, 10 Wash. 520, 39 Pac. Rep. 246.

⁷¹ *Ritchie v. Kansas etc. R. R. Co.*, 55 Kan. 38, 39 Pac. Rep. 748;

executed at the same time between the same parties in relation to the same subject matter, should be construed together.⁷² Where the grant of a right of way to a railroad company was "on condition that the road is built by the expiration of two years from date," it was held to mean the whole road.⁷³ In another case substantially the same language was held to require, not only that the road should be built, but also that it should be maintained.⁷⁴ Where the conveyance is upon condition that the grantee will construct a railroad on the land, it cannot be used for an entirely different line of road,⁷⁵ or for a track for storing cars.⁷⁶ If the road is partly constructed and abandoned, the right will be forfeited.⁷⁷ A condition that a railroad company shall construct and maintain a freight and passenger depot on the land granted is not complied with by constructing a station and stopping all trains thereat, when in fact a different station is used for passenger purposes.⁷⁸ In another case it is held that such a condition is satisfied by the maintenance of the depot for a reasonable time and that a reasonable time means time enough to enable the grantors to realize the benefits anticipated from the location of the depot.⁷⁹ A condition that the principal offices

Chute v. Washburn, 44 Minn. 312, 46 N. W. Rep. 555.

⁷² *Ritchie v. Kansas etc. R. R. Co.*, 55 Kan. 38, 39 Pac. Rep. 718; *Chute v. Washburn*, 44 Minn. 312, 46 N. W. Rep. 555.

⁷³ *White v. Memphis etc. R. R. Co.*, 64 Miss. 566. Contra: *Morrill v. Wabash etc. R. R. Co.*, 96 Mo. 174, 9 S. W. Rep. 657.

⁷⁴ *Louisville & Nashville R. R. Co. v. Covington*, 2 Bush, 526.

⁷⁵ *Crosbie v. Chicago etc. R. R. Co.*, 62 Ia. 189. And see *Knight v. Ala. Midland R. R. Co.*, 101 Ala. 407, 13 So. Rep. 260.

⁷⁶ *Hickox v. Chicago etc. R. R. Co.*, 94 Mich. 237, 53 N. W. Rep. 1105,

⁷⁷ *Savannah etc. R. R. Co. v. Atkinson*, 94 Ga. 780, 21 S. E. Rep. 1010; *Roanoke Investment Co. v. Kansas City etc. R. R. Co.*, 108 Mo. 50, 17 S. W. Rep. 1000.

⁷⁸ *Ritchie v. Kansas etc. R. R. Co.*, 55 Kan. 38, 39 Pac. Rep. 718.

⁷⁹ *Little Rock etc. R. R. Co. v. Birnie*, 59 Ark. 66, 26 S. W. Rep. 528; *Texas etc. R. R. Co. v. Scott*, 77 Fed. Rep. 726, 23 C. C. A. 424. Such a grant is not forfeited because the station is not located at a point verbally agreed upon by the owner and engineer of the company; *Schliehauf v. Canada So. R. R. Co.*, 28 Grant Ch. 236,

and machine shops of the company shall be located on the land or permanently located thereon, does not require that they shall be permanently maintained thereon.⁸⁰ A condition that the terminus of the road shall be located on the land conveyed is satisfied if such land is included in the grounds forming such terminus.⁸¹ A condition to construct and maintain a farm crossing does not require that it shall be kept free from snow.⁸² A condition to erect a station is satisfied by the erection of such a station as is maintained at other similar places on the road.⁸³ Where a conveyance was upon condition that the "grantor and his family" should have free passage over the road, the word "family" means those living in the grantor's house and under his management, and would not include a granddaughter living elsewhere.⁸⁴ If a condition is not complied with a forfeiture results.⁸⁵ If the grant is of a fee, no one can take advantage of a breach of a condition subsequent, except the grantor or his heirs.⁸⁶ If of a less estate than a fee, then the right of forfeiture follows the fee.⁸⁷

§ 292b. **Reservations, exceptions, restrictions, etc. — A**

⁸⁰ *Texas etc. R. R. Co. v. City Marshal*, 136 U. S. 393, 10 S. C. Rep. 846; *Mead v. Ballard*, 7 Wall. 290. To same effect *Jessup v. Grand Trunk R. R. Co.*, 7 U. C. App. 128, reversing S. C. 28 Grant Ch. 583.

⁸¹ *Geaueau v. Great Western R. R. Co.*, 3 U. C. App. 412.

⁸² *Cameron v. Wellington R. R. Co.*, 28 Grant Ch. 327. But such a condition imposes a continuing obligation. *Roman Catholic Church v. Texas etc. R. R. Co.*, 41 Fed. Rep. 564.

⁸³ *Caldwell v. East Broad Tp. R. & C. Co.*, 169 Pa. St. 99, 32 Atl. Rep. 85.

⁸⁴ *Dodge v. Boston & P. R. R. Co.*, 154 Mass. 299, 28 N. E. Rep. 243.

⁸⁵ *Thornton v. Sheffield etc. R. R. Co.*, 84 Ala. 109; *Los Angeles Cem. Ass. v. Los Angeles*, 95 Cal. 420, 30 Pac. Rep. 523; *Harvey v. Kansas etc. R. R. Co.*, 45 Kan. 228, 25 Pac. Rep. 578; *Owensboro etc. R. R. Co. v. Griffith*, 92 Ky. 137, 17 S. W. Rep. 277; *Hickok v. Chicago etc. R. R. Co.*, 78 Mich. 615, 44 N. W. Rep. 143; *Reichenbach v. Washington Short Line R. R. Co.*, 10 Wash. 357, 38 Pac. Rep. 1126; *Roman Catholic Church v. Texas etc. R. R. Co.*, 41 Fed. Rep. 564; *Provost v. Morgan's R. R. Co.*, 42 La. An. 809, 8 So. Rep. 584.

⁸⁶ *Nicoll v. New York & Erie R. R. Co.*, 12 N. Y. 121.

⁸⁷ *Ibid.*; *Reichenbach v. Washington Short Line R. R. Co.*, 10 Wash. 357, 38 Pac. Rep. 1126.

conveyance of a right of way through land, reserving a right in the grantors to pass over the tracks "to and from all portions of their respective tracts of land or wharves for ever," was held to be satisfied by a single place of crossing.⁸⁸ It is held that in case of a grant of a right of way through a farm there is an implied reservation of the right to construct and use necessary crossings.⁸⁹ The conveyance of a right of way "reserving the passway at grade over said railroad where now made," was held to operate as an exception to the grant and to annex the use of the passway as a perpetual right to the parts separated.⁹⁰ In a similar deed the language was, "reserving to ourselves the right of a passageway over said railroad, which passageway is to be constructed and kept in repair by ourselves," and it was held to operate as a reservation, and the word "heirs" not being used, to create only a personal right in the grantors.⁹¹ But the words, "reserving the right to cross the tracks of said railroad on grade near the westerly line of said lands at such place as said company can most conveniently provide, said crossing to be made with cattle guards on the sides, and maintained at the expense of said company," were held to operate as an exception and annex a perpetual easement of crossing to the lands of the grantor.⁹² A conveyance "for railroad purposes and none other," was held to prevent the same being used by a third party, by permission of the company, for a seed house or elevator to store seed for sale and transportation.⁹³ A deed of a right of way contained this: "Provided, however, that any other railroad running into or through the city of Birmingham, shall have the right to run a parallel track along the same right of way." This proviso was held valid and

⁸⁸ *Wakeman v. New York etc. R. R. Co.*, 35 N. J. Eq. 496.

⁸⁹ *Gulf etc. R. R. Co. v. Rowland*, 70 Tex. 298, 7 S. W. Rep. 718; *Gulf etc. R. R. Co. v. Ellis*, 70 Tex. 307, 7 S. W. Rep. 722.

⁹⁰ *White v. New York etc. R. R. Co.*, 156 Mass. 181, 30 N. E. Rep. 612.

⁹¹ *Clafin v. Boston & A. R. R. Co.*, 157 Mass. 489, 32 N. E. Rep. 659.

⁹² *Hamlin v. New York etc. R. R. Co.*, 160 Mass. 459, 36 N. E. Rep. 200.

⁹³ *Witzinsky v. Louisville etc. R. R. Co.*, 66 Miss. 595, 6 So. Rep. 709.

specific performance was decreed in favor of a railroad within the conditions, though not in existence when the grant was made.⁹⁴

§ 292c. **Forfeiting benefit of grant or agreement by delay.**—The benefit of a grant may be considered as abandoned by a long delay in using the land granted.⁹⁵ And a location and construction of works elsewhere may amount to such abandonment.⁹⁶

§ 293. **Effect of conveyance as to damages to property of the grantor.**—The conveyance of land for a public purpose will ordinarily vest in the grantee the same rights as though the land had been acquired by condemnation.¹ The conveyance will be held to be a release of all damages which would be presumed to be included in the award of damages if the property had been condemned.² The grantor therefore cannot recover for any damages to the remainder of his land which result from a proper construction, use and operation of works upon the property conveyed.³ Damages

⁹⁴ *South & North Ala. R. R. Co. v. Highland Ave. R. R. Co.*, 117 Ala. 395, 23 So. Rep. 973. The grant was to a commercial railroad and it was held that belt railroads and street railroads were not within the proviso.

⁹⁵ *Beattie v. Carolina Central R. R. Co.*, 108 N. C. 425, 12 S. E. Rep. 913; *Lake Erie & W. R. R. Co. v. Ziebarth*, 6 Ind. App. 223, 33 N. E. Rep. 256; and see *Baker v. Metropolitan R. R. Co.*, 31 Beav. 504.

⁹⁶ *Bertsch v. Lehigh Coal & Nav. Co.*, 4 Rawle 130; *Lake Erie & W. R. R. Co. v. Ziebarth*, 6 Ind. App. 223, 33 N. E. Rep. 256.

¹ *Roushlonge v. Chicago & A. R. R. Co.*, 115 Ind. 106, 17 N. E. Rep. 198; *St. Louis etc. R. R. v. Hurst*, 14 Ill. App. 419.

² *Fremont etc. R. R. Co. v. Harlin*, 50 Neb. 698; *Watts v.*

Norfolk & W. R. R. Co., 39 W. Va. 196, 19 S. E. Rep. 521; *Nunnamaker v. Columbia etc. R. R. Co.*, 47 S. C. 485. For damages presumed to be included in the award, see post, chap. xxiv.

³ *Houston & E. T. Ry. Co. v. Adams*, 58 Tex. 476; *Chicago, Rock Island & Pacific R. R. Co. v. Smith*, 111 Ill. 363; *I. & G. N. R. Co. v. Bost*, 2 Tex. App. Civil Cas. p. 334; *North & West Branch Ry. Co. v. Swank*, 105 Pa. St. 555; *Benson v. Chicago & Alton R. R. Co.*, 78 Mo. 504; *McCarty v. St. Paul, Minneapolis & Manitoba Ry. Co.*, 31 Minn. 278; *Gilbert v. Savannah, Griffin & North Ala. R. R. Co.*, 69 Ga. 396; *Norris v. Vermont Central R. R. Co.*, 28 Vt. 99; *Stodghill v. Chicago, Burlington & Quincy R. R. Co.*, 43 Ia. 26; *Croft v. London & North Western Ry. Co.*, 3 Best

which result from improper construction, such as lack of necessary culverts,⁴ or diverting a stream of water,⁵ or negligence of any kind,⁶ may, of course, be recovered. A deed of part of a lot or tract gives no right to encroach upon the grantor's adjoining land, as by removing the support of his soil⁷ or otherwise.⁸ The conveyance of a right of way without a reservation has been held to bar a claim for damages by the obstruction of a drain or lane crossing the right of way.⁹ A grant of a right of way through a tract was held not to bar a claim for damages caused by raising the grade of the street on which the property abutted in order to make a suitable crossing of the railroad.¹⁰ Conveyance of land for a street which is opened

& Smith, 436; 113 E. C. L. R. 435; *Tinker v. City of Rockford*, 36 Ill. App. 460; *Updegrove v. Pennsylvania S. V. R. R. Co.*, 132 Pa. St. 540, 19 Atl. Rep. 283; *Righter v. City of Philadelphia*, 161 Pa. St. 73, 28 Atl. Rep. 1015; *Faires v. San Antonio etc. R. R. Co.*, 80 Tex. 43, 15 S. W. Rep. 588; *Hodge v. Lehigh Valley R. R. Co.*, 39 Fed. Rep. 449; *Illinois Central R. R. Co. v. Anderson*, 73 Ill. App. 64; *Kirk v. Kansas City etc. R. R. Co.*, 51 La. An. 664, 25 So. Rep. 463; *Kirk v. Kansas City etc. R. R. Co.*, 51 La. An. 667, 25 So. Rep. 457; *Canabeer v. New York Central etc. R. R. Co.*, 156 N. Y. 474.

⁴ *Heath v. Texas & Pacific Ry. Co.*, 37 La. An. 728.

⁵ *Stodghill v. Chicago, Burlington & Quincy R. R. Co.*, 43 Ia. 26. And see *Jackman v. Missouri Pac. R. R. Co.*, 15 Neb. 524.

⁶ *St. Louis etc. R. R. Co. v. Morris*, 35 Ark. 622; *St. Louis etc. R. R. Co. v. Hurst*, 25 Ill. App. 98; *S. C. 14 Ill. App. 419*; *Roushlang v. Chicago & A. R.*

R. Co., 115 Ind. 106, 17 N. E. Rep. 198; *Morris Canal etc. Co. v. Ryerson*, 27 N. J. L. 457; *Freemont etc. R. R. Co. v. Harlin*, 50 Neb. 698; *St. Louis, I. M. & S. Ry. v. Walbrink*, 47 Ark. 330; *Kirk v. Kansas City etc. R. R. Co.*, 51 La. An. 667, 25 So. Rep. 457; *Kirk v. Kansas City etc. R. R. Co.*, 51 La. An. 664, 25 So. Rep. 463.

⁷ *Ante*, § 151; *post*, § 569. In *Hortsman v. Covington etc. R. R. Co.*, 18 B. Mon. 219, the plaintiff conveyed a right of way to the defendant, which made a deep cut and caused his soil to give way. It was held that the deed was a bar to damages.

⁸ *Ibid.*; *Roushlang v. Chicago & A. R. R. Co.*, 115 Ind. 106, 17 N. E. Rep. 198; *Costigan v. Pennsylvania R. R. Co.*, 54 N. J. L. 233, 23 Atl. Rep. 810.

⁹ *L'Esperance v. Great Western R. R. Co.*, 14 U. C. Q. B. 173; *Kemp v. Pennsylvania R. R. Co.*, 156 Pa. St. 430, 26 Atl. Rep. 1074.

¹⁰ *Egbert v. Lake Shore etc. R.*

and graded according to a pre-existing plan is a bar to any claim of damages for the grading.¹¹ Where land is conveyed for a railroad or other work which is already constructed, no damages can be recovered on the ground that the works are not properly built.¹² In general a grant is a bar to such and only such damages as would be included in the assessment or award in case of condemnation. The damages presumed to be included in the assessment or award are the subject of a subsequent chapter, where the matter is treated at length.¹³ It is sufficient for the present purpose to establish the principle that a deed is a bar to any damages which would be barred by a condemnation proceeding. Such a grant does not bar the right to recover for damages caused by the construction of works upon land taken from other proprietors.¹⁴ Nor does it bar a claim for damages to an entirely distinct tract.¹⁵ Where a right of way is conveyed to a railroad company, there can be no recovery for damages to adjoining property caused by additional tracks or reconstructions made necessary by the increase of business.¹⁶

R. Co., 6 Ind. App. 350, 33 N. E. Rep. 659. But see *Tinkér v. City of Rockford*, 36 Ill. App. 460.

¹¹ *Righter v. City of Philadelphia*, 161 Pa. St. 73, 28 Atl. Rep. 1015.

¹² *McDonald v. Southern Cal. R. R. Co.*, 101 Cal. 206, 35 Pac. Rep. 643; *Morris Canal etc. Co. v. Ryerson*, 27 N. J. L. 457; *Hofeditz v. Southern Pa. R. R. Co.*, 129 Pa. St. 264, 18 Atl. Rep. 125; *Faires v. San Antonio etc. R. R. Co.*, 80 Tex. 43, 15 S. W. Rep. 588; *Radke v. Minneapolis etc. R. R. Co.*, 41 Minn. 350, 43 N. W. Rep. 6. In the last case the court says: "From the sale and unqualified conveyance to the railroad company of the premises upon which its road and embankment had already been perma-

nently constructed, and where it was to be expected to remain, it was to be presumed that the grantor consented to the continued existence of such permanent improvements, for the enjoyment and use of which the purchase and conveyance of the land was obviously made."

¹³ Post, chap. 25.

¹⁴ *Eaton v. Boston & Maine R. R. Co.*, 51 N. H. 504; *St. Louis etc. Ry. Co. v. Harris*, 47 Ark. 340; *Delaware etc. Canal Co. v. Lee*, 22 N. J. L. 243.

¹⁵ *Republican Valley R. R. Co. v. Fellers*, 16 Neb. 169.

¹⁶ *Illinois Central R. R. Co. v. Anderson*, 73 Ill. App. 621; *Cona-beer v. New York Central R. R. Co.*, 156 N. Y. 474.

§ 294. **Release of damages.**—A release of damages has the same effect as the assessment and payment of damages under the statute.¹⁷ And so when the amount of damages is agreed upon and a receipt therefor given by the owner.¹⁸ A release to a railroad company of all damages incurred or to be incurred by the location, construction or operation of the road, will not cover damages from negligence in construction or operation.¹⁹ If the road is already built, the release will cover any damages resulting from a culvert and embankment, existing when the release was given.²⁰ A release is binding upon grantees of the releasor, if the releasee is in possession.²¹ If the owner releases all damages except for removing a fence, he is entitled to have those damages estimated in the manner provided by law.²² As to what will amount to a release or waiver of damages and as to what is a valid release, the same considerations apply as in other cases. If the release is obtained by fraud, it is voidable at the election of the releasor.²³ If it is upon condition that a certain number of signatures shall be obtained thereto, the party relying upon it must show a compliance with the condition.²⁴ A release by a married woman, her husband not joining, has been held invalid.²⁵

§ 295. **Oral agreements in connection with written contracts.**—As respects the proof and enforcement of oral agreements made in connection with written contracts for land for public use, the same general rules apply as in case of other similar contracts. The weight of authority is that oral agreements which formed the real consideration of a

¹⁷ *Eaton v. Boston & Maine R. Co.*, 51 N. H. 504; *Uncanoonuck Road Co. v. Orr*, 67 N. H. 541, 41 Atl. Rep. 665.

¹⁸ *Rockland Water Co. v. Tillson*, 69 Me. 255.

¹⁹ *McMinn v. Pittsburg etc. R. Co.*, 147 Pa. St. 5, 23 Atl. Rep. 325.

²⁰ *Hoffeditz v. Southern Pa. R. Co.*, 129 Pa. St. 264, 18 Atl. Rep. 125.

²¹ *Ward v. Metropolitan El. R. Co.*, 82 Hun 545, 31 N. Y. Supp. 527.

²² *Sturtevant v. County of Plymouth*, 12 Met. 7.

²³ *Rockford, Rock Island & St. Louis R. R. Co. v. Shunick*, 65 Ill. 223.

²⁴ *Ibid.*

²⁵ *Delaware etc. R. R. Co. v. Burson*, 61 Pa. St. 369.

deed or contract may be shown and enforced by proper remedies. It has been so held with respect to oral agreements to locate and construct a depot on the land conveyed or at a particular place,²⁶ or to construct and maintain crossings, fences and the like.²⁷ Where a person signed an agreement to give a right of way of a specified width through his land, provided the road of the company should be located through the same, it was held that a verbal understanding that it should be located in a particular place could not be shown.²⁸ And where a deed specified a particular location, it was held that an oral permission to locate elsewhere was not binding.²⁹ Where a right of way was conveyed by deed upon oral representations that it was to be used for main line only, and switch tracks were afterwards placed thereon, it was held that the purpose for which the deed was made could be shown and that a recovery could be had for any damage to the grantor's property, in excess of that resulting from the main line.³⁰

§ 296. **Specific performance, and other remedies; damages.**—Specific performance of an agreement to convey may be had, though the subject matter of the grant is a right of way to be afterwards located.³¹ Agreements by a railroad

²⁶ Louisville etc. R. R. Co. v. Neafus, 93 Ky. 53, 18 S. W. Rep. 1030; Watterson v. Allegheny etc. R. R. Co., 74 Pa. St. 208; Gulf etc. R. R. Co. v. Jones, 82 Tex. 156, 17 S. W. Rep. 534; Moseley v. C., B. & Q. R. R. Co., 54 Neb. 636, 78 N. W. Rep. 293. But see Houston & T. C. R. R. Co. v. McKinney, 55 Tex. 176; East Line R. R. Co. v. Garrett, 52 Tex. 133.

²⁷ Indiana etc. R. R. Co. v. Finnell, 116 Ind. 414, 19 N. E. Rep. 204; Ague v. Seitsinger, 85 Ia. 305, 52 N. W. Rep. 228; Cloure v. Canada So. R. R. Co., 4 Ont. 28.

²⁸ Burch v. Augusta etc. R. R. Co., 80 Ga. 296.

²⁹ Word v. Michigan Air Line R. R. Co., 90 Mich. 334, 51 N. W. Rep. 263.

³⁰ Donisthorpe v. Fremont etc. R. R. Co., 30 Neb. 142, 46 N. W. Rep. 240, 3 Am. R. R. & Corp. Rep. 172.

³¹ Ross v. Chicago, Burlington & Quincy R. R. Co., 77 Ill. 127; see also New Jersey Midland Ry. Co. v. Van Syckle, 37 N. J. L. 496; Regents' Canal Co. v. Ware, 26 L. J. Ch. 566. And in England owner may have specific performance as against a railroad company. Regents' Canal Co. v. Ware, 26 L. J. Ch. 566; Eastern Counties R. R. Co. v. Hawkes, 24 L. J. Ch. 601; Vyner v. Hoylake

company to build crossings,³² or fences,³³ or to locate and build a depot,³⁴ or to do other things for the benefit of the grantor³⁵ may be specifically enforced. It is no answer to a suit for specific performance that a definite description of the thing to be done is not contained in the deed or contract. That which is reasonably suitable under the circumstances to answer the purpose intended is what the contract implies.³⁶ L granted the right of way to a railroad company over his premises, in consideration of which the company agreed to erect and maintain bridges over certain crossings, and also to erect at or near Excelsior Spring a neat and tasteful station building, to be called Excelsior Spring, at which all regular trains should stop. The company entered and built its road, but refused to comply with its agreements. On a bill for specific performance, it was contended by the company that the agreements were too indefinite to be enforced, that the style and plan, size and materials of the structure were not specified. But the court held otherwise: "To insist that the railroad cannot build a bridge because they do not know whether it should be of wood or iron, or gold, or platinum, is a poor excuse. A bridge suitable for a highway crossing is what was intended, and that is definite enough."³⁷ But where the performance of an

R. R. Co., 17 W. R. 92; Mums v. Isle of Wight R. R. Co., 17 W. R. 1081. And see Chicago etc. R. R. Co. v. Durant, 44 Minn. 361, 46 N. W. Rep. 676.

³² Gray v. Burlington etc. R. R. Co., 37 Ia. 119; Hull v. Chicago, Burlington & Pacific Ry. Co., 65 Ia. 713; Haynes v. Buffalo, New York & Phila. R. R. Co., 38 Hun 17; Varner v. St. Louis etc. R. R. Co., 55 Ia. 677; Cleveland etc. R. R. Co. v. Hobbie, 61 Ill. App. 396.

³³ Hull v. Chicago, Burlington & Pacific Ry. Co., 65 Ia. 713; Hornback v. Cincinnati & Zanesville R. R. Co., 20 Ohio St. 81.

³⁴ Hubbard v. Kansas City, St.

Joseph etc. R. R. Co., 63 Mo. 68; Lawrence v. Saratoga Lake R. R. Co., 36 Hun 467.

³⁵ Williamston & Farboro R. R. Co. v. Battle, 66 N. C. 540; Bell v. Dayton & I. R. R. Co., 3 Ohio C. C. 31; Raphael v. Thomas Valley R. R. Co., 36 L. J. Ch. 209.

³⁶ Gray v. Burlington etc. R. R. Co., 37 Ia. 119; Lawrence v. Saratoga Lake R. R. Co., 36 Hun 467; and other cases cited in this section.

³⁷ Lawrence v. Saratoga Lake R. R. Co., 36 Hun 467. But see Wilson v. Northampton etc. Ry. Co., L. R. 9 Ch. 279,

agreement to establish a station will accommodate but few and will greatly delay and inconvenience the public, the plaintiff will be left to his remedy at law.³⁸ Instead of suing for specific performance, an action for damages may be maintained for the breach of such agreements.³⁹ Where a railroad company has a valid contract for right of way from the owner, and is not itself in default, it may restrain him from prosecuting an action for possession;⁴⁰ and in Iowa it has been held that it may restrain the owner from prosecuting a proceeding under the statute for compensation.⁴¹ Where a railroad company has agreed to keep open two existing passageways for stock, it may be prevented by injunction from closing the ways.⁴²

Where the action is for damages for breach of contract to execute certain works for the accommodation of the grantor, the measure of damages will depend upon the nature of the agreement. Where the agreement was to fence, the measure of damages was held to be the cost of a fence and any loss suffered in the meantime in consequence of the fence not being built.⁴³ For a failure to build a crossing, the damages cannot exceed the value of the land cut off

³⁸ *Conger v. New York etc. R. Co.*, 120 N. Y. 29, 23 N. E. Rep. 983, 2 Am. R. R. & Corp. Rep. 190. And see *Texas & P. R. R. Co. v. City of Marshall*, 136 U. S. 393, 10 S. C. Rep. 846.

³⁹ *Erie & Pittsburg R. R. Co. v. Johnson*, 101 Pa. St. 555; *Pusey v. Wright*, 31 Pa. St. 387; *Hornback v. Cincinnati & Zanesville R. R. Co.*, 20 Ohio St. 81; *Hull v. Chicago, Burlington & Pacific Ry. Co.*, 65 Ia. 713; *Hubbard v. Kansas City, St. Joseph etc. R. R. Co.*, 63 Mo. 68; *St. Louis v. Bissell*, 46 Mo. 157; *Louisville etc. R. R. Co. v. Power*, 119 Ind. 269, 21 N. E. Rep. 751; *Peden v. Chicago etc. R. R. Co.*, 73 Ia. 328, 35 N. W. Rep. 424; *Ague v.*

Seitsinger, 85 Ia. 305, 52 N. W. Rep. 228; *Louisville etc. R. R. Co. v. Neafus*, 93 Ky. 53, 18 S. W. Rep. 1030; *Stillwell v. St. Louis etc. R. R. Co.*, 39 Mo. App. 221; *Watterson v. Allegheny etc. R. R. Co.*, 74 Pa. St. 208; *Moorman v. Seattle etc. R. R. Co.*, 8 Wash. 98, 35 Pac. Rep. 596.

⁴⁰ *Ross v. Chicago, Burlington & Quincy R. R. Co.*, 77 Ill. 127.

⁴¹ *Chicago & South Western R. Co. v. Swinney*, 38 Ia. 182.

⁴² *Rock Island etc. R. R. Co. v. Dimick*, 144 Ill. 628, 32 N. E. Rep. 291.

⁴³ *Louisville etc. R. R. Co. v. Power*, 119 Ind. 269, 21 N. E. Rep. 751.

by the railroad.⁴⁴ Where the agreement was to build a depot it was held, in one case, that the measure of damages was the difference in value of the plaintiff's land with, and without, the depot,⁴⁵ and in another that it was the value of the land conveyed and damages to the remainder by the taking of the right of way therefrom, together with the amount that such remainder would have been increased in value by the establishment and maintenance of the depot.⁴⁶

§ 297. By and against whom the agreements may be enforced.—Deeds and contracts for rights of way to railroad companies are assets and pass to the grantees or mortgagees of such companies,⁴⁷ but only for the use specified and subject to such burdens or conditions as are contained therein.⁴⁸ Land was conveyed to the territory of Colorado, to be used only for the purpose of erecting thereon a capitol and other public buildings. Before any use was made of the land, the territory became a State. On a bill to enjoin the use of the land for a capitol by the State, it was held that the State succeeded to all rights of the territory and was entitled to all the benefits of the deed.⁴⁹ B conveyed to a railroad company a right of way over his land, in consideration of the location and construction of its road thereon. After some work had been done by the

⁴⁴ *Stillwell v. St. Louis etc. R. R. Co.*, 39 Mo. App. 221.

⁴⁵ *Watterson v. Allegheny etc. R. R. Co.*, 74 Pa. St. 208.

⁴⁶ *Louisville etc. R. R. Co. v. Neafus*, 93 Ky. 53, 18 S. W. Rep. 1030.

The following discuss the question of damages in case of peculiar contracts: *Smith v. Los Angeles & P. R. R. Co.*, 98 Cal. 210, 34 Pac. Rep. 53; *Gulf etc. R. R. Co. v. Dunman*, 85 Tex. 176, 17 S. W. Rep. 1073; *St. Louis etc. R. R. Co. v. Henderson*, 86 Tex. 307, 24 S. W. Rep. 381.

⁴⁷ *Barlow v. Chicago, Rock Island & Pacific R. R. Co.*, 29 Ia. 276; *Williamston & Farboro R. R. Co. v. Battle*, 66 N. C. 540; *New Jersey Midland Ry. Co. v. Van Syckle*, 37 N. J. L. 496.

⁴⁸ *Hooper v. Savannah & Memphis R. R. Co.*, 69 Ala. 529; *Williamston & Farboro R. R. Co. v. Battle*, 66 N. C. 540. Contra: *Hammond v. Port Royal & Augusta R. R. Co.*, 16 S. C. 567; S. C. 15 S. C. 10.

⁴⁹ *Brown v. Grant*, 116 U. S. 207.

company, it was sold under foreclosure to T, who conveyed to I. Afterwards another and entirely independent company condemned part of the same land. It was held that B was entitled to the compensation.⁵⁰ C agreed to sell to a railroad company a right of way for a stipulated price. The road was built and the company passed into the hands of a receiver. On a bill by C to enforce payment of the purchase price, it appeared that the price agreed upon was exorbitant, being three times the value of the land, and the chancellor, apparently on this ground alone, decreed payment of compensation to be ascertained under the direction of the court.⁵¹ Where a right of way is granted to a railroad company in consideration of its agreement to construct and maintain certain works for the benefit of the grantor, the obligation is usually held to run with the land and to bind those claiming under the grantee who take and use the land.⁵² A purchaser from such grantee is not liable for damages which accrued prior to the purchase.⁵³ An oral agreement of a railroad company to give the grantor of a right of way annual passes for himself and family during his life, is personal and does not run with the land or bind the lessees or successors of the first company.⁵⁴ But

⁵⁰ *Ingalls v. Byer's Administrator*, 94 Ind. 134.

⁵¹ *Coe v. New Jersey Midland Ry. Co.*, 30 N. J. Eq. 21.

⁵² *Rock Island etc. R. R. Co. v. Dimick*, 144 Ill. 628, 32 N. E. Rep. 291; *Lake Erie & W. R. R. Co. v. Priest*, 131 Ind. 413, 31 N. E. Rep. 77; *Toledo etc. R. R. Co. v. Cosand*, 6 Ind. App. 222, 33 N. E. Rep. 251; *Varner v. St. Louis etc. R. R. Co.*, 55 Ia. 677; *Peden v. Chicago etc. R. R. Co.*, 73 Ia. 328, 35 N. W. Rep. 424; *Hunter v. Burlington etc. R. R. Co.*, 76 Ia. 490, 41 N. W. Rep. 305; *Hunter v. Burlington etc. R. R. Co.*, 84 Ia. 605, 51 N. W. Rep. 64; *New York etc. R. R. Co. v.*

Stanley's Heirs, 35 N. J. Eq. 283; S. C. 34 N. J. Eq. 55, 39 N. J. Eq. 361; *Post v. West Shore etc. R. R. Co.*, 123 N. Y. 580, 25 N. E. Rep. 7; *Bell v. Dayton & I. R. R. Co.*, 3 Ohio C. C. 31; *Appeal of Wheeling etc. R. R. Co.*, 1 Penny. 360. But see *Sappington v. Little Rock etc. R. R. Co.*, 37 Ark. 23; *Chappell v. New York etc. R. R. Co.*, 62 Conn. 195, 24 Atl. Rep. 997.

⁵³ *Post v. West Shore etc. R. R. Co.*, 123 N. Y. 580, 25 N. E. Rep. 7; S. C. 50 Hun 301, 20 N. Y. St. 180, 3 N. Y. Supp. 172.

⁵⁴ *Pennsylvania Co. v. Erie & Pittsburgh R. R. Co.*, 108 Pa. St. 621.

where the right of way is conveyed upon condition that the grantor be provided with free passes over the road, a purchaser from the grantee takes subject to the condition.⁵⁵ But it is held that a personal action will not lie against the purchaser.⁵⁶ Where the condition was that the grantor and his family should have a right of free passage "as long as the land and its appurtenances hereinbefore described shall be used as a railroad, or for railroad purposes, under the charter of said corporation," was held not to perpetuate the right in the descendants of the grantor.⁵⁷ The agreement of the grantor to fence the road is personal, and does not bind his grantee, and the latter, notwithstanding such agreement of his grantor, can compel the company to fence under the statute.⁵⁸ If a railroad company accepts a deed procured by its agent, it will be bound by the agreements, and representations on the basis of which it was procured.⁵⁹ It has been held that a contract to convey a right of way to one company cannot be assigned to another company so as to vest the right in the latter.⁶⁰

§ 297a. Notice of unrecorded deeds and contracts. —The possession of a railroad company under an unrecorded deed or contract is notice of its rights under such contract.⁶¹

⁵⁵ *Dodge v. Boston & P. R. R. Co.*, 154 Mass. 299, 28 N. E. Rep. 243; *Ruddick v. St. Louis etc. R. R. Co.*, 116 Mo. 25, 22 S. W. Rep. 499; *Eddy v. Hinnant*, 82 Tex. 354, 18 S. W. Rep. 562.

⁵⁶ *Ibid.*

⁵⁷ *Dodge v. Boston & P. R. R. Co.*, 154 Mass. 299, 28 N. E. Rep. 243.

⁵⁸ *Bosworth v. Pittsburgh, Cincinnati & St. Louis Ry. Co.*, 1 Ohio Cir. Ct. 69.

As to covenants running with the land, see *Diffendal v. Virginia M. R. Co.*, 86 Va. 459, 10 S. E. Rep. 536; *Indianapolis Water Co. v. Multe*, 126 Ind. 373, 26 N. E. Rep. 72; *Costigan v.*

Pennsylvania R. R. Co., 54 N. J. L. 233, 23 Atl. Rep. 810.

⁵⁹ *Morris etc. R. R. Co. v. Green*, 15 N. J. Eq. 469.

⁶⁰ *Oregon R. & N. Co. v. Day*, 3 Wash. Ter. 252, 14 Pac. Rep. 588.

⁶¹ *Burrow v. Terre Haute & Logansport R. R. Co.*, 107 Ind., 432; *Day v. Railroad Co.*, 41 Ohio St. 392; *Bell v. Boston*, 101 Mass. 506; *Lawrence & Others Appeal*, 78 Pa. St. 365. See *Prescott v. Beyer*, 34 Minn. 493; *Chicago etc. R. R. Co. v. Wright*, 153 Ill. 307, 38 N. E. Rep. 1062; *Stratton v. Omaha etc. R. R. Co.*, 37 Neb. 477, 55 N. W. Rep. 1058.

The operation of an elevated railroad in a street puts a purchaser of abutting property upon notice of any rights the company has acquired by release or otherwise, as against such property.⁶²

§ 297b. **Contracts with promotors.**—An agreement made by the owner of land with the promotors of a company that, if they get the act sought, he will sell to the company, may be enforced by the company.⁶³ But such an agreement is not binding on the company without acceptance, and it may refuse to take the land.⁶⁴ Where a deed was made in the corporate name of a company before incorporation, but was accepted by the company after incorporation and the road built on the land conveyed, it was held to vest a good title.⁶⁵

§ 298. **Oral agreements, releases and licenses.**—A large amount of litigation has arisen out of oral agreements and arrangements made between the owners of property and those entitled to condemn for public use. As is usual, where similar questions have been passed upon by many different courts, in different forms of action, and presenting a great variety of circumstances, there is much apparent, and some real, discrepancy in the decided cases. It may be laid down as a general principle that a person or corporation entitled to acquire property for public use must do so either by contract with the owner, or pursuant to the statute conferring compulsory powers, or by adverse possession for the requisite period.⁶⁶ If the mode of acquiring property by contract is attempted, the same rules, in general, apply as in case of private individuals acquiring property for private use. The Statute of Frauds applies to all

⁶² Ward v. Metropolitan El. R. R. Co., 82 Hun 545, 31 N. Y. Supp. 527.

⁶³ Bedford etc. R. R. Co. v. Stanley, 32 L. J. Ch. 60, 2 Johns. & H. 746.

⁶⁴ Preston v. Liverpool etc. R. R. Co., 5 H. L. Cas. 605, 2 Jur. N. S. 241, 25 L. J. Ch. 421; Scot-

tish N. E. R. R. Co. v. Stewart, 3 Macq. 382, 5 Jur. N. S. 607.

⁶⁵ Branard v. Cincinnati etc. R. R. Co., 115 Ind. 1, 17 N. E. Rep. 183.

⁶⁶ Beck v. Louisville etc. R. R. Co., 65 Miss. 172, 3 So. Rep. 252; Wilmington Water Power Co. v. Evans, 166 Ill. 548, 46 N. E. Rep. 1083.

parties and to transfers for all purposes. An interest in land cannot be transferred by a mere oral agreement. It can only be done pursuant to such formalities as are required by the Statute of Frauds. A mere oral consent or license, therefore, to use or occupy land for any purpose for which it might be taken under compulsory powers, does not confer any permanent right or interest in the land, but is revocable at any time at the pleasure of the licensor.⁶⁷ It

⁶⁷ To build a railroad over one's land: *Baltimore & Han-nover R. R. Co. v. Algire*, 63 Md. 319; *Eggleston v. New York & Harlem R. R. Co.*, 35 Barb. 162; *Blaisdell v. Portsmouth, Great Falls & Conway R. R. Co.*, 51 N. H. 483; *Hatfield v. Central R. R. Co.*, 29 N. J. L. 571; *Miller v. Auburn & Syracuse R. R. Co.*, 6 Hill 61; *Murdock v. Prospect Park & Coney Island R. R. Co.*, 73 N. Y. 579; *St. Louis Nat. Stock Yards v. Wiggins Ferry Co.*, 112 Ill. 384; *Matthews v. St. Paul etc. R. R. Co.*, 18 Minn. 434; *Kremer v. Chicago etc. R. R. Co.*, 51 Minn. 15, 52 N. W. Rep. 977; *Minneapolis Mill. Co. v. Minneapolis etc. R. R. Co.*, 51 Minn. 304, 53 N. W. Rep. 639; *Minneapolis W. R. R. Co. v. Minneapolis etc. R. R. Co.*, 58 Minn. 128, 59 N. W. Rep. 983; *Beck v. Louisville etc. R. R. Co.*, 65 Miss. 172, 3 So. Rep. 252 (this case would seem to overrule prior decisions cited below); *Richmond & D. R. R. Co. v. Durham etc. R. R. Co.*, 104 N. C. 658, 10 S. E. Rep. 659; *Hays v. T. & P. R. R. Co.*, 62 Tex. 397; *Minneapolis etc. R. R. Co. v. Marble*, 112 Mich. 4. Contra: *Currie v. Natchez, Jackson & Columbus R. R. Co.*, 61 Miss. 725; *S. C.* 62 Miss. 506; *Provalt v. Chicago, Rock Island*

& Pacific R. R. Co., 57 Mo. 256; *Baker v. Same*, *Ibid.* 265; *Hosher v. Kansas City, St. Joseph & Council Bluffs R. R. Co.*, 60 Mo. 329; *Kanaga v. St. Louis etc. R. R. Co.*, 76 Mo. 207; *Campbell v. Indianapolis & Vincennes R. R. Co.*, 110 Ind. 490; *Evansville etc. R. R. Co. v. Nye*, 113 Ind. 223; *Lake Erie & W. R. R. Co. v. Kennedy*, 132 Ind. 274, 31 N. E. Rep. 943; *Bourdier v. Morgan's R. R. Co.*, 35 La. An. 947; *Dodd v. St. Louis etc. R. R. Co.*, 108 Mo. 581, 18 S. W. Rep. 1117; *Texas & C. R. R. Co. v. Jarrell*, 60 Tex. 267; *Pryzbłowicz v. Miss. River R. R. Co.*, 3 McCrary, 586. And see *Perkins v. Maine Central R. R. Co.*, 72 Me. 95; *Western etc. R. R. Co. v. Richards*, 137 Pa. St. 524, 19 Atl. Rep. 931; *Verdier v. Port Royal R. R. Co.*, 15 S. C. 477; *Sams v. Port Royal etc. R. R. Co.*, 15 S. C. 484; *Evans v. Gulf etc. R. R. Co.*, (Tex. Civ. App.) 28 S. W. Rep. 903; *Chicago etc. R. R. Co. v. Englehart*, 57 Neb. 444, 77 N. W. Rep. 1092; *Kuhl v. C. & N. W. R. R. Co.*, 101 Wis. 42.

To build mill or dam: *Kivett v. McKeithan*, 90 N. C. 106; *Mumford v. Whitney*, 15 Wend. 380; *Stevens v. Stevens*, 11 Met. 251; but see *Wordbury v. Parshley*, 7 N. H. 237.

justifies all that has been done under it up to the time of revocation, but from that time any continuation of the acts or structures authorized becomes unlawful, and the owner may resort to the ordinary common law remedies of ejectment or trespass.⁶⁸ No hardship can result from the above doctrine, since the licensee, as soon as the license or consent is revoked, can immediately proceed to acquire by condemnation the same property or easement which it had enjoyed under the license. And where the licensee has acted in good faith, or where the public interests would suffer from an interruption of the user, a court of equity will enjoin the prosecution of a common law suit for damages or for possession, pending proceedings to ascertain the just compensation.⁶⁹

A mere consent or license to occupy land for right of way or other public use, is to be distinguished from an oral contract of sale for such use. Such a contract may be taken

To flood land: *Foot v. New Haven & Northampton Co.*, 23 Conn. 214; *Seidensparger v. Spear*, 17 Me. 123; *Morrill v. Mackman*, 24 Mich. 279; *Woodward v. Seely*, 11 Ill. 157; *Bridges v. Purcell*, 1 Dev. & B. 492; *Clute v. Carr*, 20 Wis. 531; but see *Rerick v. Kern*, 14 S. & R. 267; *Thompson v. McElarney*, 82 Pa. St. 174; *Farmer v. McDonald*, 59 Ga. 509; *Lane v. Miller*, 27 Ind. 534; *S. C. 17 Ind. 58*, 22 Ind. 104; *Miller v. Reeves*, 1 Mich. 107.

Other public uses: *Selden v. Delaware & Hudson Canal Co.*, 29 N. Y. 634; *Parry v. Richmond*, 27 Ind. 66; *Ruggles v. Lesun*, 24 Pick. 187; *Cape Girardeau etc. Road Co. v. Renfroe*, 58 Mo. 265; *Maxwell v. Bay City Bridge Co.*, 41 Mich. 453; *Dwight v. Hayes*, 150 Ill. 273, 37 N. E. Rep. 248; *Wilmington Water Power Co. v. Evans*, 166 Ill. 548, 46 N. E. Rep. 1083; *Phillips v. Thompson*, 1

Johns. Ch. 131. Contra: *National Water Works Co. v. Kansas City*, 65 Fed. Rep. 691; see *De Graffenried v. Savage*, 9 Col. App. 131; *Uncanoonunk Road Co. v. Orr*, 67 N. H. 541, 41 Atl. Rep. 665. In Massachusetts it is held that an owner whose land is flowed by a mill-dam may waive his claim for damages by parol, but that such waiver is personal as to him and does not bind those claiming under him. *Seymour v. Carter*, 2 Met. 520; *Fitch v. Seymour*, 9 Met. 462; *Smith v. Goulding*, 6 Cush. 154; *Craig v. Lewis*, 110 Mass. 377.

⁶⁸ *Ibid.* See post, §§ 647-649.

⁶⁹ *Trenton Water Power Co. v. Chambers*, 9 N. J. Eq. 471; *Raritan Water Power Co. v. Veghte*, 21 N. J. Eq. 463; *Paterson, Newark & New York R. R. Co. v. Kamlah*, 42 N. J. Eq. 93; *Baltimore & Hannover R. R. Co. v. Algire*, 63 Md. 319, 324.

out of the Statute of Frauds by part performance.⁷⁰ Where a corporation has power to take property for works of a public nature, and has a choice of location, and an owner, in order to induce a location upon his land, and in consideration of expected benefits from such location, agrees to give the property desired if the company will locate and construct its works on his land, and the company accepts the offer and actually locates and constructs its works, then, while this will amount in law to a mere oral license, revocable at the pleasure of the owner, yet in equity it will be regarded as such a part performance of an oral agreement as will take it out of the Statute of Frauds.⁷¹ But in such case the performance, to be available, must be in strict accordance with the agreement.⁷² And the owner may repudiate the agreement at any time before it is acted upon.⁷³

Another class of cases remains to be noticed, which are often confounded with those previously considered in this section. Where the statute in regard to the exercise of compulsory powers requires the location to be made and recorded or filed in some public office, particularly describing the property to be taken, and prescribes a mode for ascertaining the damages and compensation to be paid, and

⁷⁰ *East Tennessee etc. R. R. Co. v. Davis*, 91 Ala. 615, 8 So. Rep. 349; *St. Louis Nat. Stock Yards v. Wiggins Ferry Co.*, 112 Ill. 384; *Cherokee & D. R. R. Co. v. Renken*, 77 Ia. 316, 42 N. W. Rep. 307; *Hays v. Kansas City etc. R. R. Co.*, 108 Mo. 544, 18 S. W. Rep. 1115; *Lohr v. Somerset & C. R. R. Co.*, 2 Monaghan (Pa. Supm.) 507; *Texas etc. R. R. Co. v. Sutor*, 56 Tex. 496; *Texas etc. R. R. Co. v. Sutor*, 59 Tex. 29. And see *Missouri Pac. R. R. Co. v. Gano*, 47 Kan. 457, 28 Pac. Rep. 155; *Palethorp v. Philadelphia etc. R. R. Co.*, 2 Waller's Pa. Supm. 487; *Jones v. Penn. R. R.*

Co., 143 Pa. St. 374, 22 Atl. Rep. 883; *St. Louis etc. R. R. Co. v. Tapp*, 64 Ark. 357; see *Heinzman v. Winona etc. R. R. Co.*, 75 Minn. 253.

⁷¹ *New Jersey Midland Ry. Co. v. Van Syckle*, 37 N. J. L. 496; *Macon & Augusta R. R. Co. v. Bowen*, 45 Ga. 531; *Fazendel v. Morgan*, 31 La. An. 549; and see *Crockett v. Boston*, 5 Cush. 182; *Marble v. Whitney*, 28 N. Y. 297.

⁷² *Unangst's Appeal*, 55 Pa. St. 128; *East Pennsylvania R. R. Co. v. Schollenberger*, 54 Pa. St. 144.

⁷³ *Parry v. Richmond*, 27 Ind. 66; *Fuller v. County Comrs.*, 15 Pick. 81; *Turner v. Village of Stanton*, 42 Mich. 506.

provides that upon deposit or payment the title to the property and right of possession shall vest in the condemning party, and also gives the right to agree upon compensation, then the matter of damages may be settled by oral agreement, and the title will vest by virtue of the statute the same as if the damages were ascertained and deposited pursuant thereto.⁷⁴ Or the owner may waive prepayment simply, and, thereupon, the title will vest subject to the lien for just compensation to be afterwards adjusted and paid.⁷⁵ But where the statute authorized an agreement as to damages for land taken for a highway but required such agreement to be in writing, a lay-out on a mere oral waiver of damages was held void in a collateral proceeding.⁷⁶

§ 299. **Particular contracts construed.**—A grant of a right of way, with the privilege of “borrowing or wasting earth in the construction and operation of the railway,” does not authorize the use of land outside of right of way as a dump for superfluous earth.⁷⁷ A right of way was granted “for all purposes connected with the construction, use and occupation of said railway.” The railway company was authorized to take and hold “so much real estate as may be necessary for the location, construction and convenient use of its railway, and may also take, remove and use for the construction and repair of said railway and its appurtenances, any earth, gravel, stone, timber or other materials on or from the land so taken.” It was held that the company could not take sand from the right of way to be

⁷⁴ *Rockland Water Co. v. Tillson*, 69 Me. 255; *Snow v. Moses*, 53 Me. 546; *Clement v. Durgin*, 5 Me. 9. In *Smith v. Goulding*, 6 Cush. 154; it was held that the claim for damages might be waived by oral agreement. See ante, § 296.

⁷⁵ *McAulay v. Western Vermont R. R. Co.* 33 Vt. 311. And see generally *Milwaukee etc. R.*

R. Co. v. Strange, 63 Wis. 178; *Rankin v. Great Western R. R. Co.*, 4 U. C. C. P. 463; *Thompson v. Canada Central R. R. Co.*, 3 Ontario, 136; *Duke of Beaufort v. Patrick*, 17 Beav. 60; *Doe v. Leeds etc. R. R. Co.*, 20 L. J. Q. B. 486.

⁷⁶ *McKee v. Hull*, 69 Wis. 657.

⁷⁷ *McCord v. Doniphan Branch Ry. Co.*, 21 Mo. App. 92.

used in building a round-house,—that the company could take sand for its railway but not for its appurtenances.⁷⁸ An agreement by a land-owner that, if a railroad company will construct its road on a specified line, he will pay a certain sum of money, is against public policy and cannot be enforced.⁷⁹ Where a railroad enters by consent, it is not liable in an action for use and occupation.⁸⁰ Though a company occupies by consent, it must comply with the statute as to the manner of constructing its road.⁸¹ In the absence of any limitation in the grant, a railroad company is not compelled to build within any given time.⁸² If a railroad company agrees with the owner to remove upon notice to another part of the same land so as to permit the mining of coal and refuses, it is liable for the value of the coal, and a tenant may give the notice.⁸³ The grant of a right of way is irrevocable.⁸⁴ The mayor and aldermen of Mobile passed a resolution to pay the defendants in error \$660.75 for land to be appropriated for a street, to which the defendants assented. This was held to create an obligation upon which debt would lie.⁸⁵ A contract to locate a depot “at” a specified town is complied with by locating it at a convenient distance from the business part of the town, though not within the corporate limits.⁸⁶ An agreement releasing a right of way, the damages to be assessed after the road is located and paid in the stock of the company, binds the party to accept the stock at par.⁸⁷ Where a right

⁷⁸ *Vermilyn v. Chicago, Milwaukee & St. Paul Ry. Co.*, 66 Ia. 606.

⁷⁹ *Dix v. Shaver*, 14 Hun 392.

⁸⁰ *Marquette etc. R. R. Co. v. Harlow*, 37 Mich. 554.

⁸¹ *Houston & Great Northern R. R. Co. v. Meador*, 50 Tex. 77.

⁸² *Ross v. Chicago etc. R. R. Co.*, 77 Ill. 127; but see *Baker v. Metropolitan Ry. Co.*, 31 Beav. 504.

⁸³ *Mine Mill etc. R. R. Co. v. Lippincott*, 86 Pa. St. 468.

⁸⁴ *Fazende v. Morgan*, 31 La. An. 549.

⁸⁵ *Mobile v. Richardson*, 1 Stew. & Por. (Ala.) 12.

⁸⁶ *Frey v. Ft. Worth etc. R. R. Co.*, 5 Tex. Civ. App. 29, 24 S. W. Rep. 950.

⁸⁷ *Hoffman v. Bloomsburg etc. R. R. Co.*, 143 Pa. St. 503, 22 Atl. Rep. 823; *Hoffman v. Bloomsburg etc. R. R. Co.*, 157 Pa. St. 174, 27 Atl. Rep. 564.

of way was conveyed "with right to use such additional land as may be necessary for the construction and maintenance" of the road, an action will lie if the road is improperly constructed so as to occupy more land than is necessary.⁸⁸ Where one conveys a right of way through his land so as to cut off access to a part, he will have a way of necessity over the land conveyed.⁸⁹ Where the contract makes the company liable for all damages done by the construction of the road, damage done by contractors will be within the contract.⁹⁰

§ 299a. **Reserving right of way for public use in grants by railroads and others.**—The Northern Pacific Railroad Company conveyed a portion of its lands, "reserving and excepting therefrom, however, a strip extending through the same * * * of the width of 400 feet,—that is, 200 feet on each side of the center line of the Northern Pacific Railroad, or any of its branches,—to be used for right of way, * * * in case the line of said railroad, or any of its branches, has been or shall be located on or over * * * said described premises." It was held that such reservation covered one such strip only, and that the company could not claim a right of way for both its main line and a branch line.⁹¹ Such a reservation is personal to the grantor and does not inure to the benefit of another company.⁹²

⁸⁸ *Gulf etc. R. R. Co. v. Richards*, 83 Tex. 203, 18 S. W. Rep. 161.

⁸⁹ *New York etc. R. R. Co. v. Railroad Comrs.* 162 Mass. 81, 38 N. E. Rep. 87.

⁹⁰ *Bechnel v. New Orleans etc. R. R. Co.*, 28 La. An. 522.

The following cases construing particular contracts are also noted: *People v. Stuart*, 97 Ill. 123; *Leroy etc. R. R. Co. v. Small*, 46 Kan. 300, 26 Pac. Rep. 695; *Long v. Louisville & N. R. R. Co.*, 89 Ky. 544, 13 S. W. Rep. 3; *Long v. Louisville & N. R. R. Co.*,

(Ky.) 14 S. W. Rep. 78; *St. Paul etc. R. R. Co. v. St. Paul U. D. R. R. Co.*, 44 Minn. 325, 46 N. W. Rep. 566; *Galveston etc. R. R. Co. v. Perry*, 81 Tex. 466, 17 S. W. Rep. 40; *Ague v. Seitsinger*, (Ia.) 60 N. W. Rep. 483; *Grundy v. Louisville etc. R. R. Co.*, 98 Ky. 117, 32 S. W. Rep. 392.

⁹¹ *Dunston v. Northern Pac. R. R. Co.*, 2 N. D. 46, 49 N. W. Rep. 426. To same effect: *Biles v. Tacoma etc. R. R. Co.*, 5 Wash. 509, 32 Pac. Rep. 211.

⁹² *Carlson v. Duluth Short Line R. R. Co.*, 38 Minn. 305, 37

§ 300. **Rights by prescription.**—There appears to be no reason why rights in land for public use may not be acquired by prescription the same as for private use.¹ It has accordingly been held that a right of way for a railroad² or canal,³ or for a public highway or street,⁴ or

N. W. Rep. 34; *Biles v. Tacoma* etc. R. R. Co., 5 Wash. 509, 32 Pac. Rep. 211. And see *Shippin v. Paul*, 31 N. J. Eq. 439.

¹ *City of Topeka v. Cowee*, 48 Kan. 345, 29 Pac. Rep. 560; *Oma-ha* etc. R. R. Co. v. *Rickards*, 38 Neb. 847, 57 N. W. Rep. 739; *Hanlon v. Union Pac. R. R. Co.*, 40 Neb. 52, 58 N. W. Rep. 590.

² *Ogle v. Philadelphia* etc. R. R. Co., 3 Hous. Del. 302; *East St. Louis* etc. R. R. Co. v. *Nugent*, 147 Ill. 254, 35 N. E. Rep. 464; *Sherlock v. Louisville* etc. R. R. Co., 115 Ind. 22, 17 N. E. Rep. 171; *Ryan v. Miss. Val.* etc. R. R. Co., 62 Miss. 162; *Hargis v. Kansas City* etc. R. R. Co., 100 Mo. 210, 13 S. W. Rep. 680, 2 Am. R. R. & Corp. Rep. 329; *Oma-ha* etc. R. R. Co. v. *Rickards*, 38 Neb. 847, 57 N. W. Rep. 739; *Hanlon v. Union Pac. R. R. Co.*, 40 Neb. 52, 58 N. W. Rep. 590; *Miner v. New York Cent.* etc. R. R. Co., 123 N. Y. 242, 25 N. E. Rep. 339; *Ross v. Grand Trunk R. R. Co.*, 10 Ont. 447; *Blair v. St. Louis* etc. R. R. Co., 24 Fed. Rep. 539. Compare *Davis v. Cleveland* etc. R. R. Co., 140 Ind. 468, 39 N. E. Rep. 495; *Tex-as W. R. R. Co. v. Wilson*, 83 Tex. 153, 18 S. W. Rep. 325; *Hays v. T. & P. R. R. Co.*, 62 Tex. 397. In *Nasson v. Railroad*, 122 N. C. 856, it is held that a railroad cannot acquire title by prescription, because it has a right to

enter and occupy, which owner cannot prevent.

³ *Eldridge v. City of Binghamton*, 120 N. Y. 309, 24 N. E. Rep. 462.

⁴ *Patton v. State*, 50 Ark. 53; *Patterson v. Munyan*, 93 Cal. 128, 29 Pac. Rep. 250; *City of Monterey v. Molasin*, 99 Cal. 290, 33 Pac. Rep. 840; *Bequette v. Patterson*, 104 Cal. 282, 37 Pac. Rep. 917; *Schwerdtle v. Placer County*, 108 Cal. 589, 41 Pac. Rep. 448; *Ely v. Parsons*, 55 Conn. 83; *Landers v. Town of Whitefield*, 154 Ill. 630, 39 N. E. Rep. 656; *Bales v. Pidgeon*, 129 Ind. 548, 29 N. E. Rep. 34; *State v. Waterman*, 79 Ia. 360, 44 N. W. Rep. 676; *Cemetery Ass. v. Meninger*, 14 Kan. 312; *Commonwealth v. Logan*, 5 Litt. 286; *Brock v. Chase*, 39 Me. 300; *Burns v. Annas*, 60 Me. 288; *Pittsburg v. Brown*, 82 Me. 450, 19 Atl. Rep. 858; *Weld v. Brooks*, 152 Mass. 297, 25 N. E. Rep. 719; *Taft v. Commonwealth*, 158 Mass. 526, 33 N. E. Rep. 1046; *Bumpus v. Miller*, 4 Mich. 159; *Kruger v. Le Blanc*, 70 Mich. 76; 37 N. W. Rep. 880; *Wayne County Sav. Bank v. Stockwell*, 84 Mich. 586, 48 N. W. Rep. 174; *Campau v. Detroit*, 104 Mich. 560, 62 N. W. Rep. 718; *Miller v. Town of Corinna*, 42 Minn. 391, 44 N. W. Rep. 127; *Marchand v. Town of Maple Grove*, 48 Minn. 271, 51 N. W. Rep. 606; *Hall v. St. Paul*, 56 Minn. 428, 57 N. W. Rep. 928;

land for public park,⁵ a public footway over a railroad bridge,⁶ a right of flowage,⁷ a right to divert the water of a stream⁸ or to pollute it,⁹ the right to obstruct or otherwise interfere with the flow of surface water¹⁰ and the right to occupy a street for railroad purposes,¹¹ may be acquired by prescription. It has been held that the use of private property adjoining navigable waters, as a landing place for more than twenty years, does not create a public landing.¹² A foreign corporation, which is

State v. Bradley, 31 Mo. 308; State v. Walters, 69 Mo. 463; Harper v. Morse, 46 Mo. App. 470; State v. Warner, 51 Mo. App. 174; Graham v. Flynn, 21 Neb. 229; Nelson v. Jenkins, 42 Neb. 133, 60 N. W. Rep. 311; Barker v. Clark, 4 N. H. 380; Greeley v. Quimby, 22 N. H. 335; Ward v. Folly, 5 N. J. L. 482; Regna v. Rochester, 45 N. Y. 129; James v. Sammis, 132 N. Y. 239, 30 N. E. Rep. 502; Click v. Lamar County, 79 Tex. 121, 14 S. W. Rep. 1048; Waring v. Little Rock, 62 Ark. 408, 30 S. W. Rep. 24; Leonard v. Detroit (Mich.) 66 N. W. Rep. 488; Pittsburg etc. R. R. Co. v. Crown Point, 150 Ind. 536; Mills v. Evans, 100 Ia. 712; Burlington etc. R. R. Co. v. Columbus Junction, 104 Ia. 110; District of Columbia v. Robinson, 14 App. Cas. D. C. 512.

⁵ Quindaro Tp. v. Squier, 51 Fed. Rep. 152, 2 C. C. A. 142.

⁶ Kentucky Central R. R. Co. v. City of Paris, 95 Ky. 627, 27 S. W. Rep. 84.

⁷ Williams v. Nelson, 23 Pick. 141; Borden v. Vincent, 24 Pick. 301; Ray v. Fletcher, 12 Cush. 200; Vail v. Mix, 74 Ill. 127; Gilford v. Winnipiseogee Lake Co., 52 N. H. 262; Ballard v. Struckman, 123 Ill. 636; Wood v. Kel-

ley, 30 Me. 47; Gleason v. Tuttle, 46 Me. 288; Johnson v. Boorman, 63 Wis. 268; and see Griffin v. Foster, 8 Jones L. 337. Tinkham v. Arnold, 3 Me. 120 and Hathorne v. Stinson, 12 Me. 183, appear to hold the contrary, but must be regarded as overruled by the later Maine cases above cited. And see Miller v. Stowman, 26 Ind. 143.

⁸ Gallagher v. Montecito Val. Water Co., 101 Cal. 242, 35 Pac. Rep. 770; Coleman v. State, 134 N. Y. 564, 31 N. E. Rep. 902. And see Kellogg v. Thompson, 66 N. Y. 88.

⁹ Weir v. Claude, 16 Duvall 575. But see Board of Health v. Lederer, 52 N. J. Eq. 675, 29 Atl. Rep. 444.

¹⁰ Emry v. Raleigh etc. R. R. Co., 102 N. C. 209, 9 S. E. Rep. 139; Eshleman v. Township of Martic, 152 Pa. St. 68, 25 Atl. Rep. 178; L. & N. R. R. Co. v. Mossman, 90 Tenn. 157, 16 S. W. Rep. 64.

¹¹ American Bank Note Co. v. New York El. R. R. Co., 129 N. Y. 252, 29 N. E. Rep. 302, 5 Am. R. R. & Corp. Rep. 583.

¹² Pearsall v. Post, 20 Wend. 111. Compare Wilkerson v. St. Louis Sectional Dock Co., 102 Mo. 130, 14 S. W. Rep. 177; Smith v. State, 59 Ohio St. 278.

incompetent to acquire title to lands by eminent domain, may acquire title by prescription, good against all except the State.¹³ Where by statute lands acquired for canal purposes vest in the State in fee simple, it will have a fee simple title to lands acquired for that purpose by prescription.¹⁴ Where there is color of title to a way of definite width, the actual possession and use of part for the requisite period, has been held to give title to the whole.¹⁵ In other cases the width will be limited to the land actually occupied and reasonably necessary for the use and repair of the road.¹⁶ It has been held that a highway cannot be established by prescription over vacant and unenclosed land.¹⁷ But the contrary has also been held.¹⁸ Doubtless stronger evidence would be required in such case to show that the use was adverse and not with the implied consent of the owner.¹⁹ And the use would have to be confined to some definite track and not distributed over a number of tracks occupying a wide strip of land.²⁰ A city cannot acquire by prescription a right to use a street for a market.²¹ The adverse possession of land by a city for water works is

¹³ *Hanlon v. Union Pac. R. R. Co.*, 40 Neb. 52, 58 N. W. Rep. 590.

¹⁴ *Eldridge v. Binghamton*, 120 N. Y. 309, 24 N. E. Rep. 462.

¹⁵ *Pillsbury v. Brown*, 82 Me. 450, 19 Atl. Rep. 858; *Hargis v. Kansas City etc. R. R. Co.*, 100 Mo. 210, 13 S. W. Rep. 680, 2 Am. R. R. & Corp Rep. 329.

¹⁶ *Marchand v. Maple Grove*, 48 Minn. 271, 51 N. W. Rep. 606; *Omaha etc. R. R. Co. v. Rickards*, 38 Neb. 847, 57 N. W. Rep. 739; *Whitesides v. Grear*, (Utah) 44 Pac. Rep. 1032. But in *Kruger v. Le Blanc*, 70 Mich. 76, 37 N. W. Rep. 880, it was held that a highway by prescription would be presumed to be of the statutory width. Compare *Wayne County*

Sav. Bank. v. Stockwell, 84 Mich. 586, 48 N. W. Rep. 174; *Barrows v. Guest*, 5 Utah 91, 12 Pac. Rep. 847.

¹⁷ *Cunningham v. San Saba County*, 1 Tex. Civ. App. 480, 20 S. W. Rep. 941; *Fox v. Virgin*, 11 Ill. App. 513. And see *Kyle v. Town of Logan*, 87 Ill. 67; *People v. Osborn*, 32 N. Y. Supp. 358.

¹⁸ *Ely v. Parsons*, 55 Conn. 83.

¹⁹ *Brushy Mound v. McClintock*, 150 Ill. 129, 36 N. E. Rep. 976.

²⁰ *Friel v. People*, 4 Col. App. 259, 35 Pac. Rep. 676; *Ottawa v. Yentzer*, 160 Ill. 509, 43 N. E. Rep. 601; *Engle v. Hunt*, 50 Neb. 358.

²¹ *Herrick v. Cleveland*, 4 Ohio C. C. 470.

not interrupted by an arrangement whereby the works are operated for a time by private parties.²² A private way may become public by adverse user.²³

§ 300a. **Requisites of prescription.**—Washburn says that, to create a right by prescription, “the use and enjoyment of what is claimed must have been adverse, under a claim of right, exclusive, continuous, uninterrupted, and with the knowledge and acquiescence of the owner of the estate in, over, or out of which the easement prescribed for is claimed, and while such owner was able, in law, to assert and enforce his rights, and to resist such adverse claim, if not well founded,” and “it must, moreover, be of something which one party could have granted to the other.”²⁴ It must be continued for the requisite period, which is determined by the statute of limitations as to actions for the recovery of land or any interest therein.²⁵ Adverse possession for a less period confers no right.²⁶ Knowledge and acquiescence of the owner may be presumed from an open and notorious possession under claim of right.²⁷ The user must be continuous and uninterrupted.²⁸ A change in the character of the use destroys the continuity. Thus where an elevated railroad operated by cable was changed to a steam motor road, the latter was held to be a different user.²⁹ An unavoidable interruption, or tem-

²² *Smith v. Inhabitants of Lincoln*, 170 Mass. 488.

²³ *State v. Taylor*, 54 S. C. 294, 32 S. E. Rep. 422.

²⁴ Washburn on Easements, c. 1, sec. 4, § 26. And see *City of Topeka v. Cowee*, 48 Kan. 345, 29 Pac. Rep. 560; *Omaha etc. R. R. Co. v. Rickards*, 38 Neb. 847, 57 N. W. Rep. 739; *Hanlon v. Union Pac. R. R. Co.*, 40 Neb. 552, 58 N. W. Rep. 590.

²⁵ Washburn on Easements, c. 1, sec. 4, § 24.

²⁶ Washburn on Easements, c. 1, sec. 4, § 25; *Toledo etc. R. R. Co. v. Darst*, 61 Ill. 231; *Texas*

W. R. R. Co. v. Wilson, 83 Tex. 153, 18 S. W. Rep. 325.

²⁷ Washburn on Easements, c. 1, sec. 4, §§ 66, 67; and cases cited above; also *Quindaro Tp. v. Squier*, 51 Fed. Rep. 152, 2 C. C. A. 142.

²⁸ *O'Connell v. Bowman*, 45 Ill. App. 654; *Verona v. Allegheny Valley R. R. Co.*, 152 Pa. St. 368, 25 Atl. Rep. 518; *Gray v. Haas*, 98 Ia. 502, 67 N. W. Rep. 394; *Coburn v. San Mateo County*, 75 Fed. Rep. 520; *Smith v. State*, 59 Ohio St. 278.

²⁹ *American Bank Note Co. v. New York El. R. R. Co.*, 129 N.

porary suspension of the use, as by rebuilding a dam, does not stop the prescription.³⁰ A slight deviation from the traveled path to avoid an obstruction, will not prevent the establishment of a highway by prescription.³¹ The fact that the possession was begun under an agreement, does not prevent a prescriptive right arising, if it is continued adversely and under a claim of right.³² But if the use is continued under agreement or protest no prescription arises.³³ To be adverse the user must be actually or presumptively injurious.³⁴ In case of works on one's own land which produce injury to another, such as a bridge, culvert or embankment interfering with the flow of water, the prescription does not begin to run from the construction of the works but from the doing of the injury.³⁵ To the principle that the user must be injurious in order to create a prescription, must be referred those cases which hold that a way by prescription cannot be acquired over uninclosed, unimproved and unused land.³⁶ It is held to be immaterial that the acquiescence of the owner is due to a mistake of fact, as where a highway is opened and used on what is

Y. 252, 29 N. E. Rep. 302, 5 Am. R. R. & Corp. Rep. 533.

³⁰ Wood v. Kelley, 30 Me. 47; Washburn on Easements, c. 1, sec. 4, § 55. And see Ballard v. Struckman, 123 Ill. 636.

³¹ Nelson v. Jenkins, 42 Neb. 133, 60 N. W. Rep. 311. And see Almy v. Church, 18 R. I. 182, 26 Atl. Rep. 58.

³² Hargis v. Kansas City etc. R. R. Co., 100 Mo. 210, 13 S. W. Rep. 680, 2 Am. R. R. & Corp. Rep. 329; Hanlon v. Union Pac. R. R. Co., 40 Neb. 52, 58 N. W. Rep. 590; McAllister v. Pickup, 84 Ia. 65, 50 N. W. Rep. 556. Whether use of a private way by the public for the prescriptive period creates a public way, see

Madison v. Gallagher, 159 Ill. 105, 42 N. E. Rep. 316; Harper v. State, 109 Ala. 66, 19 So. Rep. 901.

³³ Commissioner of Highways v. Riker, 79 Mich. 551, 44 N. W. Rep. 955; Washburn on Easements, c. 1, sec. 4, §§ 51, 68.

³⁴ Washburn on Easements, c. 1, sec. 4, § 29.

³⁵ Sherlock v. Louisville etc. R. Co., 115 Ind. 22, 17 N. E. Rep. 171; Emry v. Raleigh etc. R. R. Co., 102 N. C. 209, 9 S. E. Rep. 139.

³⁶ Cunningham v. San Saba County, 1 Tex. Civ. App. 480, 20 S. W. Rep. 941; Brushy Mound v. McClintock, 150 Ill. 129, 36 N. E. Rep. 976; People v. Osborn, 32 N. Y. Supp. 358; Friel v. People, 4 Col. App. 259, 35 Pac. Rep. 676.

supposed to be the correct line, but which turns out not to be so.³⁷

§ 300b. **Possession and color of title.**—Under statutes quieting title to land after a certain length of possession under color of title, it is held that defective condemnation proceedings may be color of title and that possession of any part of the land embraced in the color of title, is constructive possession of all.³⁸

§ 300c. **Rights by dedication.** To what public uses it applies. —The voluntary devotion of private property to public use, without any formal conveyance to a specific grantee for specific uses, is called a dedication.³⁹ It has been said

³⁷ *Landers v. Town of Whitefield*, 154 Ill. 630, 39 N. E. Rep. 656; *Bales v. Pidgeon*, 129 Ind. 548, 29 N. E. Rep. 34; *State v. Waterman*, 79 Ia. 360, 44 N. W. Rep. 676. Compare *Bolton v. McShane*, 79 Ia. 26, 44 N. W. Rep. 211.

³⁸ *Mobile etc. R. R. Co. v. Cogshill*, 85 Ala. 456; *Cogshill v. Mobile etc. R. R. Co.*, 92 Ala. 252, 9 So. Rep. 512. And see *Omaha etc. R. R. Co. v. Rickards*, 38 Neb. 847, 57 N. W. Rep. 739.

³⁹ *Elliott, Roads and Streets*, 85; *Washburn on Easements*, c. 1, sec. 5, § 10; *Bouvier's Dict.*, Tit. "Dedication." "Dedication, as the term is used in reference to this subject, is the act of devoting or giving property for some proper object, and in such manner as to conclude the owner. The law which governs such cases is anomalous. Under it rights are parted with and acquired in modes and by means unusual and peculiar. Ordinarily, some conveyance or written instrument is required to transmit a right to real property; but the

law applicable to dedication is different. A dedication may be made without writing; by act in pais, as well as by deed. It is not at all necessary that the owner should part with the title which he has; for dedication has respect to the possession, and not the permanent estate. Its effect is not to deprive a party of title to his land, but to estop him, while the dedication continues in force from asserting that right of exclusive possession and enjoyment which the owner of property ordinarily has. The principle upon which the estoppel rests is, that it would be dishonest, immoral or indecent, and in some instances even sacrilegious, to reclaim at pleasure property which has been solemnly devoted to the use of the public, or in furtherance of some charitable or pious object. The law therefore will not permit any one thus to break his own plighted faith; to disappoint honest expectations thus excited, and upon which reliance has been placed. The principle is

that "dedication is a term applicable only to public ways."⁴⁰ But this is manifestly an error. A dedication may be made for any purpose which is for the use and enjoyment of the public at large. Consequently a dedication may be made, not only for public ways of every kind, but also for public parks, squares and commons,⁴¹ for cemeteries,⁴² for court houses and public buildings,⁴³ for school houses,⁴⁴ public landings,⁴⁵ and any other purpose which is for the enjoyment of the public at large.⁴⁶ It is said to be of the essence

one of sound morals, and of most obvious equity, and is in the strictest sense a part of the law of the land. It is known in all courts, and may as well be enforced at law as in equity." *Hunter v. Trustees of Sandy Hill*, 6 Hill 407, 411, 412. And for a general discussion see also *Pearsoll v. Post*, 20 Wend. 111; 22 Wend. 425, and *Watson v. Chicago etc. R. R. Co.*, 46 Minn. 321, 48 N. W. Rep. 1129.

⁴⁰ *Elliott, Roads and Streets*, p. 85, note 2.

⁴¹ *Archer v. Salinas City*, 93 Cal. 43, 28 Pac. Rep. 839; *Attorney General v. Abbott*, 154 Mass. 323, 28 N. E. Rep. 346; *Plumb v. City of Grand Rapids*, 81 Mich. 381, 45 N. W. Rep. 1024; *Trustees v. Hoboken*, 33 N. J. L. 13; *Steel v. City of Portland*, 23 Or. 176, 31 Pac. Rep. 479; *Cincinnati v. White*, 6 Pet. 431.

⁴² *Campbell v. City of Kansas*, 102 Mo. 326, 13 S. W. Rep. 897; *Hunter v. Trustees of Sandy Hill*, 6 Hill 407; *Colbert v. Shepard*, 89 Va. 401, 16 S. E. Rep. 246; *Board of Comrs. v. Young*, 59 Fed. Rep. 96, 8 C. C. A. 27.

⁴³ *State v. Travis County*, 85 Tex. 435, 21 S. W. Rep. 1029.

⁴⁴ *Wilgus v. Board of Comrs.*,

54 Kan. 605, 38 Pac. Rep. 787; *Kemper v. Collins*, 97 Mo. 644, 11 S. W. Rep. 245.

⁴⁵ *Alton v. Illinois Trans. Co.*, 12 Ill. 38; *Godfrey v. Alton*, 12 Ill. 29; *Gardiner v. Tisdale*, 2 Wis. 153.

⁴⁶ "Land may be dedicated to pious and charitable purposes, as well as for public ways, commons and other easements in the nature of ways, so as to conclude the owner who makes the dedication. This is the general doctrine. (*Pearsall v. Post*, 20 Wend. 111; 22 id. 425, S. C. in error.) Public highways and sites for court houses, churches and other public buildings, are familiar instances of the application of the principle. It has been applied to the reservation of a spring of water for public use; (*McConnell v. Town of Lexington*, 12 Wheat. 582; and see 6 Pet. 438; 20 Wend. 120; 22 Wend. 452;) to a public square in a village; (*Watertown v. Cowen*, 4 Paige, 510;) and to a public burying ground. (*Beatty v. Kuntz*, 2 Pet. 566; see also 6 id. 430; 22 Wend. 454, 5, 473; *State v. Trask*, 6 Vt. 355.)" *Hunter v. Trustees of Sandy Hill*, 6 Hill 407, 411.

of a dedication to public uses that it shall be for the use of the public at large.⁴⁷ There can be no such thing as a dedication to private use, such as a private way,⁴⁸ nor to a private corporation for such a public use as would justify an exercise of the power of eminent domain, such as a railroad.⁴⁹ Dedications are of two sorts; statutory dedications and common law dedications.⁵⁰ They may also be divided into express dedications and implied dedications.⁵¹ Statutory dedications are necessarily express, and common law dedications may be either.⁵²

§ 300d. **Statutory dedications.**—Statutory dedications are such as are made pursuant to the provisions of a statute. Unless otherwise provided they become effective without any acceptance or other act on the part of the public.⁵³ There must, however, be a substantial compliance with the statute, or the dedication will not take effect as a statutory one.⁵⁴ An acknowledgment of a plat by an attorney in fact, instead of by the owner in person, has been held to prevent

⁴⁷ *Trustees v. Hoboken*, 33 N. J. L. 13.

⁴⁸ *Trustees v. Hoboken*, 33 N. J. L. 13; *Hale v. McLeod*, 2 Met. Ky. 98; *Commonwealth v. Low*, 3 Pick. 413; *Commonwealth v. Newberry*, 2 Pick. 57; *Coberly v. Butler*, 63 Mo. App. 656.

⁴⁹ *Lake Erie & W. R. R. Co. v. Whitham*, 155 Ill. 514, 40 N. E. Rep. 1014; *Louisville etc. R. R. Co. v. Stephens*, 96 Ky. 401, 29 S. W. Rep. 14; *Watson v. Chicago etc. R. R. Co.*, 46 Minn. 321, 48 N. W. Rep. 1129; *Minneapolis etc. R. R. Co. v. Marble*, 112 Mich. 4. The question is considered quite exhaustively in the last case. Compare cases cited in note 6, § 300f.

⁵⁰ *Elliott, Roads and Streets*, 85.

⁵¹ *Bouvier Dict.*, Tit. "Dedication."

⁵² Common law dedications of public ways appear to have been abolished in Massachusetts. *Guild v. Shedd*, 150 Mass. 255, 22 N. E. Rep. 896.

⁵³ *Rhodes v. Brightwood*, (Ind.) 43 N. E. Rep. 942.

⁵⁴ *City of Chicago v. Drexel*, 141 Ill. 89, 30 N. E. Rep. 774; *New Albany v. Williams*, 126 Ind. 1, 25 N. E. Rep. 187; *Armistead v. Vicksburg etc. R. R. Co.*, 47 La. An. 1381, 17 So. Rep. 888; *Burchmann v. St. Louis*, 121 Mo. 523, 26 S. W. Rep. 687; *Brown v. City of Carthage*, 128 Mo. 10, 30 S. W. Rep. 312; *Hughes v. Birmingham*, 135 N. Y. 347, 32 N. E. Rep. 78; *Tilzie v. Haye*, 8 Wash. 187, 35 Pac. Rep. 583; *United States v. Illinois Central R. R. Co.*, 154 U. S. 225, 14 S. C. Rep. 1015.

its taking effect as a statutory dedication.⁵⁵ So the failure to mark the width of a street on a plat as required by statute was held to defeat a statutory dedication.⁵⁶ The reservation in a plat of the trees and rocks on the streets and alleys was held not to impair the plat as a statutory dedication.⁵⁷ A defective statutory dedication may become effective as a common law dedication by the selling of lots according to the plat.⁵⁸ But a defective plat, though recorded, will be inoperative if the owner remains in possession and ignores the subdivision.⁵⁹ Where the statute provides that a plat shall not be of any validity unless approved by the board of public works, the board cannot arbitrarily or unreasonably withhold its approval and, in a proper case, may be compelled to give such approval by mandamus.⁶⁰

§ 300e. Construction of map or plat as to public use intended or which may be made of the land dedicated.— Maps and plats are often indefinite either in indicating the land intended to be set apart for public use, or in indicating the uses to which the property dedicated was intended to be put. A proprietor made a plat of ground on which were four squares, colored green and marked respectively, “Mar-

⁵⁵ *Thomsen v. McCormick*, 136 Ill. 135, 26 N. E. Rep. 373; *Earll v. City of Chicago*, 136 Ill. 539, 26 N. E. Rep. 370. So if the plat is otherwise defectively acknowledged. *Vermont v. Miller*, 161 Ill. 210, 43 N. E. Rep. 975; *Mason v. Chicago*, 163 Ill. 351, 45 N. E. Rep. 567; *Marsh v. Fairbury*, 163 Ill. 401, 45 N. E. Rep. 236.

⁵⁶ *Tilzie v. Haye*, 8 Wash. 187, 35 Pac. Rep. 583.

⁵⁷ *Brown v. City of Carthage*, 128 Mo. 10, 30 S. W. Rep. 312. See also *Snoddy v. Bolen*, (Mo.) 24 S. W. Rep. 142, where the right to minerals was reserved.

⁵⁸ *Thomsen v. McCormick*, 136 Ill. 135, 26 N. E. Rep. 373; *Earll*

v. City of Chicago, 136 Ill. 539, 26 N. E. Rep. 370; *Giffin v. City of Olathe*, 44 Kans. 342, 24 Pac. Rep. 470; *Armistead v. Vicksburg etc. R. R. Co.*, 47 La. An. 1381, 17 So. Rep. 888; *Lippincott v. Harvey*, 72 Md. 572, 19 Atl. Rep. 1041; *White v. Smith*, 37 Mich. 291; *Ruddiman v. Taylor*, 95 Mich. 547, 55 N. W. Rep. 376; *State v. St. Paul etc. R. R. Co.*, 62 Minn. 450, 64 N. W. Rep. 1140; *Smith v. St. Paul*, 72 Minn. 472; *Rusk v. Berlin*, 173 Ill. 634; *Clark v. McCormick*, 174 Ill. 164.

⁵⁹ *Smith v. City of Osage*, 80 Ia. 84, 45 N. W. Rep. 404.

⁶⁰ *Van Husan v. Heames*, 91 Mich. 519, 52 N. W. Rep. 18.

pel Square," "Hudson Square," "Church Ground" and "Square." It was held that the word "square" alone indicated a public use, "either for purposes of free passage, or to be ornamented and improved for grounds of pleasure, amusement, recreation or health."⁶¹ So of the words, "public square," on a block of ground.⁶² Land marked "common" may be used for a soldiers' monument,⁶³ or as a place of public exchange of merchandise.⁶⁴ A block of ground on a river was marked "Reserved Landing." This was held to intend a private and not a public use.⁶⁵ Where land was designated simply as "public ground" it was held to be dedicated to any public use, including its use for a railroad, under proper authority.⁶⁶ Some miscellaneous cases of construction are referred to in the note.⁶⁷ It is held that oral evidence is not admissible to show what one intended by the marks and lines on a plat.⁶⁸

§ 300f. **Common law dedications.**—A common law dedication is made out by certain acts or declarations of the owner manifesting an intent to devote his property to pub-

⁶¹ *Trustees v. Hoboken*, 33 N. J. L. 13. Where a square was marked "Ehmen's Park," it was held to mean a public and not a private park. *Ehmen v. Gothenburg*, 50 Neb. 715.

⁶² *Young v. City of Oskaloosa*, 88 Ia. 681, 56 N. W. Rep. 177.

⁶³ *Hoyt v. Gleason*, 65 Fed. Rep. 685.

⁶⁴ *Goode v. St. Louis*, 113 Mo. 257, 20 S. W. Rep. 1048.

⁶⁵ *Grant v. Davenport*, 18 Ia. 179; and see *Baker v. Vandenburg*, 99 Mo. 378, 12 S. W. Rep. 462.

⁶⁶ *Chicago etc. R. R. Co. v. Joliet*, 79 Ill. 25. And see *Bennett v. Chicago etc. R. R. Co.*, 73 Fed. Rep. 696. But it is held that there can be no such thing

as a dedication to railroad uses. See § 300c, note 49.

⁶⁷ *State v. Dubuque etc. R. R. Co.*, 88 Ia. 508, 55 N. W. Rep. 727; *Arnold v. Weiker*, 55 Kan. 510, 40 Pac. Rep. 901; *Allen v. Reinhardt*, 90 Ky. 466, 14 S. W. Rep. 420; *Attorney General v. Abbott*, 154 Mass. 323, 28 N. E. Rep. 346; *Dickerson v. City of Detroit*, 99 Mich. 498, 58 N. W. Rep. 645; *City of Duluth v. St. Paul etc. R. R. Co.*, 49 Minn. 201, 51 N. W. Rep. 1163; *Campbell v. City of Kansas*, 102 Mo. 326, 13 S. W. Rep. 897.

⁶⁸ *Miller v. Indianapolis*, 123 Ind. 196, 24 N. E. Rep. 228; *Village of Wayzata v. Great Northern R. R. Co.*, 46 Minn. 505, 49 N. W. Rep. 205. But see *Chicago v. Ward*, 169 Ill. 39.

lic use and which have the effect of setting apart or offering the property for such use, followed by acceptance on the part of the public.⁶⁹ The dedication may be an express or implied dedication. It is express when the intent is manifested by words, oral or written.⁷⁰ It is implied when the intent has to be gathered from the acts of the dedicatory.⁷¹ Where an owner of land makes a map or plat showing a division of the land into lots, blocks, streets, alleys and public places and sells and conveys lots with reference to such map or plat, or sells and conveys by reference to a map made by public authority or by any third party, or sells and conveys land described as abutting or bounded on a street, carved out of his own land, he thereby dedicates such streets, alleys and public places to public use, as indicated in such maps, plats and conveyances.⁷² The grantor

⁶⁹ *Starr v. People*, 17 Col. 458, 30 Pac. Rep. 64; *City of Denver v. Jacobson*, 17 Col. 497, 30 Pac. Rep. 246; *Hogue v. City of Albina*, 20 Or. 182, 25 Pac. Rep. 386; *Cunningham v. Hendricks*, 89 Wis. 632, 62 N. W. Rep. 410; *Trustees v. Hoboken*, 33 N. J. L. 13; *Alton v. Meeuwenberg (Mich)*, 66 N. W. 571; *Buntin v. Danville, (Va.)* 24 S. E. 830; *Coburn v. San Mateo County*, 75 Fed. 520.

⁷⁰ *Elliott, Roads and Streets*, p. 90.

⁷¹ *Ibid.*

⁷² *City of Demopolis v. Webb*, 87 Ala. 659, 6 So. Rep. 408; *Sherer v. City of Jasper*, 93 Ala. 530, 9 So. Rep. 584; *Western R. R. Co. v. Ala. G. T. R. R. Co.*, 96 Ala. 272, 11 So. Rep. 483; *Fitzgerald v. Saxton*, 58 Ark. 494, 25 S. W. Rep. 499; *People v. Reed*, 81 Cal. 70, 22 Pac. Rep. 474; *City of Eureka v. Armstrong*, 83 Cal. 623, 22 Pac. Rep. 928, 23 Pac. Rep. 1084; *People v. Hibernia S.*

& L. Soc., 84 Cal. 634, 24 Pac. Rep. 295; *Archer v. Salinas County*, 93 Cal. 43, 28 Pac. Rep. 839; *Helm v. McClure*, 107 Cal. 199, 40 Pac. Rep. 437; *City of Eureka v. Croghan*, 81 Cal. 524, 22 Pac. Rep. 693; *Brown v. Stark*, 83 Cal. 636, 24 Pac. Rep. 162; *Griffiths v. Galindo*, 86 Cal. 192, 24 Pac. Rep. 1025; *City and County of San Francisco v. Burr, (Cal.)* 36 Pac. Rep. 771; *Pierce v. Roberts*, 57 Conn. 31, 17 Atl. Rep. 275; *Winter v. Payne*, 33 Fla. 470, 15 So. Rep. 211; *Ford v. Harris*, 95 Ga. 97, 22 S. E. Rep. 144; *Thomsen v. McCormick*, 136 Ill. 135, 26 N. E. Rep. 373; *Earll v. City of Chicago*, 136 Ill. 539, 26 N. E. Rep. 370; *City of Chicago v. Drexel*, 141 Ill. 89, 30 N. E. Rep. 774; *Powell v. City of Gilman*, 38 Ill. App. 611; *Newell v. Sass*, 142 Ill. 104, 31 N. E. Rep. 176; *Smith v. McDowell*, 148 Ill. 51, 35 N. E. Rep. 141; *Field v. Burling*, 149 Ill. 556, 37 N. E. Rep. 850, 10 Am. R. R. & Corp.

cannot recall the dedication as against his grantees, nor resume possession of such public places, or grant them to others for private use, and the grantee may prevent the

Rep. 707; Indianapolis v. Croas, 7 Ind. 9; Indianapolis v. Kingsbury, 101 Ind. 200; Fossion v. Landrey, 123 Ind. 136, 24 N. E. Rep. 96; Wolfe v. Town of Sullivan, 133 Ind. 331, 32 N. E. Rep. 1017; Giffen v. City of Olathe, 44 Kan. 342, 24 Pac. Rep. 470; Schneider v. Jacob, 86 Ky. 101, 5 S. W. Rep. 350; Land v. Smith, 44 La. An. 931, 11 So. Rep. 577; White v. Flannigan, 1 Md. 542; Lippincott v. Harvey, 72 Md. 572, 19 Atl. Rep. 1041; Van Witson v. Gutman, 79 Md. 405, 29 Atl. Rep. 608; Heselton v. Harmon, 80 Me. 326, 14 Atl. Rep. 286; Dorman v. Bates Mfg. Co., 82 Me. 438, 19 Atl. Rep. 915; Danforth v. City of Bangor, 85 Me. 423, 27 Atl. Rep. 268; Attorney General v. Abbott, 154 Mass. 323, 28 N. E. Rep. 346; Cole v. Hadley, 162 Mass. 579, 39 N. E. Rep. 279; Boland v. St. Johns Schools, 163 Mass. 229, 39 N. E. Rep. 1035; White v. Smith, 37 Mich. 291; Plumer v. Johnston, 63 Mich. 165, 29 N. W. Rep. 687; Diamond Match Co. v. Ontonagon, 72 Mich. 249, 40 N. W. Rep. 448; Ruddiman v. Taylor, 95 Mich. 547, 55 N. W. Rep. 376; Borer v. Lange, 44 Minn. 281, 46 N. W. Rep. 358; Witherspoon v. City of Meridan, 69 Miss. 288, 13 So. Rep. 843; McLaman v. McMeley, 56 Mo. App. 556; Heitz v. St. Louis, 110 Mo. 618, 19 S. W. Rep. 735; Burchman v. St. Louis, 121 Mo. 523, 26 S. W. Rep. 687; Pillsbury v. Alexander, 40 Neb. 242, 58 N. W. Rep. 859; Pope v. Town of

Union, 18 N. J. Eq. 282; State v. Elizabeth, 37 N. J. Eq. 432; Clark v. Elizabeth, 40 N. J. L. 172; S. C. 37 N. J. L. 120; Dill v. School Board, 47 N. J. Eq. 421, 20 Atl. Rep. 739; Holdane v. Cold Spring, 21 N. Y. 474; Bridges v. Wyckoff, 67 N. Y. 130; City of Cohoes v. Del. & H. Canal Co., 134 N. Y. 397, 31 N. E. Rep. 887; Cunningham v. Fitzgerald, 138 N. Y. 165, 33 N. E. Rep. 840; Lord v. Atkyns, 138 N. Y. 184, 33 N. E. Rep. 1035; Hollaway v. Southmayd, 139 N. Y. 390, 34 N. E. Rep. 1047; In re Adams, 141 N. Y. 297, 36 N. E. Rep. 318; In re St. Nicholas Terrace, 143 N. Y. 621, 37 N. E. Rep. 635; People v. Underhill, 144 N. Y. 316, 39 N. E. Rep. 333; Haight v. Littlefield, 147 N. Y. 338, 41 N. E. Rep. 696; In re Adams, 73 Hun 581, 26 N. Y. Supp. 422; Moore v. Carson, 104 N. C. 43, 10 S. E. Rep. 689; Ferguson's Appeal, 117 Pa. St. 426, 11 Atl. Rep. 885; Dobson v. Hohenadel, 148 Pa. St. 367, 23 Atl. Rep. 1128; In re Opening Hamilton St., 6 Mont. Co. L. Rep. 207; Shields v. Titus, 46 Ohio St. 528, 22 N. E. Rep. 717; Daiber v. Scott, 3 Ohio C. C. 313; Meier v. Portland Cable R. R. Co., 16 Or. 500, 19 Pac. Rep. 610; Steel v. City of Portland, 23 Or. 176, 31 Pac. Rep. 479; Dubois Cem. Co. v. Griffin, 165 Pa. St. 81, 30 Atl. Rep. 840; Union Co. v. Peckham, 16 R. I. 64, 12 Atl. Rep. 130; Clark v. Providence, 10 R. I. 437; Thaxter v. Turner, 17 R. I. 799, 24 Atl. Rep. 829; Wolf

closing or obstruction of the same by injunction.⁷³ It has been held that conveying a lot as bounded on a street laid down on a city map, is not a dedication of the street,⁷⁴ but the contrary would seem to be the better doctrine, since the owner could readily make the conveyance without recognizing the street, or could expressly reserve his rights.⁷⁵ Notwithstanding a conveyance by reference to a plat or street, there may be other circumstances which rebut or defeat the presumption of a dedication.⁷⁶ Where

v. Brass, 72 Tex. 133, 12 S. W. Rep. 159; Taylor v. Town of Philippi, 35 W. Va. 554, 14 S. E. Rep. 130; Pettibone v. Hamilton, 40 Wis. 402; Barbour v. Lyddy, 49 Fed. Rep. 896; Herbert v. Rainey, 54 Fed. Rep. 248; Fitzgerald v. Barbour, 55 Fed. Rep. 440, 5 C. C. A. 180; Northern Pac. R. R. Co. v. Spokane, 56 Fed. Rep. 915; Avondale Land Co. v. Avondale, 111 Ala. 523, 21 So. Rep. 318; Evans v. Blankenship, (Ari.) 39 Pac. Rep. 312; Marsh v. Fairbury, 163 Ill. 401, 45 N. E. Rep. 236; Rhodes v. Brightwood, 145 Ind. 21, 43 N. E. Rep. 942; Woodruff Place v. Raschig, 147 Ind. 517; Great Northern R. R. Co. v. St. Paul, 61 Minn. 1, 63 N. W. Rep. 96; State v. South Amboy, 57 N. J. L. 252, 30 Atl. Rep. 628; Wilson v. Acree, 97 Tenn. 378; McDonald v. Stark, 176 Ill. 456, 52 N. E. Rep. 37; Brownell v. White, 87 Md. 521. But if the description goes to the center of the unopened street there is no dedication. Baltimore v. Northern Central R. R. Co., 88 Md. 427, 41 Atl. Rep. 911. See Fulton v. Dover, (Del.) 31 Alt. Rep. 974; Prescott v. Edwards, 117 Cal. 298, 49 Pac. Rep. 178; Omaha v. Hanover, 49 Neb. 1, 67 N.

W. Rep. 891. An owner opened a street through his land and sold and leased lots bounded on the street but the deeds stated that the street was referred to for the purpose of description only and was not intended as a dedication. It was held that there was no dedication. Baltimore v. Fear, 82 Md. 246, 33 Atl. Rep. 637.

⁷³ Ibid.

⁷⁴ Opening of Brooklyn St., 118 Pa. St. 640, 12 Atl. Rep. 664; Opening of Wayne Av., 124 Pa. St. 135, 16 Atl. Rep. 631. See Matter of Opening 116th St., 1 App. Div. 436, 37 N. Y. Supp. 508.

⁷⁵ City of Demopolis v. Webb, 87 Ala. 659, 6 So. Rep. 408; Clark v. Elizabeth, 40 N. J. L. 172; S. C. 37 N. J. L. 120; Atwood v. O'Brien, 80 Me. 447, 15 Atl. Rep. 44; Central Land Co. v. Providence, 15 R. I. 246, 2 Atl. Rep. 556; Flersheim v. Baltimore, 85 Md. 489, 36 Atl. Rep. 1089.

⁷⁶ Waggeman v. North Peoria, 155 Ill. 545, 40 N. E. Rep. 485; City of Covington v. McDonald, 94 Ky. 1, 21 S. W. Rep. 235; Vaughn v. Lewis, 89 Va. 187, 15 S. E. Rep. 525. And see Cerf. v. Pfleging, 94 Cal. 131, 29 Pac. Rep. 417; Cook v. Sudden, 94 Cal. 443,

school trustees made a plat of school lands with streets and alleys without authority of law the sale of lots with reference to the plat was held to have no effect as a dedication of the streets.⁷⁷ There is a difference of opinion as to whether the conveyance of one or a few lots according to a plat, will amount to a dedication of all the streets and alleys on the plat, or of such only as are necessary for the convenient use and enjoyment of the property sold.⁷⁸ Where the land platted is subject to a mortgage, a release of certain lots by reference to the plat operates as an assent by the mortgagee to the dedication of all the streets marked on the plat.⁷⁹

In all common law dedications the question is largely one of fact,⁸⁰ and where there is no plat or written conveyance

29 Pac. Rep. 949; *City of Eureka v. Fay*, 107 Cal. 166, 40 Pac. Rep. 235; *Scranton v. City of Minneapolis*, 58 Minn. 437, 60 N. W. Rep. 26; *Whitworth v. Berry*, (Miss.) 12 So. Rep. 146; *City of Scranton v. Thomas*, 141 Pa. St. 1, 21 Atl. Rep. 413; *Phillips v. St. Claire Inclined Plane Co.*, 153 Pa. St. 230, 25 Atl. Rep. 735; *Daniels v. Almy*, 18 R. I. 244, 27 Atl. Rep. 330; *Monaghan v. Memphis Fair etc. Co.*, 95 Tenn. 108, 31 S. W. Rep. 497.

⁷⁷ *Seeger v. Mueller*, 133 Ill. 86, 24 N. E. Rep. 513.

⁷⁸ In *Thaxter v. Turner*, 17 R. I. 799, 24 Atl. Rep. 829, a sale of one or more lots was held to be a dedication of all the streets, alleys and public places indicated on the plat. The following cases are cited as supporting this view: *Rowan's Exrs. v. Portland*, 8 B. Mon. 232; *In re Opening of Pearl St.*, 111 Pa. St. 565, 5 Atl. Rep. 430; *Bartlett v. Bangor*, 67 Me. 460; *De Witt v. Ithaca*, 15 Hun 568; *Chapin v. Brown*, 15 R. I.

579, 10 Atl. Rep. 639; *Clark v. City of Providence*, 10 R. I. 437; 2 Dill. Munic. Corp. § 640; *Elliott Roads and Sts.*, 112, 113. So in *Pry v. Mankedick*, 172 Pa. St. 535, 34 Atl. Rep. 46, it was held that the conveyance of a single lot would work a complete dedication of all the streets on the plan. The contrary is held in *Diamond Match Co. v. Ontonagon*, 72 Mich. 249, 40 N. W. Rep. 448. And see *Johnson v. Shelter Island Grove and Camp-meeting Ass.*, 122 N. Y. 330, affirming 47 Hun 374, 14 N. Y. St. 576; *Mason v. Chicago*, 163 Ill. 351, 45 N. E. Rep. 567.

⁷⁹ *Pry v. Mankedick*, 172 Pa. St. 535, 34 Atl. Rep. 46.

⁸⁰ *Helm v. McClure*, 107 Cal. 199, 40 Pac. Rep. 437; *City of Hartford v. New York etc. R. R. Co.*, 59 Conn. 250, 22 Atl. Rep. 37; *Cemetery Ass. v. Meninger*, 14 Kan. 312; *Flock v. Green Island*, 122 N. Y. 107, 25 N. E. Rep. 267; *Maltman v. Chicago etc. R. R. Co.*, 41 Ill. App. 229.

the question may depend upon a great variety of circumstances, and the cases are practically incapable of classification. We refer to a large number of cases in the note, in some of which a dedication was found and in some not.⁸¹

⁸¹ *Wolfskill v. Los Angeles County*, 86 Cal. 405, 24 Pac. Rep. 1094; *Southern Pac. R. R. Co. v. Ferris*, 93 Cal. 263, 28 Pac. Rep. 828; *Plummer v. Sheldon*, 94 Cal. 533, 29 Pac. Rep. 947; *Smith v. City of San Luis Obispo*, 95 Cal. 463, 30 Pac. Rep. 591; *People v. Eel River etc. R. R. Co.*, 98 Cal. 665, 33 Pac. Rep. 728; *Cooper v. Monterey County*, 104 Cal. 437, 38 Pac. Rep. 106; *Helm v. McClure*, 107 Cal. 199, 40 Pac. Rep. 437; *Demartini v. City and County of San Francisco*, 107 Cal. 402, 40 Pac. Rep. 496; *Hibberd v. Melville*, (Cal.) 33 Pac. Rep. 201; *Los Angeles Cem. Ass. v. Los Angeles*, 32 Pac. Rep. 240; *McKenzie v. Gilmore*, 33 Pac. Rep. 262; *Starr v. People*, 17 Col. 458, 30 Pac. Rep. 64; *City of Denver v. Jacobson*, 17 Col. 497, 30 Pac. Rep. 246; *City of Hartford v. New York etc. R. R. Co.*, 59 Conn. 250, 22 Atl. Rep. 37; *Pettitt v. City of Macon*, 95 Ga. 645, 23 S. E. Rep. 198; *Smith v. Montgomery*, 2 Idaho 1187, 31 Pac. Rep. 812; *City of Bloomington v. Bloomington Cem. Ass.* 126 Ill. 221, 18 N. E. Rep. 298; *Moffitt v. South Park Comrs.*, 138 Ill. 620, 28 N. E. Rep. 975; *City of Chicago v. Chicago etc. R. R. Co.*, 152 Ill. 561, 38 N. E. Rep. 768; *Waggeman v. North Peoria*, 41 Ill. App. 132; *Pennsylvania Co. v. Plotz*, 125 Ind. 26, 24 N. E. Rep. 343; *Lake Erie & W. R. R. Co. v. Town*

of Boswell, 137 Ind. 336, 36 N. E. Rep. 1103; *State v. Birmingham*, 74 Ia. 407, 38 N. W. Rep. 121; *Goodfellow v. Riggs*, 88 Ia. 540, 55 N. W. Rep. 319; *Cemetery Ass. v. Meninger*, 14 Kan. 312; *Boener v. McKillip*, 52 Kan. 508, 35 Pac. Rep. 5; *Eastern Cem. Co. v. Louisville, (Ky.)* 15 S. W. Rep. 1117; *Plumb v. Grand Rapids*, 81 Mich. 381, 45 N. W. Rep. 1024; *Ellsworth v. Lord*, 40 Minn. 389, 42 N. W. Rep. 389; *St. Paul etc. R. R. Co. v. Minneapolis*, 44 Minn. 149, 46 N. W. Rep. 324; *Klenk v. Walnut Lake*, 51 Minn. 381, 53 N. W. Rep. 703; *Gamble v. Pettyjohn*, 116 Mo. 375, 22 S. W. Rep. 783; *Vossen v. Dantel*, 116 Mo. 379, 22 S. W. Rep. 734; *Perkins v. Fielding*, 119 Mo. 149, 24 S. W. Rep. 444, 27 S. W. Rep. 1100; *Bauman v. Boeckeler*, 119 Mo. 189, 24 S. W. Rep. 207; *Buschman v. St. Louis*, 121 Mo. 523, 26 S. W. Rep. 687; *Hill v. Sedalia*, 64 Mo. App. 494; *Wood v. Hurd*, 34 N. J. L. 87; *Iselin v. Starin*, 144 N. Y. 453, 39 N. E. Rep. 488; *Longworth v. Cincinnati*, 48 Ohio St. 637, 29 N. E. Rep. 274; *Hogue v. City of Albina*, 20 Or. 182, 25 Pac. Rep. 386; *Weiss v. South Bethlehem*, 136 Pa. St. 294, 20 Atl. Rep. 801; *Commonwealth v. Barker*, 140 Pa. St. 189, 21 Atl. Rep. 243; *Evans v. Bor. of Letitz*, 162 Pa. St. 561, 29 Atl. Rep. 711; *Dubois Cem. Co. v. Griffin*, 165 Pa. St. 81, 30 Atl. Rep. 840; *Patterson v.*

Some particular elements involved in the question of dedication are discussed in the following sections.

§ 300g. **Who may make dedication.**—Only the owner of land can make a dedication of the same to public use.⁸² A tenant for years cannot do so.⁸³ When there are cotenants all must join or concur to make the dedication effectual.⁸⁴ It has been held, that when one who has not the title makes a dedication to public use, an after acquired title will inure to the benefit of the public.⁸⁵ A railroad company has power to dedicate a crossing over its right of way, or a street over its lands.⁸⁶ But the owner of the fee of a rail-

Peoples Nat. Gas Co., 172 Pa. St. 554, 33 Pac. Rep. 575; Parisa v. City of Dallas, 83 Tex. 253, 18 S. W. Rep. 568; Colbert v. Shepherd, 89 Va. 401, 16 S. E. Rep. 246; Wilson v. Hull, 7 Utah 90, 24 Pac. Rep. 799; Fischer v. Laack, 76 Wis. 313, 45 N. W. Rep. 104; Bartlett v. Beardmore, 77 Wis. 356, 46 N. W. Rep. 494; Witter v. Damitz, 81 Wis. 385, 51 N. W. Rep. 575; Cunningham v. Hendricks, 89 Wis. 632, 62 N. W. Rep. 410; Cincinnati v. White, 6 Pet. 431; McKey v. Hyde Park, 134 U. S. 84, 10 S. C. Rep. 512; People v. Sperry, 116 Cal. 593, 48 Pac. Rep. 723; Spaulding v. Wesson, (Cal.) 45 Pac. Rep. 807; Waggeman v. North Peoria, 160 Ill. 277, 43 N. E. Rep. 347; Ottawa v. Yentzer, 160 Ill. 509; 43 N. E. Rep. 601; Benson v. St. Paul etc. R. R. Co., 62 Minn. 198, 64 N. W. Rep. 393; Nally v. Pennsylvania R. R. Co., 177 Ill. 117, 35 Atl. Rep. 638; Burns v. Liberty, 131 Mo. 372, 33 S. W. Rep. 18; Le Roy v. Leonard, (Tenn. Ch. App.) 35 S. W. Rep. 884.

⁸² Boener v. McKillip, 52 Kan. 508, 35 Pac. Rep. 5; Warren v. Brown, 31 Neb. 8, 47 N. W. Rep.

633; City of New Albany v. Williams, 126 Ind. 1, 25 N. E. Rep. 187; Edwardsville v. Barnsback, 66 Ill. App. 381; Kansas City M. Co. v. Riley, 133 Mo. 574, 34 S. W. Rep. 835.

⁸³ Bauman v. Boeckeler, 119 Mo. 189, 24 S. W. Rep. 207; Queen v. Wismer, 6 U. C. Q. B. 293.

⁸⁴ Daniels v. Almy, 18 R. I. 244, 27 Atl. Rep. 330; South Balt. Harbor etc. Co. v. Smith, 85 Md. 537, 37 Atl. Rep. 27.

⁸⁵ City of Napa v. Howland, 87 Cal. 84, 25 Pac. Rep. 247.

⁸⁶ People v. Eel River & E. R. R. Co., 98 Cal. 665, 33 Pac. Rep. 728; City of Chicago v. Chicago etc. R. R. Co., 152 Ill. 561, 38 N. E. Rep. 768; Pennsylvania Co. v. Plotz, 125 Ind. 26, 24 N. E. Rep. 343; Lake Erie & W. R. R. Co. v. Town of Boswell, 137 Ind. 336, 36 N. E. Rep. 1103; St. Paul etc. R. R. Co. v. Minneapolis, 44 Minn. 149, 46 N. W. Rep. 324; Central R. R. Co. v. Bayonne, 52 N. J. L. 503, 20 Atl. Rep. 69; Missouri Pac. R. R. Co. v. Lee, 70 Tex. 496, 7 S. W. Rep. 857; Northern Pac. R. R. Co. v. City of Spokane, 56 Fed. Rep. 915; S. C.

road right of way cannot dedicate a crossing as against the company.⁸⁷ Where a married woman could not convey except her husband joined, it was held that a dedication could not be established against her by equitable estoppel.⁸⁸ It has been held that a dedication by a mortgagor fails when the mortgagee acquires title under the mortgage.⁸⁹

§ 300h. **The intent of the owner.**—The vital element in making out a dedication is the intent of the owner.⁹⁰ By this is meant not the secret intent which he may have, but that manifested by his acts and declarations.⁹¹ It may be more correct to say that there must be either an actual intent to dedicate or such conduct on the part of the owner as clearly manifests such intent, accompanied by circumstances which would render it inequitable for him to deny that he so intended.⁹² The intent may be manifested by writing, by oral declarations, or by acts.⁹³ "It may be made to appear by deed or by parol, by words or by acts."⁹⁴ All the authorities agree that, to establish a dedication, the intent must be clearly shown.⁹⁵ "The owner's acts and

affirmed, 64 Fed. Rep. 506, 12 C. A. 246. And see *Brunswick & W. R. R. Co. v. Waycross*, 91 Ga. 573, 17 S. E. Rep. 674; *Commonwealth v. Philadelphia & R. R. Co.*, 135 Pa. St. 256, 19 Atl. Rep. 1051.

⁸⁷ *Keim v. Philadelphia*, 2 Pa. Co. Ct. 149.

⁸⁸ *Vansandt v. Weir*, 109 Ala. 224, 19 So. Rep. 424.

⁸⁹ *Alton v. Fishback*, 181 Ill. 396.

⁹⁰ *Starr v. People*, 17 Col. 458, 30 Pac. Rep. 64; *City of Denver v. Jackson*, 17 Col. 497, 30 Pac. Rep. 246; *Perkins v. Fielding*, 119 Mo. 149, 24 S. W. Rep. 444, 27 S. W. Rep. 1100; *Hogue v. City of Albina*, 20 Or. 182, 25 Pac. Rep. 386; *Cunningham v. Hendricks*, 89 Wis. 632, 62 N. W. Rep. 410.

⁹¹ *Perkins v. Fielding*, 119 Mo. 149, 24 S. W. Rep. 444, 27 S. W. Rep. 1100.

⁹² *Starr v. People*, 17 Col. 458, 30 Pac. Rep. 64; *Cunningham v. Hendricks*, 89 Wis. 632, 62 N. W. Rep. 410; *Waggeman v. North Peoria*, 42 Ill. App. 132.

⁹³ *Willey v. People*, 36 Ill. App. 609; *State v. Birmingham*, 74 Ia. 407, 38 N. W. Rep. 121.

⁹⁴ *Cunningham v. Hendricks*, 89 Wis. 632, 62 N. W. Rep. 410.

⁹⁵ *People v. Reed*, 81 Cal. 70, 22 Pac. Rep. 474; *Chicago v. Stinson*, 124 Ill. 510; *Chicago v. Hill*, 124 Ill. 646; *City of Bloomington Cem. Ass.*, 126 Ill. 221, 18 N. E. Rep. 298; *Eckart v. Irons*, 128 Ill. 568, 20 N. E. Rep. 687; *Willey v. People*, 36 Ill. App. 609; *Waggeman v. North Peoria*, 42 Ill. App. 132; *State v. Birmingham*,

declarations should be deliberate, unequivocal and decisive, manifesting a position and unmistakable intention to permanently abandon his property to the specific public use."⁹⁶ "The evidence of intent must consist of such acts or declarations by the owner as clearly and unequivocally indicate his purpose to make the dedication, or such conduct on his part as equitably estops him from denying such intention."⁹⁷ The intent is to be proven like any other fact and by any competent evidence.⁹⁸ The burden of proof is on the party asserting the dedication.⁹⁹ Declarations of the owner, in connection with acts relied upon, are a part of the *res gestae*, and may be shown by either party.¹ Any facts tending to explain the owner's conduct or to rebut the presumption of an intent to dedicate may be shown.² The fact that the owner has continued to pay taxes on the property claimed to have been dedicated is not conclusive against an intent to dedicate.³ Whether an intent to dedicate may be in-

74 Ia. 407, 38 N. W. Rep. 121; *Goodfellow v. Riggs*, 88 Ia. 540, 55 N. W. Rep. 319; *Cemetery Ass. v. Meninger*, 14 Kan. 312; *Pitts v. Baltimore*, 73 Md. 326, 21 Atl. Rep. 52; *Irving v. Ford*, 65 Mich. 241, 32 N. W. Rep. 601; *White Bear v. Stewart*, 40 Minn. 284, 41 N. W. Rep. 1045; *Perkins v. Fielding*, 119 Mo. 149, 24 S. W. Rep. 444, 27 S. W. Rep. 1100; *Rosenberger v. Miller*, 61 Mo. App. 422; *Rube v. Sullivan*, 23 Neb. 779, 37 N. W. Rep. 666; *Brown v. Stein*, 38 Neb. 596, 57 N. W. Rep. 401; *Hogue v. City of Albina*, 20 Or. 182, 25 Pac. Rep. 386; *Cunningham v. Hendricks*, 89 Wis. 632, 62 N. W. Rep. 410; *Cincinnati v. White*, 6 Pet. 431; *Steinaur v. Tell City*, 146 Ind. 490, 45 N. E. 1056; *State v. Adkins*, 42 Kan. 203, 21 Pac. Rep. 1069; *De Grilleau v. Frawley*, (La.) 19 So. Rep. 151; *Buntin v.*

Danville, 93 Va. 200.

⁹⁶ *Holdane v. Cold Spring*, 21 N. Y. 474, 477.

⁹⁷ *Starr v. People*, 17 Col. 458, 30 Pac. Rep. 64.

⁹⁸ *Elliott, Roads and Streets*, 92-94; *City of Denver v. Jacobson*, 17 Col. 497, 30 Pac. Rep. 246.

⁹⁹ *Hogue v. City of Albina*, 20 Or. 182, 25 Pac. Rep. 386.

¹ *City of Denver v. Jacobson*, 17 Col. 497, 30 Pac. Rep. 246.

² *Waggeman v. North Peoria*, 42 Ill. App. 132; *Goodfellow v. Riggs*, 88 Ia. 540, 55 N. W. Rep. 319; *Coberly v. Butler*, 63 Mo. App. 556; *Weiss v. South Bethlehem*, 136 Pa. St. 294, 20 Atl. Rep. 801; *Commonwealth v. Barker*, 140 Pa. St. 189, 21 Atl. Rep. 243; *Frankfort etc. R. R. Co. v. Philadelphia*, 175 Pa. St. 120, 34 Atl. Rep. 577.

³ *Burchmann v. St. Louis*, 121 Mo. 523, 26 S. W. Rep. 687.

ferred from mere user by the public, is a question on which the authorities appear to differ.⁴ The intent must be a present one and not an intent to dedicate at a future time. Thus where the owners of land by agreement divided it into lots and streets, but one of their number was to retain possession until the streets should be needed, it was held there was no dedication of streets so long as such party kept possession.⁵

§ 300i. **Acceptance by the public.**—As a general rule a dedication is not complete without an acceptance on the part of the public.⁶ In a few cases of statutory dedications,

⁴ The following hold that such inference may be made, if the user is with the knowledge of the owner and without his objection, or if it has been so long continued that his ignorance of it might be deemed negligence. *Hope v. Barnett*, 78 Cal. 9, 20 Pac. Rep. 245; *State v. Birmingham*, 74 Ia. 407, 38 N. W. Rep. 121; *Cemetery Ass. v. Meninger*, 14 Kan. 312; *Klenk v. Walnut Lake*, 51 Minn. 381, 53 N. W. Rep. 703; *McKey v. Hyde Park*, 134 U. S. 84, 10 S. C. Rep. 512. Contra: *Starr v. People*, 17 Col. 458, 30 Pac. Rep. 64; *City of Bloomington v. Bloomington Cem. Ass.* 126 Ill. 221, 18 N. E. Rep. 298; *Cunningham v. Hendricks*, 89 Wis. 632, 62 N. E. Rep. 410. And see *Cooper v. Monterey County*, 104 Cal. 437, 38 Pac. Rep. 106; *Hill v. City of Sedalia*, 64 Mo. App. 494; *Woolard v. Clymer* (Ch. App. Tenn.), 35 S. W. Rep. 1086.

⁵ *Holly Grove v. Smith*, 63 Ark. 5.

⁶ *Denver v. Denver etc. R. R. Co.*, 17 Col. 583, 31 Pac. Rep. 338; *St. Louis etc. R. R. Co. v. Belleville*, 122 Ill. 376; *Hamilton v.*

Chicago etc. R. R. Co., 124 Ill. 235; *Chicago v. Stinson*, 124 Ill. 510; *Chicago v. Drexel*, 141 Ill. 89, 30 N. E. Rep. 774; *Schmitz v. Germantown*, 31 Ill. App. 284; *Willey v. People*, 36 Ill. App. 609; *State v. Birmingham*, 74 Ia. 407, 38 N. W. Rep. 121; *Cemetery Ass. v. Meninger*, 14 Kan. 312; *Wilgus v. Board of Comrs.* 54 Kan. 605, 38 Pac. Rep. 787; *Tillman v. People*, 12 Mich. 401; *White v. Smith*, 37 Mich. 291; *Plumer v. Johnston*, 63 Mich. 165, 29 N. W. Rep. 687; *Irving v. Ford*, 65 Mich. 241, 32 N. W. Rep. 601; *Diamond Match Co. v. Ontonagon*, 72 Mich. 249, 40 N. W. Rep. 448; *Harrison County v. Seal*, 66 Miss. 129, 5 So. Rep. 622; *Kemper v. Collins*, 97 Mo. 644, 11 S. W. Rep. 245; *Burchman v. St. Louis*, 121 Mo. 523, 26 S. W. Rep. 687; *Warren v. Brown*, 31 Neb. 8, 47 N. W. Rep. 633; *Holmes v. Jersey City*, 12 N. J. Eq. 299; *Wood v. Hurd*, 34 N. J. L. 87; *De Groot v. Jersey City*, 55 N. J. L. 120, 25 Atl. Rep. 272; *Oswego v. Oswego Canal Co.*, 6 N. Y. 257; *Holdane v. Cold Spring*, 21 N. Y. 474; *Matter of*

it is provided by statute that the title to the land or easement shall vest immediately in the public, without any act of acceptance on the part of the public or public authorities.⁷ According to some authorities, where the dedication confers a benefit on the public without imposing any burden, as when land is donated for a public park or square, or school site, an acceptance will be presumed, and the dedication becomes complete, as soon as the owner has manifested his intent by appropriate acts or declarations.⁸ With these exceptions the general rule prevails. An acceptance may be either express or implied.⁹ An express acceptance is one made by a formal vote or resolution of the proper authorities.¹⁰ An implied acceptance, is one inferred from the acts of the public or public authorities. Until an acceptance is made in some form, the acts of the owner amount to no more than an offer to donate his property to the public use specified or intended, and, like any other offer, it may be withdrawn before acceptance.¹¹ As

Department of Public Works, 53 Hun 556, 25 N. Y. St. 231, 6 N. Y. Supp. 779; *State v. Fisher*, 117 N. C. 733, 23 S. E. Rep. 158; *Lockland v. Smiley*, 26 Ohio St. 94; *Commonwealth v. Moorehead*, 118 Pa. St. 344, 12 Atl. Rep. 424; *Greene v. O'Connor*, 18 R. I. 56, 25 Atl. Rep. 692; *State v. Paine Lumber Co.*, 84 Wis. 205, 54 N. W. Rep. 503; *Trine v. Pueblo*, 21 Col. 102, 39 Pac. Rep. 330; *Jordan v. Chenoa*, 166 Ill. 530, 47 N. E. Rep. 191; *Edwardsville v. Barnsback*, 66 Ill. App. 381; *Cambridge v. Cook*, (Ia.) 66 N. W. Rep. 884; *State v. South Amboy*, 57 N. J. L. 252, 30 Atl. Rep. 628; *Baltimore v. Brownell*, 86 Md. 153; *Gaines v. Merryman*, 95 Va. 660.

⁷ *Burchmann v. St. Louis*, 121 Mo. 523, 26 S. W. Rep. 687; *Greene v. O'Connor*, 18 R. I. 56,

25 Atl. Rep. 692.

⁸ *Archer v. Salinas County*, 93 Cal. 43, 28 Pac. Rep. 839; *Wilgus v. Board of Comrs.*, 54 Kan. 605, 38 Pac. Rep. 787; *Marsh v. Fairbury*, 163 Ill. 401, 45 N. E. Rep. 236; *Rhodes v. Brightwood*, (Ind.) 43 N. E. Rep. 942.

⁹ *City of Denver v. Denver etc. R. R. Co.*, 17 Col. 583, 31 Pac. Rep. 338; *Taylor v. Town of Phillipi*, 35 W. Va. 554, 14 S. E. Rep. 130.

¹⁰ *Elliott, Roads and Streets*, p. 115.

¹¹ *Schmitt v. City and County of San Francisco*, 100 Cal. 302, 34 Pac. Rep. 961; *Denver v. Denver etc. R. R. Co.*, 17 Col. 583, 31 Pac. Rep. 338; *City of Chicago v. Drexel*, 141 Ill. 89, 30 N. E. Rep. 774; *Plumer v. Johnston*, 63 Mich. 165, 29 N. W. Rep. 687; *Diamond Match Co. v. Ontonagon*, 72 Mich. 249, 40 N. W. Rep.

to what will amount to a revocation of an offer to dedicate, must depend upon circumstance, and is largely a question of fact. A sale and conveyance of the property offered,¹² or enclosing it so as to exclude the public use,¹³ will amount to a revocation. When the dedication is made by a sale of lots with reference to a map or street, the grantee takes subject to the offer of dedication, and cannot revoke the offer,¹⁴ and the grantor cannot, at least as against his grantees.¹⁵ Whether there is any rule requiring an offer of dedication to be accepted in a reasonable time may be doubted.¹⁶ At all events there are authorities to the effect that an acceptance may be made at any time before the offer is withdrawn by some affirmative act of the dedicator and acceptances after the lapse of more than twenty-five years have been sustained.¹⁷

An acceptance may be implied from user by the public for the purpose for which the dedication was intended to

448; *Holdane v. Cold Spring*, 21 N. Y. 474; *Matter of Department of Public Works*, 53 Hun 556, 25 N. Y. St. 231, 6 N. Y. Supp. 779; *State v. Fisher*, 117 N. C. 733, 23 S. E. Rep. 158; *Steinaur v. Tell City*, 146 Ind. 490, 45 N. E. Rep. 1056; *Eckerson v. Haverstraw*, 6 App. Div. 102, 39 N. Y. Supp. 634; *Mahler v. Brumder*, 92 Wis. 477, 66 N. W. Rep. 502; *Niles v. Los Angeles*, 125 Cal. 572, 58 Pac. Rep. 190; *Minneapolis etc. R. R. Co. v. Town of Britt*, 105 Ia. 198; *Hewes v. Crete*, 175 Ill. 348; *Baltimore v. Brownell*, 86 Md. 153; *Story v. Ullman*, 88 Md. 244, 41 Atl. Rep. 120; *Norfolk v. Nottingham*, 96 Va. 34, 30 S. E. Rep. 444.

¹² *Schmitt v. City and County of San Francisco*, 100 Cal. 302, 34 Pac. Rep. 961; *City of Chicago v. Drexel*, 141 Ill. 89, 30 N. E. Rep. 774; *Los Angeles v. Kysor*, 125 Cal. 463, 58 Pac. Rep. 90;

Lockland v. Smiley, 26 Ohio St. 94; *City of Eureka v. Croghan*, 81 Cal. 524, 22 Pac. Rep. 693.

¹³ *Diamond Match Co. v. Ontonagon*, 72 Mich. 249, 40 N. W. Rep. 448.

¹⁴ *Matter of Department of Public Works*, 53 Hun 556, 25 N. Y. St. 231, 6 N. Y. Supp. 779.

¹⁵ *Holdane v. Cold Spring*, 21 N. Y. 474; *Clark v. Providence*, 10 R. I. 437; ante, § 300g.

¹⁶ See *Elliott, Roads and streets*, p. 119; *John Monat Lumber Co. v. Denver*, 21 Col. 1, 40 Pac. Rep. 237.

¹⁷ *Wilgus v. Board of Comrs.* 54 Kan. 605, 38 Pac. Rep. 787; *White v. Smith*, 37 Mich. 291; *Matter of Department of Public Works*, 53 Hun 556, 25 N. Y. St. 231 6 N. Y. Supp. 779; and see *Forsythe v. Dunagan*, 94 Cal. 438, 29 Pac. Rep. 770; *Baltimore v. Frick*, 82 Md. 77, 33 Atl. Rep. 435.

be made,¹⁸ or from acts of the proper public authorities relating to the regulation, control, use, repair or improvement of the property.¹⁹ Where by statute a public highway cannot exceed four rods in width, one eighty feet wide cannot be accepted.²⁰ As to whether the acceptance of one street on a plat will operate as an acceptance of all the streets indicated thereon, or the user of a part of a street will operate as an acceptance of the whole street, there is some discrepancy in the authorities.²¹ Collection of taxes upon land will not estop a city from claiming it for public use under a dedication.²²

¹⁸ *Fitzgerald v. Saxton*, 58 Ark. 494, 25 S. W. Rep. 499; *People v. Davidson*, 79 Cal. 166, 21 Pac. Rep. 538; *Los Angeles Cem. Ass. v. Los Angeles*, (Cal.) 32 Pac. Rep. 240; *People v. Marin County*, 103 Cal. 223, 37 Pac. Rep. 203; *Hall v. Kaufman*, 106 Cal. 451, 39 Pac. Rep. 756; *Cemetery Ass. v. Meninger*, 14 Kan. 312; *Attorney General v. Abbott*, 154 Mass. 323, 28 N. E. Rep. 346; *Rosenberger v. Miller*, 61 Mo. App. 422; *Harrison County v. Seal*, 66 Miss. 129, 5 So. Rep. 622; *Holdane v. Cold Spring*, 21 N. Y. 474; *Commonwealth v. Moorehead*, 118 Pa. St. 344, 12 Atl. Rep. 424; *Logan v. Rose*, 88 Cal. 263, 26 Pac. Rep. 106.

¹⁹ Acts held to constitute an acceptance: *Eureka v. Armstrong*, 83 Cal. 623, 22 Pac. Rep. 928, 23 Pac. Rep. 1084; *Denver v. Denver etc. R. R. Co.*, 17 Col. 583, 31 Pac. Rep. 338; *Palmer v. City of Clinton*, 52 Ill. App. 67; *Devoe v. Smeltzer*, 86 Ia. 385, 53 N. W. Rep. 287; *Plumb v. Grand Rapids*, 81 Mich. 381, 45 N. W. Rep. 1024; *Hopkins v. Crombie*, 4 N. H. 520; *Taylor v. Town of*

Phillippi, 35 W. Va. 554, 14 S. E. Rep. 130; *Fairbury Union Agricultural Board v. Holly*, 169 Ill. 9; *McDonald v. Stark*, 176 Ill. 456, 52 N. E. Rep. 37; *Sullivan v. Tichenor*, 179 Ill. 97; *Jarvis v. Grafton*, 44 W. Va. 453.

Acts held not to constitute an acceptance: *City of Chicago v. Drexel*, 141 Ill. 89, 30 N. E. Rep. 774; *Moore v. Cape Girardeau*, 103 Mo. 470, 15 S. W. Rep. 755; *People v. Underhill*, 144 N. Y. 316, 39 N. E. Rep. 333; *State v. Fisher*, 117 N. C. 733, 23 S. E. Rep. 158; *Commonwealth v. Royce*, 152 Pa. St. 88, 25 Atl. Rep. 162. And see *Iselin v. Starin*, 144 N. Y. 453, 39 N. E. Rep. 488; *People v. Beaudry*, 91 Cal. 213, 27 Pac. Rep. 610; *Daiber v. Scott*, 3 Ohio C. C. 313.

²⁰ *Holmes v. Jersey City*, 12 N. J. Eq. 299.

²¹ See *Hall v. City of Meriden*, 48 Conn. 416; *Chicago v. Drexel*, 141 Ill. 89, 30 N. E. Rep. 774; *Heitz v. St. Louis*, 110 Mo. 618, 19 S. W. Rep. 735; *Commonwealth v. Royce*, 152 Pa. St. 88, 25 Atl. Rep. 162.

²² *Evans v. Blankenship*, (Ari.) 39 Pac. Rep. 812; *Rhodes*

§ 300j. **Miscellaneous matters relating to dedication.**—A street may be dedicated subject to a railroad right of way or to the right of a railroad company to lay its tracks therein.²³ One who opens a toll road and collects tolls for its use, whether with or without legislative authority, thereby dedicates it to public use as a highway.²⁴ Where the owner petitioned for the laying out of a highway over his property and one was laid out and used, but the tribunal had no jurisdiction to act, it was held good as a dedication.²⁵ A statute may provide that a fee shall vest upon dedication,²⁶ but otherwise an easement only will be acquired.²⁷ Some cases on misuser and reversion are referred to in the note but the general question is discussed elsewhere.²⁸

v. Brightwood, 145 Ind. 21, 43 N. E. Rep. 942. Contra: Illinois Cent. R. R. Co. v. Bloomington, 167 Ill. 9, 47 N. E. Rep. 318.

²³ Noblesville v. Lake Erie & W. R. R. Co., 130 Ind. 1, 29 N. E. Rep. 484; Ayres v. Pennsylvania R. R. Co., 52 N. J. L. 405, 20 Atl. Rep. 54; Tallon v. Hoboken, 59 N. J. L. 383.

²⁴ McMullin v. Leitch, 83 Cal. 239, 23 Pac. Rep. 294; Blood v. Woods, 95 Cal. 78, 30 Pac. Rep. 129.

²⁵ Philbrick v. University Place, 106 Ia. 352, 76 N. W. Rep. 742.

²⁶ Brown v. City of Carthage, 128 Mo. 10, 30 S. W. Rep. 312.

²⁷ Ellsworth v. Lord, 40 Minn. 389, 42 N. W. Rep. 389; Board of Comrs. v. Young, 59 Fed. Rep. 96, 8 C. C. A. 27; Elliott, Roads and Streets, 87-89, 110.

²⁸ Campbell v. City of Kansas, 102 Mo. 326, 13 S. W. Rep. 897; Goode v. St. Louis, 113 Mo. 257, 20 S. W. Rep. 1048; Trustees v. Hoboken, 33 N. J. L. 13; State v. Travis County, 85 Tex. 435, 21 S. W. Rep. 1029; Meeker v. City of Payallup, 5 Wash. 759, 32 Pac. Rep. 727; United States v. Illinois Central R. R. Co., 154 U. S. 225, 14 S. C. Rep. 1015.

CHAPTER XII.

PRELIMINARY AND MISCELLANEOUS MATTERS PERTAINING TO PROCEEDINGS.

§ 301. **Necessity of an attempt to agree.**—Statutes conferring the power of eminent domain usually require that an attempt shall be made to agree with the owner of property desired, before instituting proceedings to condemn it. In whatever form of words this direction is couched, it is generally held to be imperative, and a condition precedent to the exercise of compulsory powers.¹ It is generally held

¹ *Lincoln v. Colusa Co.*, 28 Cal. 662; *Gilmer v. Lime Point*, 19 Cal. 47; *Williams v. Hartford & New Haven R. R. Co.*, 13 Conn. 397; *Arnold v. Village of Decatur*, 29 Mich. 77; *Morseman v. Ionia*, 32 Mich. 283; *Dickinson v. Van Wormer*, 39 Mich. 141; *Whistler v. Drain Comr.*, 40 Mich. 591; *Lind v. Clemens*, 44 Mo. 540; *Leslie v. St. Louis*, 47 Mo. 474; *Anderson v. St. Louis*, 47 Mo. 479; *Ells v. Pacific R. R. Co.*, 51 Mo. 200; *Cunningham v. Pacific R. R. Co.*, 61 Mo. 33; *Kansas City etc. R. R. Co. v. Campbell*, 62 Mo. 585; *Moses v. St. Louis Sectional Dock Co.*, 84 Mo. 242; *Graf v. St. Louis*, 8 Mo. App. 562; *Doughty v. Somerville etc. R. R. Co.*, 21 N. J. L. 442; *Coster v. New Jersey R. R. Co.*, 23 N. J. L. 227; *State v. Trenton*, 36 N. J. L. 499; *State v. Plainfield*, 41 N. J. L. 138; *Gilbert v. Columbia Turnpike Co.*, 3 Johns. Cas. 107; *Matter of New York & Boston R. R. Co.*, 62 Barb. 85; *Matter of Opening House Ave.*, 67 Barb. 350; *S. C. 3 N. Y.*

Supme. Ct. 770; *Adams v. Saratogo etc. R. R. Co.*, 10 N. Y. 328; *Matter of Marsh*, 71 N. Y. 315; *Reitenbaugh v. Chester Valley R. R. Co.*, 21 Pa. St. 100; *Powers v. Railway Co.*, 33 Ohio St. 429; *Oregon Ry. etc. Co. v. Oregon Real Estate Co.*, 10 Or. 444.

Bishop v. Superior Judge, 87 Cal. 226, 25 Pac. Rep. 435; *Reed v. Ohio & Miss. R. R. Co.*, 126 Ill. 48, 17 N. E. Rep. 807; *Chaplin v. Highway Comrs.*, 129 Ill. 651, 22 N. E. Rep. 484; *Lake Shore etc. R. R. Co. v. Cincinnati etc. R. R. Co.*, 116 Ind. 578, 19 N. E. Rep. 440; *Portland & G. Turnpike Co. v. Bobb*, 88 Ky. 226, 10 S. W. Rep. 794; *Toledo etc. R. R. Co. v. Detroit etc. R. R. Co.*, 62 Mich. 564, 29 N. W. Rep. 500; *Goodell v. Kalamazoo*, 63 Mich. 416, 29 N. W. Rep. 880; *Grand Rapids etc. R. R. Co. v. Weiden*, 70 Mich. 390, 38 N. W. Rep. 294; *Corey v. Chicago etc. R. R. Co.*, 100 Mo. 282, 13 S. W. Rep. 346; *City of Springfield v. Whitlock*, 34 Mo. App. 642; *Fore v. Hoke*, 48 Mo. App. 254; *Water Comrs.*

that the inability to agree should be alleged and proven.² But, if the allegation is not traversed and the parties go to trial on the question of damages, proof of the allegation may be regarded as waived.³ The allegation may, of course, be controverted,⁴ and, if disproven, the proceedings must be dismissed.⁵ It has been held that the objection may be taken at any stage of the proceedings and will be good ground for setting aside an award or quashing the proceedings on certiorari.⁶ If the record fails to show such inability to agree, the proceedings are generally held to be void collaterally.⁷ In Massachusetts it has been held that,

v. Lawrence, 3 Edw. Ch. *552; *Seaman v. Washington*, 172 Pa. St. 467, 33 Atl. Rep. 756; *Howland v. School District*, 16 R. I. 257, 15 Atl. Rep. 74; *In re Montgomery*, 48 Fed. Rep. 896; *State v. School District*, 79 Mo. App. 103.

² *Gilmer v. Lime Point*, 19 Cal. 47; *Lincoln v. Colusa Co.*, 28 Cal. 662; *Williams v. Hartford & New Haven R. R. Co.*, 13 Conn. 397; *Oregon Ry. etc. Co. v. Oregon Real Estate Co.*, 10 Or. 444; *Powers v. Railway Co.*, 33 Ohio St. 429; *Matter of Marsh*, 71 N. Y. 315; *Reed v. Ohio & M. R. R. Co.*, 126 Ill. 48, 17 N. E. Rep. 807; *Lake Shore etc. R. R. Co. v. Cincinnati etc. R. R. Co.*, 116 Ind. 578, 19 N. E. Rep. 440; *Portland & G. Turnpike Co. v. Bobb*, 88 Ky. 226, 10 S. W. Rep. 794; *Toledo etc. R. R. Co. v. Detroit etc. R. R. Co.*, 62 Mich. 564, 29 N. W. Rep. 500; *Grand Rapids etc. R. R. Co. v. Weiden*, 70 Mich. 390, 38 N. W. Rep. 294; *Fore v. Hoke*, 48 Mo. App. 254; *In re Montgomery*, 48 Fed. Rep. 896. Compare *Bishop v. Superior Judge*, 87 Cal. 226, 25 Pac. Rep. 435;

Farnsworth v. Lime Rock R. R. Co., 83 Me. 440, 22 Atl. Rep. 373; *Gulf etc. R. R. Co. v. Ft. Worth etc. R. R. Co.*, 86 Tex. 537, 26 S. W. Rep. 54.

³ Post, § 303.

⁴ *Gilmer v. Lime Point*, 19 Cal. 47; *Grand Rapids etc. R. R. Co. v. Weiden*, 69 Mich. 572, 37 N. W. Rep. 872.

⁵ *Matter of Marsh*, 71 N. Y. 315.

⁶ *Gilbert v. Columbia Turnpike Co.*, 3 Johns. Cas. 107; *State v. Plainfield*, 41 N. J. L. 138; *State v. Trenton*, 36 N. J. L. 499; *Lind v. Clemens*, 44 Mo. 540; *Whistler v. Drain Comrs.*, 40 Mich. 591; *Dickinson v. Van Wermer*, 39 Mich. 141; *Morseman v. Ionia*, 32 Mich. 283; and see next section.

⁷ *Adams v. Saratoga etc. R. R. Co.*, 10 N. Y. 328; *Graf v. St. Louis*, 8 Mo. App. 562; *Moses v. St. Louis Sectional Dock Co.*, 84 Mo. 242; *Kansas City etc. R. R. Co. v. Campbell*, 62 Mo. 585; *Cunningham v. Pacific R. R. Co.*, 61 Mo. 33; *Ellis v. Pacific R. R. Co.*, 51 Mo. 200; *Leslie v. St. Louis*, 47 Mo. 474; *Anderson v.*

under a statute which authorized proceedings, in case the parties "shall not agree upon the damages to be paid," no attempt to agree was necessary, but the commencement of proceedings was an election not to agree.⁸ In Illinois in a collateral proceeding, it was held that the provision of the statute as to agreement was directory.⁹ In Indiana, in a case in which condemnation proceedings were interposed as a defense to an action of trespass, it was held an attempt to agree was not essential to the jurisdiction of the court.¹⁰ The matter of requiring an attempt to agree rests wholly in the discretion of the legislature, and a statute is not invalid because it does not require it.¹¹ Of course, if the statute does not require an attempt to agree, none is necessary, and inability to agree need not be alleged or shown.¹² If the parties can agree, no proceedings can be had.¹³

§ 302. What is a sufficient attempt to agree. — No general rule can be laid down on this question. The attempt must be made in good faith and reasonable efforts put forth.¹⁴ Where the owner offered to take one hundred dollars for land desired for a street, and the council simply laid the offer on the table and no further attempt to agree

St. Louis, 47 Mo. 479; Chaplin v. Highway Comrs., 129 Ill. 651, 22 N. E. Rep. 651. Contra: Ney v. Swinney, 36 Ind. 454.

⁸ Burt v. Brigham, 117 Mass. 307; *Ætna Mills v. Waltham*, 126 Mass. 422. To same effect, *Bigelow v. Mississippi Central & Tenn. R. R. Co.*, 2 Head, 624.

⁹ Hall v. People, 57 Ill. 307.

¹⁰ Ney v. Swinney, 36 Ind. 454.

¹¹ Grand Rapids v. Grand Rapids & Indiana R. R. Co., 58 Mich. 641; *Detroit v. Beecher*, 75 Mich. 454, 42 N. W. Rep. 986.

¹² *Chicago & N. W. R. R. Co. v. Chicago*, 148 Ill. 141, 35 N. E. Rep. 881; *Cahill v. Norwood Park*, 149 Ill. 156, 36 N. E. Rep. 606; *Lake Shore & M. S. R. R.*

Co. v. Chicago, 148 Ill. 509, 37 N. E. Rep. 88; *Chicago & N. W. R. R. Co. v. Chicago*, 149 Ill. 495, 36 N. E. Rep. 1006; *Chicago & A. R. R. Co. v. Chicago*, 150 Ill. 597, 37 N. E. Rep. 1029; *Lake Shore & M. S. R. R. Co. v. Chicago*, 151 Ill. 359, 37 N. E. Rep. 880; *City of Danville v. McAdams*, 153 Ill. 216, 38 N. E. Rep. 632; *Matter of Petition of Gardner*, 41 Mo. App. 589; *Detroit v. Beecher*, 75 Mich. 454, 42 N. W. Rep. 986; *In re Independence Ave. Boulevard*, 128 Mo. 272, 30 S. W. Rep. 773.

¹³ *Matter of House Ave.*, 3 N. Y. Supm. 770; post, § 303a.

¹⁴ *Grand Rapids etc. R. R. Co. v. Weiden*, 70 Mich. 390, 38 N. W. Rep. 294. If the owner refuses

was made, it was held insufficient.¹⁵ Where plaintiff made two propositions to the agent of the defendant company at its office and no reply was made, it was held sufficient.¹⁶ So when a railroad company made a proposition to the owner and received no reply within a reasonable time.¹⁷ Where no sufficient attempt was made before the petition was sworn to but there was afterwards, it was held sufficient.¹⁸ The attempt need not be prosecuted further than to develop the fact that an agreement is impossible.¹⁹ The inability to agree required by the statute does not mean an inability to buy at any price, but only at a price which the condemning party is willing to pay.²⁰ Where there was a contingent dower and a tenancy, it was held that a failure to agree with the owner of the fee was sufficient.²¹ Negotiations may be carried on by an authorized agent, and where the president of a company had such authority, it was held that he might depute an agent to negotiate, and that such negotiations would satisfy the statute.²²

§ 303. **How excused or waived.—Owners under disability.**—If the property desired is owned by persons under disability, no attempt to agree need be made, because no agreement is possible.²³ In Tennessee it was held that, where the owners had combined against the improvement and de-

to sell no further effort is necessary. *St. Louis etc. R. R. Co. v. Postal Tel. Co.*, 173 Ill. 508.

¹⁵ *Lane v. Saginaw*, 53 Mich. 442.

¹⁶ *West Virginia Trans. Co. v. Volcanic Oil & Coal Co.*, 5 W. Va. 382.

¹⁷ *Louisville etc. R. R. Co. v. Postal Tel. Cable Co.*, 68 Miss. 806, 10 So. Rep. 74.

¹⁸ *Grand Rapids etc. R. R. Co. v. Weiden*, 70 Mich. 390, 38 N. W. Rep. 294.

¹⁹ *Matter of the Village of Mid-dletown*, 82 N. Y. 196; *Reed v. Ohio & Miss. R. R. Co.*, 126 Ill. 48, 17 N. E. Rep. 807; *Jockbeck*

v. Board of Comrs., 53 Kan. 780, 37 Pac. Rep. 621.

²⁰ *Matter of Application of Prospect Park & Coney Island R. Co.*, 67 N. Y. 371; *Westfield Cem. Ass. v. Danielson*, 62 Conn. 319, 26 Atl. Rep. 345.

²¹ *Toledo etc. Ry. Co. v. Dun-lap*, 47 Mich. 456. See *Thomas v. St. Louis etc. R. R. Co.*, 164 Ill. 634, 46 N. E. Rep. 8.

²² *Matter of New York Central & Hudson River R. R. Co.*, 33 Hun 274.

²³ *Balch v. County Comrs. of Essex*, 103 Mass. 106; *Indiana Central R. R. Co. v. Oakes*, 20 Ind. 9; *Davis v. North Western*

clared it should not go through, the attempt to agree was useless and need not be made.²⁴ It is held that the owner may waive the attempt to agree,²⁵ and that a failure to object at the proper time constitutes a waiver.²⁶

§ 304. **How the inability to agree should be alleged and shown.**—It has generally been held sufficient to state the inability to agree in the language of the statute, or in general terms having substantially the same effect, without setting forth the facts which constitute such inability.²⁷ An allegation on information and belief that the owner will not sell, is insufficient.²⁸ Where the statute requires an inability to agree as to compensation, and the petition alleges an inability to agree as to right of way, it is good after verdict.²⁹ But, where the statute requires it to appear that the petitioner has been unable to agree, and the reason of such inability, the reasons must be set forth in the petition.³⁰ The affidavit of the petitioner or its agent is sufficient *prima*

El. R. R. Co., 170 Ill. 595; Stillwater etc. R. R. Co. v. Slade, 36 N. Y. App. Div. 587; Grand Rapids etc. R. R. Co. v. Chesebro, 74 Mich. 466, 42 N. W. Rep. 66. But in *Brown v. Rome* etc. R. R. Co., 86 Ala. 206, it was held that there should be an attempt to agree with the guardian or it should be made to appear that there was none.

²⁴ *President etc. v. Diffebach*, 1 Yates, 367.

²⁵ *United States v. Reid*, 56 Mo. 565; *Trotier v. St. Louis* etc. R. Co., 180 Ill. 471.

²⁶ In the *Matter of the Water Comrs.*, 3 Edwards, ch. 552; *President etc. v. Diffebach*, 1 Yates, 367; *Ney v. Swinney*, 36 Ind. 454; *Taylor v. Clemson*, 11 Clark & Finnelly, 610; *Wilson Bros. v. Trenton*, 53 N. J. L. 178,

20 Atl. Rep. 738; and see last two sections.

²⁷ *Chicago, B. & Q. R. R. Co. v. Chamberlain*, 84 Ill. 333; *Booker v. Venice* etc. R. R. Co., 101 Ill. 333; *Bowman v. Same*, 102 Ill. 459; *Hannibal* etc. R. R. Co. v. Muder, 49 Mo. 165; *Matter of Lockport & Buffalo R. R. Co.*, 77 N. Y. 557; *Reitenbaugh v. Chester Valley R. R. Co.*, 21 Pa. St. 100; *Cincinnati* etc. R. R. Co. v. Bay City etc. R. R. Co., 106 Mich. 473, 64 N. W. Rep. 471; *Glass v. Basin Mining* etc. Co., 22 Mon. 151, 55 Pac. Rep. 1047.

²⁸ *Metropolitan El. R. R. Co. v. Dominick*, 55 Hun 198, 27 N. Y. St. 576, 8 N. Y. Supp. 151.

²⁹ *Oregon Ry. etc. Co. v. Oregon Real Estate Co.*, 10 Or. 444.

³⁰ *Matter of Marsh*, 71 N. Y. 315.

facie evidence of the fact.³¹ If the allegation is traversed, as it may be,³² the issue should be disposed of by the court as preliminary to a trial of the question of damages.³³ If not traversed, it has been questioned whether any proof need be offered in support of the petition.³⁴ Going to trial on the question of compensation has been held a waiver of such proof.³⁵

§ 304a. **An agreement precludes proceedings.**—If the statute provides that condemnation proceedings can be instituted only upon a failure of the parties to agree, it necessarily follows that if the parties come to an agreement no proceedings can be had.³⁶ The party seeking to acquire the property cannot repudiate the agreement and condemn the property.³⁷

§ 305. **Priority of right to appropriate specific property: Mill cases.**—It is usual, in mill acts, to provide that no dam shall be erected to the injury of any existing mill or dam or improved water power. Under such statutes the one who first in good faith commences the erection of a mill or dam is prior in point of time, not the one who first commences proceedings.³⁸ Where a statute provided that no dam should be erected to the injury of any mill lawfully existing or to any mill-site on which a mill or dam shall have been

³¹ Doughty v. Sommerville R. Co., 21 N. J. L. 442.

³² Gilmer v. Lime Point, 19 Cal. 47; Williams v. Hartford & New Haven R. R. Co., 13 Conn. 397; Ante, § 301, note 4.

³³ Powers v. Railway Co., 33 Ohio St. 429; Lieberman v. Chicago etc. R. R. Co., 141 Ill. 140, 30 N. E. Rep. 544.

³⁴ Ward v. Minnesota & North Western R. R. Co., 119 Ill. 287; And see Corey v. Chicago etc. R. R. Co., 100 Mo. 282, 13 S. W. Rep. 346; Chicago etc. R. R. Co. v. Randolph Town-Site Co., 103 Mo. 451, 15 S. W. Rep. 437.

³⁵ Lieberman v. Chicago etc. R. R. Co., 141 Ill. 140, 30 N. E. Rep. 544. And see Wilson Bros. v. Trenton, 53 N. J. L. 178, 20 Atl. Rep. 738.

³⁶ Matter of House Ave., 3 N. Y. Supm. 770; Council Bluffs etc. R. R. Co. v. Bentley, 62 Ia. 446.

³⁷ Jersey City v. National Docks R. R. Co., 55 N. J. L. 194, 26 Atl. Rep. 145.

³⁸ Larsh v. Test, 48 Ind. 130; Nosser v. Seeley, 10 Neb. 460; Bigelow v. Newell, 10 Pick. 348. Contra: Miller v. Troost, 14 Minn. 365.

lawfully erected and used, it was held that a partially completed mill was not within the statute; hence, though plaintiffs first commenced the erection of a mill, defendants, who first completed a mill and dam, were held to have priority.³⁹ A mill site from which the mill has been burned within a year, and on which a temporary but insufficient mill has been erected, is within the protection of such a statute.⁴⁰ But one on which no mill had existed for a hundred and fifty years was regarded as abandoned.⁴¹ Disuse for a short period, with other circumstances showing intention, may be sufficient to establish an abandonment.⁴² So much of the fall below the mill as is necessary to the use, operation and convenient repair of the mill is protected from subsequent appropriation as part of the mill itself.⁴³ In the absence of such provisions in the statutes, the one who first institutes proceedings under the statute is entitled to priority.⁴⁴ But this priority may be lost by delay in prosecuting the proceedings and erecting the mill.⁴⁵ Where two applications were filed on the same day, it was held that it might be shown by parol which was first in time, and that the priority of the first application was not defeated by an error of the clerk of the court in issuing the writ, whereby it was quashed, but the new writ would relate back to the time of

³⁹ Baird v. Wills, 22 Pick. 312.

⁴⁰ McDougale v. Clark, 7 B. Mon. 448.

⁴¹ Curtiss v. Smith, 35 Conn. 156.

⁴² McArthur v. Morgan, 49 Conn. 347; French v. Braintree, 23 Pick. 216.

⁴³ Occum Co. v. Sprague Manf. Co., 35 Conn. 496; Elting Woolen Co. v. Williams, 36 Conn. 310; Gleason v. Assabet Manf. Co., 101 Mass. 72; Bottamly v. Chism, 102 Mass. 463.

⁴⁴ Hendricks v. Johnson, 6 Porter, 472; Lummary v. Braddy, 8 Ia. 33.

⁴⁵ Macon v. Owen, 3 Ala. 116.

In this case A applied for a writ of *ad quod damnum*, under the mill act, in September, 1836, but took no further step until February, 1837. In the meantime B had instituted proceedings, prosecuted them to judgment, and built a mill appropriating a part of the power which A sought to appropriate. It was held that A lost his priority by delay in prosecuting his writ, and that he could not build a mill to interfere with B's. And see, to same effect, Humes v. Shugart, 10 Leigh, 332.

application.⁴⁶ At common law there can be no question of priority, since one person has no right to interfere with the flow of a stream upon another's land and cannot acquire such right, except by agreement with the owner or adverse possession for the requisite period.⁴⁷

§ 306. The same continued: Railroads and other public works. —Where there are two grants by the legislature of the right to take the same property for public use, that which is prior in time will have priority of right.⁴⁸ But the presumption is against the intention of the legislature to make grants of the same thing to different persons or corporations and such a construction of the grants will be sought as will avoid conflict.⁴⁹ Where the conflict arises out of rival locations over the same property, by companies acting under general powers, that one is entitled to priority which is first in making a completed location over the property, and the relative dates of their organizations or charters are immaterial.⁵⁰ In the case first cited the Warren Company was, on the 12th of February, 1851, authorized to construct a railroad from the Central Railroad to the Dela-

⁴⁶ *Hendricks v. Johnson*, 6 Porter, 472. In *Hook v. Smith*, 6 Mo. 225, a priority of a few hours in making the application was disregarded and leave granted to the one whose dam would do the least damage.

⁴⁷ *Heath v. Williams*, 25 Me. 209; *Pugh v. Wheeler*, 2 Dev. & B. (N. C.) 50.

⁴⁸ *Chesapeake & Ohio Canal Co. v. Baltimore & Ohio R. R. Co.*, 4 G. & J. 1; *Morris & Essex R. R. Co. v. Blair*, 9 N. J. Eq. 635, 644.

⁴⁹ *Packer v. Sunbury etc. R. R. Co.*, 19 Pa. St. 211.

⁵⁰ *Morris & Essex R. R. Co. v. Blair*, 9 N. J. Eq. 635; *New Brighton etc. R. R. Co. v. Pittsburgh etc. R. R. Co.*, 105 Pa. St.

13, 20; *Davis v. Titusville & Oil City Ry. Co.*, 114 Pa. St. 308; *Railway Co. v. Alling*, 99 U. S. 463; *Rochester etc. R. R. Co. v. New York etc. Ry. Co.*, 44 Hun 206; *Rochester etc. R. R. Co. v. New York etc. R. R. Co.*, 110 N. Y. 128, 17 N. E. Rep. 680; *Matter of Rochester etc. R. R. Co.*, 110 N. Y. 119, 17 N. E. Rep. 678; *Matter of Mayor etc. of New York*, 51 Hun 416, 5 N. Y. Supp. 463; *Pittsburgh etc. R. R. Co. v. Pittsburgh etc. R. R. Co.*, 159 Pa. St. 331, 28 Atl. Rep. 155; *Williamsport etc. R. R. Co. v. Philadelphia etc. R. R. Co.*, 8 Pa. Co. Ct. 10; *Barre R. R. Co. v. Montpelier R. R. Co.*, 61 Vt. 1, 17 Atl. Rep. 923; *Kanawha etc. R. R. Co. v. Glen Jean etc. R. R. Co.*, 45 W. Va. 119, 30 S. E. Rep. 86.

ware River. On the 19th of the same month the Morris Company was authorized to extend its road from its then terminus to the Delaware River. Both acts provided in substantially the same language that "when the route of such road shall have been determined upon, and a survey of such route deposited in the office of the Secretary of State, then it shall be lawful for said company to enter upon," etc. The routes selected by the two companies conflicted through certain passes, and the question was as to which had priority. The surveys of both companies were filed in the office of the Secretary of State on the same day, March 8, 1853. It appeared that the Morris Company was the first to make actual surveys over the route in question, but the Warren Company was the first to adopt a definite route, and was the first to file its survey with the Secretary of State. It was held that the Warren Company was entitled to priority.

In the first Pennsylvania case cited the following facts appeared: In 1875-6 the Pennsylvania Company caused a route to be surveyed and located over the property in dispute for a railroad from Newcastle to New Brighton. It was marked by stakes in the usual way, and a map thereof made and reported to the company. In March, 1881, the New Brighton Company was organized. On March 30, 1881, the map of the route surveyed by the Pennsylvania Company was presented to its board of directors, and a resolution adopted "that the location of this company's line of road, as shown by the map now presented, be and the same is hereby adopted, and the president is instructed to take such steps as may be necessary to secure such location." On April 11, 1881, the New Brighton Company commenced to re-survey and to mark anew with stakes in the usual way the route previously adopted, and within a week the work of re-location was completed over the territory in dispute. The Pittsburgh Company was organized in December, 1880. Prior to that time, and in April, 1880, the projectors of the company had caused a survey and location of a railroad to be made and to be marked with stakes in the usual way. On February 15, 1881, the directors of the Pittsburgh Com-

pany, by resolution, adopted the survey so made, and directed the president to cause a re-survey to be made where necessary, preparatory to the procurement of the right of way and the construction of the road. Nothing, however, was done upon the ground until May 10, 1881, when the work of re-surveying was commenced. Both companies were organized under the same acts, which provided that "the president and directors of such company shall have power and authority, by themselves, their engineers, superintendents, agents, artisans and workmen, to survey, ascertain, locate, fix, mark and determine such route for a railroad as they may deem expedient," etc., * * * "and, in like manner, by themselves or other persons by them appointed, or employes, as aforesaid, to enter upon or into and occupy all land on which the said railroad, or depots," etc., may be located. In deciding the case the court say: "The provisions of the act are clear and explicit. Every railroad company, incorporated thereunder, is created for a purpose that is essentially public; and to that end, it is clothed with the right of eminent domain, which is never delegated by the commonwealth to unincorporated associations or private individuals. It is expressly authorized to survey, mark and determine the route of its road, between the points designated in its charter, and to enter upon and occupy all lands on which its road may be so located, subject however to the constitutional obligation of making compensation for property taken or injured. In thus exercising the right of appropriating to public use the lands of private individuals, it is necessary, in the first place, to survey, locate, and designate by appropriate marks the property to be taken. It was undoubtedly intended that these essential acts upon the ground should be performed, not by the projectors of a railroad company before its incorporation, nor by any one not authorized by the legislature to do so, but only by the president and directors of a duly incorporated company, their engineers and employes. Indeed, the act expressly authorizes them to do so, but it is silent as to the right of all others. No such thing as a wholesale adoption, by mere resolution, of an unauthorized preliminary survey

and location appears to have been contemplated. Doubtless a preliminary survey, made at the instance of persons contemplating the procurement of a charter, greatly facilitates the work of the corporation, afterwards created, in making its location, and designating the same by marks on the ground; and there can be no impropriety in the corporation resolving to adopt such preliminary survey, but that alone, without more, will not secure to it the right of location as against another company that goes upon the ground, surveys, marks, and actually appropriates the proposed location. The unauthorized preliminary survey, though well marked by a line of stakes indicating the location of a railroad, cannot be regarded as sufficient notice of a prior legal appropriation of the land. The marks upon the ground would of course suggest the purpose for which they were made, and thus impose the duty of inquiring when and by whom they were placed there, but the due prosecution of that inquiry would disclose the fact that the survey was made by persons who had no authority to locate and construct a railroad on that route, and before any company was incorporated for the purpose. There the duty of inquiry would end, and the company first on the ground would have an undoubted right to consider it unoccupied for railroad purposes, and to proceed with its survey and location. The facts of the case before us serve as an apt illustration of the construction which we think should be given to the act. The appellant company was the first to go upon the ground in controversy, and there, by actual survey and appropriate marks, fix and determine the location of the road it was authorized to build. All this was done before actual notice was given by the appellee that its line had been located partly on the same ground. The only constructive notice appellant had was that a survey and location had been made without authority from the commonwealth and before either company was incorporated. That was no notice, either to appellant or land-owners, that the location had been previously appropriated by authority of law. It follows therefore that the general conclusion, drawn by the

learned court from the facts found by the master, was erroneous."

We have referred to this case at length, because it is the decision of a court of high authority upon a point on which there are but few reported cases. It seems to the writer, however, that the correctness of the decision is open to question. The Pittsburgh Company was the first to adopt a survey by a vote of its board of directors. No point was made that the survey adopted by the Pittsburgh Company was defective in any respect, or that it was not fully marked on the ground by stakes in the usual way. Five years had elapsed since the survey adopted by the other company was made, and the stakes which marked it had mostly disappeared. Conceding that the survey of 1880 was definite and complete, and that the stakes which marked it were still standing, as seems to have been conceded in the case, we see no reason why the adoption of that survey by the Pittsburgh Company should not have the same effect as though it had been made by its own agents acting under its authority.⁵¹ It would be an idle ceremony to require the Pittsburgh Company, in order to make the adoption effective, to re-survey the lines and re-drive the stakes and possibly re-map the location, ending with precisely the same result with which it began. If both locations had become substantially obliterated by the disappearance of the stakes, the case would be different; so if there had been any unreasonable delay on the part of the Pittsburgh Company in proceeding with its work. But there was no unreasonable delay, and the route of the latter company was easily retraced by means of stakes still standing.⁵²

As to what is such a completed location as to secure priority must depend largely upon local statutes. We should say, in general, that it includes everything necessary to perfect the right to proceed and condemn the prop-

⁵¹ *Lower v. Chicago, Burlington & Quincy Ry. Co.*, 59 Ia. 563; *Morris & Essex R. R. Co. v. Blair*, 9 N. J. Eq. at p. 645.

⁵² Compare *Williamsport etc.*

R. R. Co. v. Philadelphia etc. R. R. Co., 141 Pa. St. 407, 21 Atl. Rep. 645; *Pittsburgh etc. R. R. Co. v. Pittsburgh etc. R. R. Co.*, 159 Pa. St. 331, 28 Atl. Rep. 155.

erty.⁵³ Where a company makes a location beyond the term fixed by its charter, and which, therefore, it had no authority to occupy or condemn, but files supplemental articles giving such authority, another company making a location on the same route, after that of the first company, but before the filing of the supplemental articles, will have priority.⁵⁴ The making of a preliminary survey by an engineer of a railroad company, never reported to the company or acted upon, will not prevent another company locating on the same line.⁵⁵ Where priority of right has been secured by priority of location, it cannot be defeated by a rival company agreeing with the owners and purchasing the property.⁵⁶ The reasoning of

⁵³ See the cases cited in notes 50 and 52. In *Williamsport etc. R. R. Co. v. Philadelphia etc. R. R. Co.*, 141 Pa. St. 407, 21 Atl. Rep. 645, the court says: "The successive steps contemplated by the act of 1849 and subsequent legislation, as necessary to vest a title to the roadway in the corporation, are these: First, A preliminary entry on the land of private owners for the purpose of exploration. This is made by engineers and surveyors, who run and mark one or more experimental lines, and who report their work, with such maps and profiles as may be necessary to present it properly to the company that employs them. Second, A selection and adoption of a line, or one of the lines, so run, as and for the location of the proposed railroads. This is done by the corporation, and it requires the action in some form of the board of directors. This makes what was before experimental and open a fixed and definite location. It fastens a

servitude upon the property affected thereby, and so takes from the owner and appropriates to the use of the corporation. Third, Payment to the owner for what is taken and the consequences of the taking, or security that it shall be made, when the amount due him is legally ascertained. The title of the owner is not divested until the last of these steps has been taken. * * * As against him the corporation can acquire only a conditional title by its act of location, which ripens into an absolute one upon making compensation. As to third persons and rival corporations, however, the action of the company adopting a definite location is enough to give title."

⁵⁴ *Washington etc. R. R. Co. v. Coeur D'Alene R. & Nav. Co.*, 60 Fed. Rep. 981, 9 C. C. A. 303.

⁵⁵ *Williamsport etc. R. R. Co. v. Philadelphia etc. R. R. Co.*, 141 Pa. St. 407, 21 Atl. Rep. 645.

⁵⁶ *Sioux City etc. R. R. Co. v. Chicago etc. Ry. Co.*, 27 Fed.

Shiras, J., upon this point is so cogent that we cannot do better than quote it: "It is certainly equitable that a company, which in good faith surveys and locates a line of railway, and pays the expense thereof, should have a prior claim for the right of way for at least a reasonable length of time. The company does not perfect its right to the use of the land, as against the owner thereof, until it has paid the damages, but, as against a railroad company, it may have a prior right, and better equity. The right to the use of the right of way is a public, not a private, right. It is, in fact, a grant from the State, and although the payment of the damages to the owner is a necessary prerequisite, the State may define who shall have the prior right to pay the damages to the owner, and therefore acquire a perfected right to the easement. The owner cannot, by conveying the right of way to A, thereby prevent the State from granting the right to B. All that the owner can demand is that his damages shall be paid, and, subject to the right of compensation to the owner, the State has the control over the right of way, and can, by statute, prescribe when, and by what acts, the right thereto shall vest, and also what shall constitute an abandonment of such right." * * * * "The injustice and injury to private and public rights alike, which would arise, were it held that, after a company has duly surveyed and located its line of railway, and is in good faith preparing to carry forward the construction of its road, some other company may, by private purchase, procure the right of way over parts of the located line, and either prevent the construction of the road, or extort a heavy and exorbitant payment from the company first locating its line as a condition to the right to build the same as originally located, are strong reasons for holding that the first location, if made in good faith, and followed up within a reasonable time, may confer the prior right, even

Rep. 770; Titusville etc. R. R. Co. v. Warren etc. R. R. Co., 12 Phila. 642; Morris & Essex R. R. Co. v. Blair, 9 N. J. Eq. 635, 646; Matter of Rochester etc. R.

R. Co., 110 N. Y. 119, 19 N. E. Rep. 678; Rochester etc. R. R. Co. v. New York etc. R. R. Co., 110 N. Y. 128, 17 N. E. Rep. 680.

though a rival company may have secured the conveyance of the right of way by purchase from the property owners after the location, but before the application to the sheriff for the appointment of commissioners."⁵⁷ A valid location will take precedence over a prior unrecorded deed or contract.⁵⁸ In cases where no location or survey is necessary, and where the statute does not require any map, survey or description to be recorded, that person will have priority of right to appropriate particular property who first institutes proceedings to condemn it, or secures a contract therefor.⁵⁹ But, to secure such priority, the proceedings must be lawfully instituted, and so as to be capable of being prosecuted to a successful issue, and where one company commenced proceedings without a previous attempt to agree with the owner when that was required by statute, such proceedings will not defeat a subsequent purchase of the same property by a rival company organized for the same purpose.⁶⁰ A priority once obtained in any of the ways or cases above specified may be lost by laches in following it up,⁶¹ or by permitting another company to occupy and build over the same property.⁶² Where two railroad companies, having the same termini, apply at the same time to railroad commissioners for a certificate that public convenience and necessity require the construction of the proposed road, the fact that one was incorporated before

⁵⁷ *Sioux City etc. R. R. Co. v. Chicago etc. Ry. Co.*, 27 Fed. Rep. 770, 774.

⁵⁸ *Barre R. R. Co. v. Montpelier R. R. Co.*, 61 Vt. 1, 17 Atl. Rep. 923.

⁵⁹ *Joplin & W. R. R. Co. v. Kansas City etc. R. R. Co.*, 135 Mo. 549, 37 S. W. Rep. 540; *Lake Merced Water Co. v. Cowles*, 31 Cal. 215; and see cases cited in last section. Where two companies have given notice to treat for the same land under the English statutes, and the compulsory powers of one company

expire, the other company may take the land though the first company had priority originally. *Bristol etc. R. R. Co. v. Somerset R. R. Co.*, 22 W. R. 601.

⁶⁰ *San Francisco & Alameda Water Co. v. Alameda Water Co.*, 36 Cal. 639.

⁶¹ *New York etc. R. R. Co. v. Boston etc. R. R. Co.*, 36 Conn. 196; and see *Rochester etc. R. R. Co. v. New York etc. R. R. Co.*, 110 N. Y. 128, 17 N. E. Rep. 680.

⁶² *Coe v. New Jersey Midland Ry. Co.*, 31 N. J. Eq. 105.

the other, does not entitle it to any priority or preference.⁶³ Where the location of one company crosses that of another, the one which first constructs its road has choice of grade and the other must conform thereto.⁶⁴ A corporation was by its charter prohibited from taking the land of another corporation. Held to prevent the condemnation of land acquired by another corporation after the former had made its survey or location, but before it had instituted proceedings. It was intimated, however, that the survey or location gave priority in equity and that relief might be had in that forum.⁶⁵ Other cases involving the question of priority and turning on the construction of peculiar statutes, are referred to in the note.⁶⁶

§ 306a. **Priority of right to use streets.**—Where two companies had authority to lay down tracks on a certain street, it was held that the one which first commenced laying its tracks on a definite line had a prior right to go on and complete its track on that line.⁶⁷ Such a right is a valuable franchise or privilege, and is property, and cannot be taken or impaired without compensation.⁶⁸ As the legislature may take property already devoted to public use for the same or a different use, it may also take the right to appropriate specific property as well as the property after it has been appropriated.⁶⁹ Two street railroad companies took actual possession of parts of the same street on the same day. Each of them had a proper and sufficient grant to use the street, when considered by itself. One of them had first begun the construction of a line between two

⁶³ *In re Depew & S. W. R. R. Co.*, 92 Hun 406, 36 N. Y. Supp. 991. And see *Cox v. Easter*, 1 Porter, 130.

⁶⁴ *St. Louis etc. R. R. Co. v. P. O. & G. R. R. Co.*, 42 Ark. 249.

⁶⁵ *American Trans. & Nav. Co. v. New York etc. R. R. Co.*, 59 N. J. L. 156, affirming *S. C.* 58 N. J. L. 109, 32 Atl. Rep. 74.

⁶⁶ *Suburban Rapid Transit Co.*

v. New York, 128 N. Y. 510, 28 N. E. Rep. 525; *Pocantico Water Works Co. v. Bird*, 130 N. Y. 249, 29 N. E. Rep. 246; *People v. Board of R. R. Comrs.*, 4 App. Div. 259, 38 N. Y. St. 528.

⁶⁷ *Waterbury v. Dry Dock etc. R. R. Co.*, 54 Barb. 383.

⁶⁸ *Ibid.*

⁶⁹ For the extent of this right and its limitations, see ante, chap. x.

points which included the street in question and had diligently prosecuted the work, and it was held to have the prior right.⁷⁰ The same company also had a prior grant, which, however, was in general terms, embracing all the streets of the city, but the decision did not go at all upon the priority of the grant. Under the constitution and laws of Pennsylvania as construed by its supreme court a street railroad company cannot occupy a street without the consent of the municipality, and but one road can be authorized on any one street. It is held that a company, which first obtains a charter to construct a road on a specified street, secures priority to occupy the street, provided it procures the municipal consent within a reasonable time, and that a month is a reasonable time.⁷¹

The question of priority has arisen between different electric companies having lines, or claiming the right to use or establish lines on the same street. As between two companies of the same character, doubtless the same principles would apply as to street railroads. Where an electric light company was authorized to occupy a street with its poles and wires, and had erected the same and expended money on its plant, it was protected by injunction from interference by a second company, operating under a subsequent

⁷⁰ Indianapolis Cable St. R. R. Co. v. Citizens' St. R. R. Co., 127 Ind. 369, 24 N. E. Rep. 1054, 26 N. E. Rep. 893.

⁷¹ Homestead St. R. R. Co. v. Pittsburgh & H. Electric St. R. R. Co., 166 Pa. St. 162, 30 Atl. Rep. 950. The Pittsburgh company was chartered November 16, 1893, and obtained its consent December 19, 1893. The Homestead company was chartered November 29, 1893, and claimed under a consent granted in its name on November 20, 1893. The latter consent was held invalid because granted before the incorporation of the company, but it was intimated

that it would have been equally ineffectual if it had been granted after its incorporation and before December 19. See also on the subject of priority between street railroads; Appeal of Lorimer etc. R. R. Co., 137 Pa. St. 533, 20 Atl. Rep. 570; Tamaqua etc. R. R. Co. v. Inter-county St. R. R. Co., 167 Pa. St. 91, 31 Atl. Rep. 473; People's Pass. R. R. Co. v. Marshall St. R. R. Co., 20 Phil. 203; Middletown etc. R. R. Co. v. Middletown Electric R. R. Co., 4 Pa. Dist. Ct. 32; West Jersey Traction Co. v. Camden Horse R. R. Co., 53 N. J. Eq. 163, 35 Atl. Rep. 49.

grant, so placing its wires as to endanger the employes of the first company or impair the efficiency of its plant.⁷² A telephone company has been protected in a similar way from interference by an electric light company.⁷³ The franchise of a telephone or telegraph company to use a street, is held to be subject to all legitimate street uses and therefore subject to a subsequent grant to an electric railway company to use the same street.⁷⁴

§ 307. The property must be legally designated; plans, surveys, etc.—Before instituting proceedings, the property to be condemned should be designated in such manner as may be required by law.⁷⁵ Where the taking is by a corporation, the governing body of the corporation, which is ordinarily the board of directors, should designate or approve the location by a definite description.⁷⁶ Frequently a map, plan, survey or other description of the location is required to be filed or recorded in some public office. This is usually made preliminary to the institution of proceedings, and if

⁷² Rutland El. Lt. Co. v. Marble City El. Lt. Co., 65 Vt. 377, 26 Atl. Rep. 635, 8 Am. R. R. & Corp. Rep. 157. To same effect: Consolidated El. Lt. Co. v. People's El. Lt. & G. Co., 94 Ala. 372, 10 So. Rep. 440.

⁷³ Nebraska Tel. Co. v. York Gas & El. Lt. Co., 27 Neb. 284, 43 N. W. Rep. 126.

⁷⁴ Cincinnati Inclined Plane R. R. Co. v. City & Suburban Tel. Ass., 48 Ohio St. 390, 27 N. E. Rep. 890, 4 Am. R. R. & Corp. Rep. 533; Hudson River Tel. Co. v. Watervliet Turnpike & R. R. Co., 135 N. Y. 393, 32 N. E. Rep. 148, 6 Am. R. R. & Corp. Rep. 619; Cumberland Tel. & Tel. Co. v. United Electric R. R. Co., 93 Tenn. 492, 29 S. W. Rep. 104, 10 Am. R. R. & Corp. Rep. 549.

⁷⁵ Heck v. School District, 49 Mich. 551; Darlington v. United

States, 82 Pa. St. 382; Williams v. Hartford & New Haven R. R. Co., 13 Conn. 397; Riddell v. Animas Canon Toll Road Co., 5 Col. 230; People v. Haverstraw, 137 N. Y. 88, 32 N. E. Rep. 1111.

⁷⁶ Williamsport etc. R. R. Co. v. Philadelphia etc. R. R. Co., 141 Pa. St. 407, 21 Atl. Rep. 645; Pittsburgh etc. R. R. Co. v. Pittsburgh etc. R. R. Co., 159 Pa. St. 331, 28 Atl. Rep. 155; New York etc. R. R. Co. v. Long, 69 Conn. 424; Lancaster v. Kennebec Log Driving Co., 62 Me. 272. In the last case a vote of the company authorized the directors "to build the Brown's Island Boom this season." This was held to be too indefinite for the foundation of proceedings. But compare State v. Proprs. of Morris Aqueduct Co., 58 N. J. L. 303, 33 Atl. Rep. 252.

so must be strictly complied with.⁷⁷ If the description is indefinite or the instrument defective, it will not be sufficient to authorize proceedings,⁷⁸ but formal defects are waived, if not insisted upon, until after a hearing on the merits.⁷⁹ A statute, which provides that when the route of a railroad company has been determined upon and a survey thereof deposited in the office of the Secretary of State, then proceedings may be instituted to condemn, requires the entire route to be first surveyed.⁸⁰ It is not always easy to determine from the statute whether the filing of the map, survey or location is a prerequisite to condemnation

⁷⁷ *Matter of New York & Boston R. R. Co.*, 62 Barb. 85; *Indianapolis etc. Ry. Co. v. Reed*, 52 Ind. 357; *Matter of Rochester Electric R. R. Co.*, 57 Hun 56, 10 N. Y. Supp. 379; *Durham & N. R. Co. v. Richmond & D. R. Co.*, 106 N. C. 16, 10 S. E. Rep. 1041; *Trudeau v. Sheldon*, 62 Vt. 198, 20 Atl. Rep. 161; *City of Madison v. Daley*, 58 Fed. Rep. 751.

⁷⁸ *Hyde Park v. Spencer*, 118 Ill. 446; *People v. Board of Trustees*, 137 N. Y. 88, 32 N. E. Rep. 1111; *Coe v. Aiken*, 61 Fed. Rep. 24; *Convers v. Grand Rapids & Indiana R. R. Co.*, 18 Mich. 459; *Hamor v. Bar Harbor Water Co.*, 78 Me. 127; *Warren v. Spencer Water Co.*, 143 Mass. 9; *Kenesin v. Arlington*, 144 Mass. 456; *Woodbury v. Marblehead Water Co.*, 145 Mass. 509; *Matter of Boston etc. R. R. Co.*, 10 Abb. N. C. 104; *New York & Albany R. Co. v. New York etc. R. R. Co.*, 11 Ibid. 386. A map designating the location of a railroad by a single line without showing whether it was the center or

side, was held altogether insufficient.

The sufficiency of particular descriptions or locations is determined in the following cases: *Callon v. Jacksonville*, 147 Ill. 113, 35 N. E. Rep. 223; *Newman v. Chicago*, 153 Ill. 469, 38 N. E. Rep. 1053; *Stanton v. Chicago*, 154 Ill. 23, 39 N. E. Rep. 987; *Milligan v. State*, 60 Ind. 206; *Commonwealth v. Abbott*, 160 Mass. 282, 35 N. E. Rep. 782; *Hayden v. State*, 132 N. Y. 533, 30 N. E. Rep. 961; *Clarke v. Kingstown*, 18 R. I. 283, 27 Atl. Rep. 336; *St. Vincent v. Greenfield*, 12 Ontario, 297; *Burk v. Baltimore*, 77 Md. 469, 26 Atl. Rep. 868; *City of Owosso v. Richfield*, 80 Mich. 324, 45 N. W. Rep. 129; *People v. Board of Trustees*, 137 N. Y. 88, 32 N. E. Rep. 1111; *Copcutt v. Yonkers*, 83 Hun 178, 31 N. Y. Supp. 659; *Lexington Print Works v. Canton*, 167 Mass. 341, 45 N. E. Rep. 746.

⁷⁹ *Logansport etc. Ry. Co. v. Buchanan*, 52 Ind. 163.

⁸⁰ *Doughty v. Somerville etc. R. R. Co.*, 7 N. J. Eq. 51.

or not.⁸¹ A statute required a map and profile of a railroad into and through a county to be filed before the construction of the road. It was held that it need not be done before instituting proceedings,⁸² and that as to any proprietor it was sufficient if a map and profile of the route through his land had been filed, though not through the entire county.⁸³ In Indiana it is held that the instrument of appropriation may be amended in aid of proceedings founded thereon.⁸⁴

§ 308. When an ordinance, resolution or vote of a municipal body is essential and the requisites thereof.—When the taking is by a municipal corporation, it usually must be authorized by a vote of the governing body, and this must be passed in such manner and by such formalities as are required by law. No general rule can be laid down, except that the statute must be strictly complied with.⁸⁵

⁸¹ In the following cases the filing was held not to be a prerequisite: *Chicago etc. R. R. Co. v. Abbott*, 44 Kan. 170, 24 Pac. Rep. 52; *Pocantico Water Works Co. v. Bird*, 130 N. Y. 249, 29 N. E. Rep. 246; *Wheeling Bridge & T. R. R. Co. v. Camden Consol. Oil Co.*, 35 W. Va. 205, 13 S. E. Rep. 369. And see *Matter of Coney Island etc. R. R. Co.*, 12 Hun 451; *Purifoy v. Richmond & D. R. R. Co.*, 108 N. C. 100, 12 S. E. Rep. 741.

⁸² *Missouri River etc. R. R. Co. v. Shepard*, 9 Kan. 647.

⁸³ *Hunt v. Smith*, 9 Kan. 137; see also *Doughty v. Sommerville etc. R. R. Co.*, 21 N. J. L. 442.

⁸⁴ *Hunt v. New York, Chicago & St. Louis Ry. Co.*, 99 Ind. 593; *Chicago & Gt. Southern Ry. Co. v. Jones*, 103 Ind. 386.

⁸⁵ *St. Louis v. Franks*, 78 Mo. 41; ante, § 253. The sufficiency of particular ordinances, resolutions and votes is passed upon in

the following cases, which all go to sustain the general proposition of the text: *Los Angeles v. Dehail*, 97 Cal. 13, 31 Pac. Rep. 626; *Wulzen v. Board of Supervisors*, 101 Cal. 15, 35 Pac. Rep. 353; *Hyde Park v. Spencer*, 118 Ill. 446; *Callon v. Jacksonville*, 147 Ill. 113, 35 N. E. Rep. 223; *Newman v. Chicago*, 153 Ill. 469, 38 N. E. Rep. 1053; *Stanton v. Chicago*, 154 Ill. 23, 39 N. E. Rep. 987; *Burk v. Baltimore*, 77 Md. 469, 26 Atl. Rep. 868; *Commonwealth v. Abbott*, 160 Mass. 282, 35 N. E. Rep. 782; *City of Owosso v. Richfield*, 80 Mich. 324, 45 N. W. Rep. 129; *Burkleo v. Washington*, 38 Minn. 441, 38 N. W. Rep. 108; *Cape Girardeau v. Houck*, 129 Mo. 607, 31 S. W. Rep. 933; *Read v. City of Camden*, 54 N. J. L. 347, 24 Atl. Rep. 549; *S. C. 53 N. J. L. 322*, 21 Atl. Rep. 565; *State v. Trenton*, 54 N. J. L. 92, 23 Atl. Rep. 281; *State v. Newark*, 54 N. J. L. 102, 23

Sixty days' notice of an application to pass such an ordinance was required to be given by publication. It was held that the notice was indispensable, and that the ordinance must correspond with the notice. And where the ordinance was for only part of the street described in the notice the ordinance and all proceedings founded on it were held void.⁸⁶ So, where the ordinance was required to be introduced at a previous regular or stated meeting, this must appear or it will be void.⁸⁷ Where the resolution for opening a street was required to be passed by a two-thirds vote entered on the journal, the vote must be so entered, or it is void.⁸⁸ So where the ordinance was required to be read on three different days, unless three-fourths of the members elected dispensed with the rule.⁸⁹ If the form is prescribed, it is material and cannot be disregarded. A statute required that if the trustees of a village should decide to make an improvement they should "so decide by resolution to be entered in the minutes of the board." The record showed that a petition for an improvement was received and placed on file, and then the following: "Moved that improvement asked for in the said petition be made. Motion carried, all voting aye." This was held insufficient.⁹⁰ But,

Atl. Rep. 284; *Avis v. Vineland*, 55 N. J. L. 285, 26 Atl. Rep. 149; *People v. Trustees*, 137 N. Y. 88, 32 N. E. Rep. 1111; *Copcutt v. Yonkers*, 83 Hun 178, 31 N. Y. Supp. 659; *People v. Supervisors* (N. Y. Supm.), 35 N. Y. Supp. 91; *Scranton v. Barnes*, 147 Pa. St. 461, 23 Atl. Rep. 777; *In re Frederick St.*, 155 Pa. St. 623, 26 Atl. Rep. 773; *Gay & West Sts.*, 7 Pa. Co. Ct. 217.

⁸⁶ *Baltimore v. Grand Lodge*, 44 Md. 436; to same effect *State v. Elizabeth*, 32 N. J. L. 357.

⁸⁷ *State v. Jersey City*, 25 N. J. L. 309; *State v. Bergen*, 33 N. J. L. 39; *S. C. Ibid.* 72. In the latter case the ordinance was re-

quired to name three commissioners. At a subsequent meeting one of these was changed and the ordinance passed. It was held to be invalid.

⁸⁸ *Matter of Widening Carlton St., Buffalo*, 16 Hun 497; *S. C.* 78 N. Y. 362; *In re South Market St.*, 76 Hun 85, 27 N. Y. Supp. 843. In the first case it was also held that the city was not estopped to move to set aside the confirmation of the report of the commissioners and to dismiss the proceedings.

⁸⁹ *Campbell v. Cincinnati*, 49 Ohio St. 463, 31 N. E. Rep. 606.

⁹⁰ *People v. Whitney's Point*, 32 Hun 508; *Packard v. Bergen*

if the statute is silent as to the form of such a vote or order, then form becomes immaterial, and either a resolution or ordinance may be adopted.⁹¹ Nothing can be done under a resolution or ordinance, except what is authorized by it. Under a resolution to open a street, one already opened cannot be widened.⁹² The resolution or ordinance need not express that the improvement is necessary unless required.⁹³ The charter of St. Louis provided that no street should be extended nearer than five hundred feet of a street already opened, without the unanimous recommendation of the board of public works submitted in writing to the assembly. It was held that this must affirmatively appear, and that it could not be inferred from the passage of the ordinance.⁹⁴ Where a statute provided that a petition for a highway should be presented to the town council for approval before being presented to the court, a lay-out without such approval was held void.⁹⁵ Authority to lay out streets whenever, in the opinion of the city council, the public good requires it, does not necessitate any formal declaration of opinion as preliminary to action.⁹⁶ But where a statute authorized town supervisors to establish a ditch if, in their judgment, it was demanded by the public health or welfare, it was held that they must not only decide that it was so demanded but that such decision must affirma-

Neck R. R. Co., 48 N. J. Eq. 281, 22 Atl. Rep. 227. But failure to comply is not available in a suit for damages by reason of a defective street. *Seymour v. Salamanca*, 137 N. Y. 364, 33 N. E. Rep. 304.

⁹¹ *Sower v. Philadelphia*, 35 Pa. St. 231.

⁹² *In re Powelton Ave.*, 11 Phila. 447.

⁹³ *Trinity Church v. Higgins*, 4 Robt. 1.

⁹⁴ *St. Louis v. Franks*, 78 Mo. 41. To same effect where reference to a committee or petition of abutters was required; *City*

of Madison v. Daley, 58 Fed. Rep. 751; *Frederick St.*, 11 Pa. Co. Ct. 114. Where an ordinance for opening an alley makes the improvements conditional upon the dedication of certain property the condition must be complied with before any valid proceedings can be had under the ordinance. *St. Louis v. Cruikshank*, 16 Mo. App. 495.

⁹⁵ *Norwegian Street*, 81 Pa. St. 349.

⁹⁶ *Elwood v. Rochester*, 43 Hun 102. But see *Northern R. Co. v. Englewood*, 62 N. J. L. 188.

tively appear on the face of the proceedings.⁹⁷ Where the statute requires public notice to be given of the introduction of an ordinance for street improvement, an ordinance passed without such notice is void.⁹⁸ A statute of Ohio provided that no ordinance, resolution or order for the appropriation of money should be passed by a municipal council or board, unless the auditor or clerk should certify that the money required to pay for the same was in the treasury to the credit of the fund from which it was to be drawn. This was held in the Toledo circuit to apply to an ordinance for extending a street, though the cost was to be defrayed by special assessment,⁹⁹ but the contrary was held in the Columbus circuit.¹

§ 309. When a previous refusal of some other tribunal is essential to jurisdiction. — In the New England States, upon the neglect or refusal of the selectmen of a town to lay out a way which has been petitioned for, jurisdiction is given to some other tribunal to act in the matter, not by way of an appeal but by an original application. In such case the previous refusal or neglect is essential to jurisdiction, and should appear upon the face of the proceedings.² Where the jurisdiction of county commissioners depended upon an unreasonable refusal of the town to accept the report of selectmen laying out a way, there must be a legal report to accept,³ and a finding by the county commissioners that the

⁹⁷ *State v. Curtis*, 86 Wis. 140, 56 N. W. Rep. 475.

⁹⁸ *State v. Long Branch Comrs.*, 54 N. J. L. 484, 24 Atl. Rep. 368.

⁹⁹ *Rhoades v. Toledo*, 6 Ohio C. C. 9.

¹ *Tyler v. Columbus*, 6 Ohio C. C. 224.

² *Inhabitants of Pownal*, 8 Me. 271; *State v. Inhabitants of Pownal*, 10 Me. 24; *Small v. Pennell*, 31 Me. 267; *Scarborough v. Commissioners*, 41 Me. 604; *Belcher-town v. County Comrs.*, 11 Cush. 189; *Treat v. Middletown*, 8

Conn. 243; *Torrington v. Nash*, 17 Conn. 197. And see *Dunn v. Town of Pownal*, 65 Vt. 116, 26 Atl. Rep. 484. But where city council has exclusive jurisdiction over laying out city streets, the general law does not apply to such streets. *Biddeford v. County Comrs.*, 78 Me. 105. The previous refusal may be found at any stage of the proceedings. *Southington v. Clark*, 13 Conn. 370.

³ *Lewiston v. County Comrs. of Lincoln*, 30 Me. 19.

neglect or refusal of the selectmen was unreasonable is essential to their jurisdiction and must affirmatively appear.⁴ The petition to the second tribunal may be signed by different persons, but it must be for the same road.⁵ The lay-out of a road includes all that is essential to its legal establishment, and a neglect to perform any essential act is a refusal within the statute.⁶ Where a petition was pending before selectmen for eight months, and their last action was to meet and view the route, and they then separated without any action or adjournment, it was held a sufficient neglect to give jurisdiction.⁷ The second tribunal is held to have the same powers as the selectmen in the premises, where not otherwise specified by law.⁸ Where an application is made to the second tribunal, showing the necessary neglect or refusal of the selectmen, if this is contested, it should be done before commissioners are appointed to act on the application, and, if not, the point is waived.⁹

§ 310. Other matters and questions preliminary to the institution of proceedings.—Since the statutory authority to take private property for public use must be strictly pursued, whatever is required by way of preliminaries must be complied with.¹⁰ The giving of a certain notice,¹¹ or the

⁴ *Donnell v. Comrs. of York County*, 87 Me. 223, 32 Atl. Rep. 884.

⁵ *Simpson v. Oxford*, 41 N. H. 228.

⁶ *Wolcott v. Pond*, 19 Conn. 597.

⁷ *Stratton's Petition*, 21 N. H. 44.

⁸ *Matter of Town of Bridport*, 24 Vt. 176.

⁹ *Kennett's Petition*, 24 N. H. 139.

¹⁰ *State v. Bayonne*, 35 N. J. L. 332. And see *Hollins v. Patterson*, 6 Leigh, 457; *In re Canal & Charles Sts.*, 18 R. I. 129, 25 Atl. Rep. 975; *People v. Jones*,

2 N. Y. Supr. Ct. 360; *Chicago etc. Bridge Co. v. Pac. Mut. Tel. Co.*, 36 Kan. 113; *Colonial City Traction Co. v. Kingston City R. Co.*, 153 N. Y. 540, 47 N. E. Rep. 810.

¹¹ *Mitchell v. Bond*, 11 Bush. 614; *Baltimore v. Bouldin*, 23 Md. 328; *Baltimore v. Little Sisters*, 56 Md. 400; *Stewart v. Baltimore*, 7 Md. 500; *Matter of Prospect Park etc. R. R. Co.*, 8 Hun 30; *State v. New Brunswick*, 58 N. J. L. 225, 33 Atl. Rep. 477; *Matter of Citizens W. W. Co.*, 32 App. Div. N. Y. 54; *Champlain v. McCrea*, 33 App. Div. N. Y. 259.

filing of a bond¹² is often required as a condition precedent to condemnation, and cases construing such statutes are referred to in the notes. If a preliminary estimate of the cost of an improvement, such as widening a street, is required, it is essential to the validity of proceedings.¹³ A statute which provides that an expenditure by a village exceeding five hundred dollars must be authorized by a vote of the taxable inhabitants before being incurred, was held not to apply to a taking of property for widening a street.¹⁴ The charter of St. Louis provided that: "Whenever the assembly shall provide by ordinance, for establishing, opening, widening or altering any street, avenue, alley, wharf, market-place or public square or route for sewer or water pipe, either on the unanimous recommendation of the board of public improvements, or on the petition of the owners of a major portion of the ground fronting thereon, and it becomes necessary for that purpose to appropriate private property, the city counsellor, in the name of the city of St. Louis, shall apply to the circuit court of the eighth judicial circuit, or to any one of the judges in vacation, by petition," etc. Under this provision either a recommendation of the board of public improvements or a petition of property-owners, in compliance with the charter, is indispensable to the jurisdiction of the city assembly to pass

¹² *Hill v. Board of Supervisors*, 95 Cal. 239, 30 Pac. Rep. 385; *Hopkins v. Contra Costa County*, 106 Cal. 566, 39 Pac. Rep. 933; *Geary v. Board of Supervisors*, 107 Cal. 530, 40 Pac. Rep. 800; *Darst v. Griffin*, 31 Neb. 668, 48 N. W. Rep. 819; *Genesee Fork Imp. Co. v. Ives*, 144 Pa. St. 114, 22 Atl. Rep. 887; *Getz v. Philadelphia etc. R. R. Co.*, 1 Walker's Pa. Supm. Ct. 427; *In re Petition of Schuylkill Riv. etc. R. R. Co.*, 17 Phila. 11; *Bryant v. New Castle etc. R. R. Co.*, 6 Pa. Co. Ct. 53; *Welsh v. New Castle*

etc. R. R. Co., 6 Pa. Co. Ct. 56; *Edgewood Water Co. v. Troy Water Co.*, 7 Pa. Co. Ct. 476; *Lebanon Water Co.*, 9 Pa. Co. Ct. 589; *Crescent Pipe Line Co.*, 2 Pa. Dist. Ct. 93; *Bate v. Philadelphia etc. R. R. Co.*, 1 Mont. Co. L. R. 47; *Myers v. Delaware etc. R. R. Co.*, 3 Luzerne Leg. Reg. Rep. 347.

¹³ *State v. Bergen*, 35 N. J. L. 332; *Friedenwald v. Shipley*, 74 Md. 220, 21 Atl. Rep. 790, 24 Atl. Rep. 156.

¹⁴ *Allen v. Northville*, 39 Hun 240.

a valid ordinance for the extension of a street.¹⁵ A statute required railroad companies to give notice to the actual occupants of land over which a proposed road was to be located, and which had not been purchased or donated to the company, of the time and place where the map and profile were filed, and that the route passed over the land of such occupant. The giving of the notice to all such actual occupants was held to be a condition precedent to the right to condemn, and that one who had notice could object because others had not been notified.¹⁶ Sometimes the consent or certificate of railroad commissioners,¹⁷ or of certain local authorities,¹⁸ or even of the legislature,¹⁹ is required as a condition precedent to condemnation proceedings. It has been held that a street railroad company may condemn private rights in a street before getting authority from the municipality to occupy the street.²⁰ A corporation

¹⁵ *St. Louis v. Gleason*, 89 Mo. 67, 93 Mo. 33; S. C. 15 Mo. App. 25. To same effect: *Richman v. Board of Supervisors*, 77 Ia. 513, 42 N. W. Rep. 422; *City of Anderson v. Bain*, 120 Ind. 254, 22 N. E. Rep. 323; *Iowa St.*, 12 Pa. Co. Ct. 611. See also *State v. Board of Chosen Freeholders*, 51 N. J. L. 454, 18 Atl. Rep. 117; S. C. affirmed, 52 N. J. L. 398, 20 Atl. Rep. 255; *Kyle v. Malin*, 8 Ind. 34; *Caldwell v. Village of Carthage*, 49 Ohio St. 334, 31 N. E. Rep. 602.

¹⁶ *Matter of Niagara Falls & Whirlpool Ry. Co.*, 46 Hun 94.

¹⁷ *Derby v. Framingham etc. R. R. Co.*, 119 Mass. 516; *Wilder v. Boston & A. R. R. Co.*, 161 Mass. 387, 37 N. E. Rep. 380. And see in re *New Hamburg etc. R. R. Co.*, 76 Hun 76, 27 N. Y. Supp. 664; in re *Amsterdam etc. R. R. Co.*, 86 Hun 578, 33 N. Y. Supp. 1009; *Neal v. Portland*, 85 Me. 62, 26 Atl. Rep. 994; *Cran-*

dall v. Des Moines etc. R. R. Co., 103 Ia. 684.

¹⁸ In re *Rochester Electric R. R. Co.*, 123 N. Y. 351, 25 N. E. Rep. 381; *Harrisburg etc. R. R. Co. v. Harrisburg Turnpike Co.*, 15 Pa. Co. Ct. 389. And see *Los Angeles County v. San Jose Land & W. Co.*, 96 Cal. 93, 30 Pac. Rep. 969.

¹⁹ *Gillinwater v. Mississippi etc. R. R. Co.*, 13 Ill. 1.

²⁰ *Metropolitan City R. R. Co. v. Chicago West Div. R. R. Co.*, 87 Ill. 317. And see *Ligare v. Chicago etc. R. R. Co.*, 166 Ill. 249, 46 N. E. Rep. 803. But a street railroad was enjoined from building on a township road between two boroughs before it had obtained the right to build in the boroughs. *Rohn Tp. v. Tamaqua etc. R. R. Co.*, 4 Pa. Dist. Ct. 29; and see *Colonial City Traction Co. v. Kingston City R. R. Co.*, 154 N. Y. 493.

was organized to supply water to the inhabitants of Milwaukee by means of pipes from a spring in Waukesha. It was held that it could not condemn land for right of way until it had acquired the right to supply water to said city, and that must appear in its petition to condemn.²¹ Where foreign railroad corporations were authorized to extend their lines into and through the State, it was held that such a company could condemn a right of way without showing that it had built to the State line.²² Where a school district meeting decides on the erection of a new school house but a committee select the site, both must be done before proceedings are instituted, but the order is immaterial.²³ A statute applicable to New York city provides for a report of commissioners in lieu of the consent of property-owners for a railroad on a street. Cases construing and applying this section are referred to below.²⁴

²¹ *Wisconsin Water Co. v. Winans*, 85 Wis. 26, 54 N. W. Rep. 1003. In New York the statute as to such companies provides that they cannot condemn until they have a contract to supply water. *Citizens' Water Works Co. v. Parry*, 59 Hun 202, 35 N. Y. St. 640, 13 N. Y. Supp. 490; affirmed 128 N. Y. 669. And see *Pocantio Water Works Co. v. Bird*, 130 N. Y. 249, 29 N. E. Rep. 246. In *Prescott Ice Co. v. Flathers*, 20 Wash. 454, 55 Pac. Rep. 635, it was held that an irrigation company could condemn a right of way before it had acquired a right to water.

²² *St. Louis etc. R. R. Co. v. Lewright*, 113 Mo. 660, 21 S. W. Rep. 210. And see on the subject of premature proceedings: *Clarke v. South Kingston*, 18 R. I. 283, 27 Atl. Rep. 336; *State v. Jersey City*, 29 N. J. L. 441.

²³ *Howland v. School District*,

15 R. I. 184, 2 Atl. Rep. 549, 8 Atl. Rep. 337. The consent of voters may be required as a preliminary. *State v. School District*, 79 Mo. App. 103.

²⁴ *Matter of Elevated R. R. Co.*, 18 Hun 378; *Matter of Kings County El. R. R. Co.*, 20 Hun 217; *Matter of Broadway Underground Ry. Co.*, 23 Hun 693; *Matter of Broadway Surface R. R. Co.*, 34 Hun 414; *Matter of Nassau Cable Co.*, 36 Hun 272; *Matter of New York Cable Co.*, 36 Hun 355; *Hilton v. Thirty-fourth Street R. R. Co.*, 1 How. Pr. N. S. 453; *Matter of Nassau Cable Co.*, 2 How. Pr. N. S. 124; *In re Board of Rapid Transit Comrs.*, 147 N. Y. 260, 41 N. E. Rep. 575; *In re Nassau Electric R. R. Co.*, 85 Hun 446, 32 N. Y. Supp. 1146; *Matter of People's R. R. Co.*, 112 N. Y. 578, 20 N. E. Rep. 367; *In re Atlantic Ave. R. R. Co.*, 136 N. Y. 292, 32 N. E. Rep. 771;

§ 311. Of the right to a common law jury.—Some constitutions provide that the compensation for property taken for public use shall be ascertained by a jury of twelve men, according to the course of the common law. Other constitutions provide that the compensation may be ascertained by commissioners, or by a jury of less than twelve men.²⁵ In either case the express provision of the constitution removes any question as to the right to a common law jury. In the absence of any express provision on the subject, the authorities almost uniformly hold that it is not a matter of constitutional right.²⁶ The line of reasoning upon which

McWilliams v. Jewett, 14 Misc. 491, 36 N. Y. Supp. 620; Ante, § 116.

²⁵ See §§ 15-52.

²⁶ Cairo & Fulton R. R. Co. v. Trout, 32 Ark. 17; Hoppikus v. State Capitol Comrs., 16 Cal. 248; People ex rel. Heyneman v. Blake, 19 Cal. 579; Kimball v. Board of Supervisors, 46 Cal. 19; Whiteman's Executrix v. Wilmington & Susquehanna R. R. Co., 2 Harr. Del. 514; Bailey v. Phila., Wilmington & Balt. R. R. Co., 4 Harr. Del. 389, 417; Drouberger v. Reed, 11 Ind. 420; Hymes v. Aydelott, 26 Ind. 431; Evansville & Crawfordsville R. R. Co. v. Miller, 30 Ind. 209; Anderson v. Caldwell, 91 Ind. 451; Indianapolis & Cumberland Gravel Road Co. v. Christian, 93 Ind. 360; Lipes v. Hand, 104 Ind. 503; Central Branch U. P. R. R. Co. v. Atchison, etc., R. R. Co., 28 Kan. 453; People ex rel. Green v. Michigan Southern R. R. Co., 3 Mich. 496; Smith v. McAdam, 3 Mich. 506; Langford v. County Comrs. of Ramsey Co., 16 Minn. 375; Bruggerman v. True, 25 Minn. 123; Minneapolis v. Wilkin, 30 Minn. 140; Louisiana &

Frankford Plank Road Co. v. Pickett, 25 Mo. 535; City of Kansas v. Hill, 80 Mo. 523; Virginia & Truckee R. R. Co. v. Elliott, 5 Nev. 358; Backus v. Lebanon, 11 N. H. 19; Dalton v. Northampton, 19 N. H. 362; Baker v. Holderness, 26 N. H. 110; Petition of the Mount Washington Road Co., 35 N. H. 134; Scudder v. Trenton Del. Falls Co., 1 N. J. Eq. 694; Beekman v. Saratoga & Schenectady R. R. Co., 3 Paige, 45; Livingston v. New York, 8 Wend. 85; People v. Smith, 21 N. Y. 595; Matter of Comrs. of State Reservation at Niagara, 37 Hun 537; S. C. 102 N. Y. 734; Raleigh & Gaston R. R. Co. v. Davis, 2 Dev. & B. Law 451; Willyard v. Hamilton, 7 Ohio, Pt. 2, 111; Kendall v. Post, 8 Or. 141; Ligat v. Commonwealth, 19 Pa. St. 456; Penna. R. R. Co. v. Lutheran Congregation, 53 Pa. St. 445; Anderson v. Turbeville, 6 Coldw. 150; Houston, etc., R. R. Co. v. Milburn, 34 Tex. 224; Gold v. Vermont Central R. R. Co., 19 Vt. 478; Hood v. Finch, 8 Wis. 381; Wurts v. Hoagland, 114 U. S. 606; Missouri Pac. Ry. Co. v. Hunes, 115 U. S. 512; Great

these decisions are founded is that, before any of our constitutions were adopted, it had been the practice in America and England to ascertain the compensation to be paid for property taken for public use by other agencies than a common law jury; that this practice was well known to the framers of those constitutions, and that presumably they did not intend by any general language employed to abrogate a practice so universal and of such long standing and against which no complaint existed.²⁷ The provisions relied upon in support of the opposite contention are those which prescribe in substance that the right of trial by jury shall remain inviolate and that no person shall be deprived of his property without due process of law. In a proceeding to enjoin the operation of an elevated railroad in a street and for damages, neither party is entitled to a

Falls Manf. Co. v. Garland, 25 Fed. Rep., 521; Bonaparte v. Camden & Amboy R. R. Co., 1 Baldwin 205; Johnson v. Joliet & Chicago R. R. Co., 23 Ill. 202 (see, contra, Rich v. Chicago, 59 Ill. 286); Central Branch U. P. R. R. Co. v. Atchison etc. R. R. Co., 28 Kan. 453; Henderson & Nashville R. R. Co. v. Dickerson, 17 B. Monroe 173; Ames v. Lake Superior & Miss. R. R. Co., 21 Minn. 241; Kramer v. Cleveland etc. R. R. Co., 5 Ohio St. 140; Buffalo Bayou etc. R. R. Co. v. Ferris, 26 Tex. 588; Rhine v. McKinney, 53 Tex. 354; Oliver v. Union Point & W. R. R. Co., 83 Ga. 257, 9 S. E. Rep. 1086; Morris v. Heppenheimer, 54 N. J. L. 268, 23 Atl. Rep. 664; State v. Lyle, 100 N. C. 497, 6 S. E. Rep. 379; Chowan & S. R. R. Co. v. Parker, 105 N. C. 246, 11 S. E. Rep. 328; Baltimore Belt R. R. Co. v. Baltzell, 75 Md. 94, 23 Atl. Rep. 74; Leavenworth etc. R. R.

Co. v. Atchison, 137 Mo. 218; Martin v. Tyler, 4 N. D. 278, 60 N. W. Rep. 392; Bauman v. Ross, 167 U. S. 548, 17 S. C. Rep. 966; St. Joseph v. Geiwetz, 148 Mo. 210, 49 S. W. Rep. 1000. Opposing decisions and dicta: South Western R. R. Co. v. Southern & Atlantic Tel. Co., 46 Ga. 43; Rich v. Chicago, 59 Ill. 286; Lake Erie etc. R. R. Co. v. Heath, 9 Ind. 558; Piper v. Connersville & Liberty Turnpike Co., 12 Ind. 400; Norristown etc. Turnpike Co. v. Burkett, 26 Ind. 53; Louisville etc. R. R. Co. v. Dryden, 39 Ind. 393; Harness v. Chesapeake & Ohio Canal Co., 1 Md. Ch. 248; Salem Turnpike etc. Corporation v. County of Essex, 100 Mass. 282; Newcomb v. Smith, 1 Chandler, Wis. 71; Hanlon v. Supervisors of Westchester, 57 Barb. 383; Heyward v. New York, 7 N. Y. 314, 324; Kimel v. Kimel, 4 Jones Law 121.

²⁷ Ibid.

jury trial, either on the question of past or fee damages.²⁸ Though the constitution provides that the compensation shall be ascertained by a jury, yet a jury may be waived by agreement of parties or otherwise.²⁹ When the constitution provides for a jury in such cases, an ordinary jury of twelve will be intended.³⁰ Though the constitution provides that the compensation shall be ascertained by a jury of twelve men in a court of competent jurisdiction as may be prescribed by law, the legislature cannot enact that the concurrence of less than twelve in the verdict shall be sufficient.³¹ If the constitution requires a jury, it is imperative.^{31a} But in New York, whose constitution required the damages to be assessed by a jury or not less than three commissioners appointed by a court of record, it was held that a jury of twelve, a majority of whom could decide,

²⁸ *Lynch v. Metropolitan El. R. R. Co.*, 129 N. Y. 274, 29 N. E. Rep. 315; *Shepard v. Manhattan R. R. Co.*, 131 N. Y. 215, 30 N. E. Rep. 187; *Pegram v. New York El. R. R. Co.*, 147 N. Y. 135, 41 N. E. Rep. 424; *Libmann v. Manhattan R. R. Co.*, 59 Hun 428, 36 N. Y. St. 639, 13 N. Y. Supp. 378; *Bergman v. Manhattan R. R. Co.*, 59 N. Y. Supr. 566, 14 N. Y. Supp. 384; affirmed, 129 N. Y. 637; *Saunders v. New York El. R. R. Co.*, 16 Daly 261, 10 N. Y. Supp. 112; *Watson v. Manhattan R. R. Co.*, 17 Abb. N. C. 289; *Klipstein v. New York El. R. R. Co.*, 8 Misc. 457, 28 N. Y. Supp. 683.

²⁹ *Chicago, Milwaukee & St. Paul Ry. Co. v. Hock*, 118 Ill. 587; *Hughes v. Mermod*, 121 Mo. 98, 25 S. W. Rep. 891; *Borgman v. Detroit*, 102 Mich. 261, 60 N. W. Rep. 696; *Chowan & S. R. R. Co. v. Parker*, 105 N. C. 246, 11 S. E. Rep. 328; *Akin v. Water Comrs.*, 82 Hun 265, 31 N. Y.

Supp. 254; *Minneapolis etc. R. R. Co. v. Nester*, 3 N. D. 480, 57 N. W. Rep. 510; *Lawrence R. R. Co. v. O'Harra*, 48 Ohio St. 343, 28 N. E. Rep. 175.

³⁰ *Lamb v. Lane*, 4 Ohio St. 167; *Smith v. Atlantic & Great Western R. R. Co.*, 25 Ohio St. 91; *Chicago etc. R. R. Co. v. Sanford*, 23 Mich. 418; *Clark v. Utica*, 18 Barb. 451; *Postal Tel. Cable Co. v. Alabama G. S. R. R. Co.*, 92 Ala. 331, 9 So. Rep. 555; *Alabama M. R. R. Co. v. Newton*, 94 Ala. 443, 10 So. Rep. 89; *Jacksonville etc. R. R. Co. v. Adams*, 33 Fla. 608, 15 So. Rep. 257.

³¹ *Jacksonville etc. R. R. Co. v. Adams*, 33 Fla. 608, 15 So. Rep. 257.

^{31a} *Pusey's Appeal*, 83 Pa. St. 67; *William's Executors v. Pittsburgh*, 83 Pa. St. 71; *Whitehead v. Arkansas Central R. R. Co.*, 28 Ark. 460; *Shaver v. Starrett*, 4 Ohio St. 494; *West End Narrow Gauge R. R. Co. v. Almeroth*, 13 Mo. App. 91,

was valid.³² This was put on the ground that damages in such cases had been assessed by such juries for twenty years prior to the adoption of that provision of the constitution. In interpreting the same provision it has been held that the legislature was not limited to one mode in the same proceeding, but might provide that compensation should be assessed by commissioners in the first instance and by a jury on review or appeal.³³ Also, that an act which required the court to select by lot three commissioners from among twelve persons designated by the common council of a city to act in street cases was void, as an attempt to control the discretion vested in the court by the constitution.³⁴ Where the constitution recognized a jury of six in proceedings before justices of the peace, an assessment in a condemnation proceeding before a justice by such a jury was upheld.³⁵ Where by law a jury may be demanded, it is a substantial right and should not be trifled with nor denied on technical grounds.³⁶ If a constitution is revised or amended so as to require or give the option of a jury trial, it is self-executing and modifies existing statutes in that regard unless otherwise provided.³⁷ Where the constitution required that the compensation should be ascertained by a jury, a statute providing that it might be ascertained by viewers or commissioners was held invalid.³⁸ The constitution of Missouri provides that "the

³² *Cruger v. Hudson River R. Co.*, 12 N. Y. 190.

³³ *Clark v. Miller*, 54 N. Y. 528.

³⁴ *Menges v. Albany*, 56 N. Y. 374.

³⁵ *McManus v. McDonough*, 107 Ill. 95.

³⁶ *Port Huron etc. Ry. Co. v. Callanan*, 61 Mich. 12.

³⁷ *Woodward Iron Co. v. Cabaniss*, 87 Ala. 328, 6 So. Rep. 300; *Kansas City etc. R. R. Co. v. Story*, 96 Mo. 611, 10 S. W. Rep. 203; *St. Joseph & I. R. R. Co. v. Cudmore*, 103 Mo. 634, 15

S. W. Rep. 535; *Chicago etc. R. R. Co. v. Miller*, 106 Mo. 458, 17 S. W. Rep. 499; *St. Joseph & I. R. R. Co. v. Shambaugh*, 106 Mo. 557, 17 S. W. Rep. 581; *Chicago etc. R. R. Co. v. Elliott*, 108 Mo. 321, 18 S. W. Rep. 901; *Chicago etc. R. R. Co. v. Bates*, 109 Mo. 53, 18 S. W. Rep. 1133; *Chicago etc. R. R. Co. v. McGrew*, 113 Mo. 390, 21 S. W. Rep. 201; *Roosa v. St. Joseph & I. R. R. Co.*, 114 Mo. 309, 21 S. W. Rep. 1124; *Kansas City etc. R. R. Co. v. Cox*, 41 Mo. App. 499.

³⁸ *Peterson v. Smith*, 6 Wash.

right of trial by jury shall be held inviolate in all trials of claims for compensation when, in the exercise of the right of eminent domain, any incorporated company shall be interested either for or against such right." It is held that a municipal corporation is not an "incorporated company" within such provision;³⁹ also that if corporations, who are parties, waive the right, individuals, who are also parties, cannot insist upon it.⁴⁰ There is no right to a jury trial on the question of the right to condemn.⁴¹

§ 312. It is sufficient, in any event, if a jury trial may be had on appeal.—Even in those States in which a jury trial is a matter of right, either by virtue of the express provision of the constitution or the manner of interpreting it by the courts, it is held sufficient that a jury trial may be had on appeal.⁴² If a party does not appeal, he thereby waives his right to a jury trial.⁴³ The requirement of a bond as a condition to an appeal in such a case is not invalid.⁴⁴

§ 313. What tribunal is sufficient.—In the absence of any special constitutional provision prescribing how compensation shall be ascertained, there is no limitation on the

163, 32 Pac. Rep. 1050; *Smith v. Cochrane*, 9 Wash. 85, 37 Pac. Rep. 311, 494.

³⁹ *Kansas City v. Vineyard*, 128 Mo. 75, 30 S. W. Rep. 326.

⁴⁰ *In re Independence Ave. Boulevard*, 128 Mo. 272, 30 S. W. Rep. 773.

⁴¹ *United States v. Engerman*, 46 Fed. Rep. 176.

⁴² *Atlanta v. Central R. R. Co.*, 53 Ga. 120; *Thorp v. Witham*, 65 Ia. 566; *Stewart v. Baltimore*, 7 Md. 500; *Aldridge v. Tusculum Co.*, 2 Stew. & Por. 199; *Reckner v. Warner*, 22 Ohio St. 275; *Norristown etc. Turnpike Co. v. Burkett*, 26 Ind. 53; *Whitemen's Executrix v. Wilmington & Susquehanna R. R.*

Co., 2 Harr. Del. 514; *Mississippi Levee Comrs. v. Johnson*, 66 Miss. 248, 6 So. Rep. 199; *Rothan v. St. Louis etc. R. R. Co.*, 113 Mo. 132, 20 S. W. Rep. 892; *People v. Village of Haverstraw*, 80 Hun 385, 30 N. Y. Supp. 325. But see *Smith v. Cochran*, 9 Wash. 85, 37 Pac. Rep. 311; *Dell Rapids v. Irving*, 7 S. D. 310, 64 N. W. Rep. 149; *Terre Haute v. Evansville etc. R. R. Co.*, 149 Ind. 174; *Turlow v. Ross*, 144 Mo. 234.

⁴³ *Thorp v. Witham*, 65 Ia. 566; *Stewart v. Baltimore*, 7 Md. 500.

⁴⁴ *Rechner v. Warner*, 22 Ohio St. 275; *People v. Village of Haverstraw*, 80 Hun 385, 30 N. Y. Supp. 325.

legislature, except the provision that no man shall be deprived of his property except by due process of law or the law of the land. The legislature may provide such mode as it sees fit for ascertaining the compensation,⁴⁵ provided only that the tribunal is an impartial one⁴⁶ and that the parties interested have an opportunity to be heard.⁴⁷ A court or judge, with or without a jury, is an impartial tribunal;⁴⁸ so are any disinterested men of integrity and fair intelligence forming a committee or board. Commissioners appointed by the governor were held a proper tribunal in case of a taking by the State.⁴⁹ An agent of the party condemning and two disinterested freeholders do not form an impartial tribunal.⁵⁰ A committee of three freeholders appointed by the council of a city is not an impartial tribunal to assess the compensation for property taken

⁴⁵ Virginia & Truckee R. R. Co. v. Elliott, 5 Nev. 358; Raleigh & Gaston R. R. Co. v. Davis, 2 Dev. & B. Law 451; Kramer v. Cleveland etc. R. R. Co., 5 Ohio St. 140; New Orleans etc. R. R. Co. v. Drake, 60 Miss. 621; Evansville & Crawfordsville R. R. Co. v. Miller, 30 Ind. 209; Indianapolis v. Cumberland Gravel Road Co., 93 Ind. 360; Ames v. Lake Superior & Miss. R. R. Co., 21 Minn. 241; St. Paul v. Nickl, 42 Minn. 262, 44 N. W. Rep. 59; Musick v. Kansas City etc. R. R. Co., 114 Mo. 309, 21 S. W. Rep. 491.

⁴⁶ Ames v. Lake Superior & Miss. R. R. Co., 21 Minn. 241; Rhine v. McKinney, 53 Tex. 354; Koppikus v. State Capitol Comrs., 16 Cal. 248; Langford v. County Comrs., 16 Minn. 375; Bruggerman v. True, 25 Minn. 123; Uhrig v. St. Louis, 44 Mo. 458; Harward v. St. Clair etc. Drainage Co., 51 Ill. 130; Hughes v. Milligan, 42 Kans. 396, 22 Pac.

Rep. 313; State v. Spencer, 53 Kan. 655, 37 Pac. Rep. 174; State v. Rapp, 39 Minn. 65, 38 N. W. Rep. 926; State v. Perth Amboy, 52 N. J. L. 132, 18 Atl. Rep. 670; Morris v. Heppenheimer, 54 N. J. L. 268, 23 Atl. Rep. 664; Backus v. Fort St. Union Depot Co., 169 U. S. 557; People v. Adirondack R. R. Co., 160 N. Y. 225, 241.

⁴⁷ Zimmerman v. Canfield, 42 Ohio St. 463; Wurts v. Hoagland, 114 U. S. 606; United States v. Jones, 109 U. S. 513; Gamble v. McCrady, 75 N. C. 509; Harness v. Chesapeake & Ohio Canal Co., 1 Md. Ch. 248; Hodges v. Milligan, 42 Kan. 396, 22 Pac. Rep. 313; Morris v. Heppenheimer, 54 N. J. L. 268, 23 Atl. Rep. 664; and see post, §§ 363-368.

⁴⁸ Evansville & Crawfordsville R. R. Co. v. Miller, 30 Ind. 209; Indianapolis etc. Gravel Road Co. v. Christian, 93 Ind. 360.

⁴⁹ Morris v. Heppenheimer, 54 N. J. L. 268, 23 Atl. Rep. 664.

⁵⁰ Powers v. Bears, 12 Wis. 213.

by such city for streets.⁵¹ But it has been held that a statute providing for an assessment of damages by a board of city officers or by commissioners appointed by the council was valid when an appeal was given to an impartial tribunal.⁵²

§ 314. **Nature of the proceedings generally:** Whether a "suit," "action," "special proceeding," etc.—The character of proceedings for condemnation depends mainly upon the statute under which they are authorized. They involve the exercise of judicial power.⁵³ In general, they partake of the nature of legal rather than of equitable proceedings.⁵⁴ They have sometimes been called proceedings in rem.⁵⁵ A proceeding under the flowage acts has been held to be a civil action within the statute as to removals;⁵⁶ or within a statute abolishing special pleading in all civil actions,⁵⁷

⁵¹ *Rhine v. McKinney*, 53 Tex. 354; *House v. Rochester*, 15 Barb. 517; *In re Fisher*, 178 Pa. St. 325, 35 Atl. Rep. 922.

⁵² *Bass v. Ft. Wayne*, 121 Ind. 389, 23 N. E. Rep. 259, 1 Am. R. R. & Corp. Rep. 173; *St. Paul v. Nickl*, 42 Minn. 262, 44 N. W. Rep. 59; *Fulton v. Dover*, 8 Hous. 78, S. C. 6 Del. Ch. 1.

⁵³ *Grady v. Dunden*, 30 Or. 333; *Wright v. Baker*, 94 Ky. 343, 22 S. W. Rep. 335; *State v. Neville*, 110 Mo. 345, 19 S. W. Rep. 491; *Union Depot Co. v. Frederick*, 117 Mo. 138, 21 S. W. Rep. 1118, 1130, 26 S. W. Rep. 350; *Burke v. City of Kansas*, 118 Mo. 309, 24 S. W. Rep. 48; *Bell v. County Ct.*, 61 Mo. App. 173; *People v. Board of Assessors*, 59 Hun 407, 36 N. Y. St. 622, 13 N. Y. Supp. 404; *Flat Swamp etc. Co. v. McAllister*, 74 N. C. 159. But see *Nealy v. Brown*, 6 Ill. 10.

⁵⁴ *Bevier v. Dillingham*, 18

Wis. 529; *Union Canal Co. v. Woodside*, 11 Pa. St. 176; *Pack v. Chesapeake & Ohio R. R. Co.*, 5 W. Va. 118; *Union Mut. Life Ins. Co. v. Slee*, 123 Ill. 57; *Hathorn v. Kelley*, 86 Me. 487, 29 Atl. Rep. 1108; and see cases cited in next section, in which they are held to be common law proceedings.

⁵⁵ *Smith v. Taylor*, 34 Tex. 589; *Stewart v. Board of Police*, 25 Miss. 479; *New Orleans etc. R. R. Co. v. Hemphill*, 35 Miss. 17; *St. Paul, M. & M. R. R. Co. v. Minneapolis*, 35 Minn. 141; *Wilson v. Hatheway*, 42 Ia. 173; *Costello v. Burke*, 63 Ia. 361.

⁵⁶ *Hale v. Burwell*, 2 Patten & Heath, 608; *Colorado Midland Ry. Co. v. Jones*, 29 Fed. Rep. 193; *Banigan v. Worcester*, 30 Fed. Rep. 392; and see next section.

⁵⁷ *Howard v. Proprietors of Locks & Canals*, 12 Cush. 259.

or prohibiting arrest of judgment in all civil actions,⁵⁸ or relating to the competency of parties as witnesses in civil actions,⁵⁹ or permitting a defendant to tender a sum and obtain costs if this sum is not exceeded,⁶⁰ or relating to error in civil cases.⁶¹ In Indiana a proceeding to condemn land for a railroad was held to be a civil case, within the meaning of the constitution guaranteeing a trial by jury,⁶² but a proceeding to establish a drain was held not to be within the same provision.⁶³ In the same State in one case a drainage proceeding was held to be a special proceeding and not a civil action to which the code applied,⁶⁴ but in another case it was held to be so far a civil action that the provisions of the code as to a change of venue applied.⁶⁵ A condemnation case is a special proceeding, and not an action, within the New York code.⁶⁶ So in Wisconsin.⁶⁷ It is a special case or proceeding, and not a case at law, within the meaning of the constitution of California conferring appellate jurisdiction on the Supreme Court.⁶⁸ It is a remedial case within the meaning of the constitution of Minnesota, which gives the Supreme Court original jurisdiction in such remedial cases as may be prescribed by

⁵⁸ *Bryant v. Glidden*, 36 Me. 36.

⁵⁹ *Hosmer v. Warner*, 15 Gray 46.

⁶⁰ *Chicago etc. R. R. Co. v. Tounsden*, 45 Kan. 771, 26 Pac. Rep. 427.

⁶¹ *Atlantic etc. R. R. Co. v. Sullivant*, 5 Ohio St. 276.

⁶² *Lake Erie etc. R. R. Co. v. Heath*, 9 Ind. 558.

⁶³ *Anderson v. Caldwell*, 91 Ind. 451.

⁶⁴ *Dukes v. Working*, 93 Ind. 501; so also in *Colorado*, *Knoth v. Barclay*, 8 Col. 300.

⁶⁵ *Bass v. Elliott*, 105 Ind. 517; and see *Baltimore etc. R. R. Co. v. Ketring*, 122 Ind. 5, 23 N. E. Rep. 527.

⁶⁶ *King v. New York*, 36 N. Y.

182; *Matter of One Hundred and Sixty-third St.*, 61 Hun 365, 40 N. Y. St. 684, 16 N. Y. Supp. 120; *In re South Market St.*, 80 Hun 246, 29 N. Y. Supp. 1030.

⁶⁷ *Wisconsin Cent. R. R. Co. v. Cornell University*, 49 Wis. 162; *Cornish v. Milwaukee etc. R. R. Co.*, 60 Wis. 476; *Barker v. Milwaukee etc. R. R. Co.*, 60 Wis. 480; *Gill v. Milwaukee etc. R. R. Co.*, 76 Wis. 293, 45 N. W. Rep. 23; *Wisconsin Central R. R. Co. v. Kneale*, 79 Wis. 89, 48 N. W. Rep. 248.

⁶⁸ *Sacramento, Placer & Nevada R. R. Co. v. Harlan*, 24 Cal. 334; *Appeal of Houghton*, 42 Cal. 35; *Spencer Creek Water Co. v. Vallejo*, 48 Cal. 70.

law.⁶⁹ But it was held not a civil cause within the constitution of the same State relating to jurisdiction of justices of the peace.⁷⁰ In Massachusetts a complaint for flowage was held not to be within a statute which provided for the submission to arbitration of any demands which might be the subject of a suit in law or equity.⁷¹ In Maine such a complaint was held to be a personal action within the meaning of a statute as to service of process.⁷² In Michigan such proceedings have been held to be "civil cases" within the purview of an act allowing challenges in "civil cases,"⁷³ and also not "suits at law" within the statute as to change of venue.⁷⁴ In Iowa they have been held to be "civil cases" within the act regulating appeals in "civil cases."⁷⁵ A proceeding to lay out a highway was held to be a suit within a statute of Massachusetts authorizing selectmen to appear and defend suits brought against the town;⁷⁶ also within a statute of Vermont that no act should affect any suit begun or pending at the time of its passage.⁷⁷ A proceeding to condemn a railroad right of way was held to be an action relating to real estate and not an action "for the recovery of money only," within a statute of Indiana giving jurisdiction of appeals in the former cases to the Supreme Courts and in the latter to the Appellate Court.⁷⁸

§ 315. Jurisdiction of the Federal Courts: Removals.— In *Kohl v. United States*,⁷⁹ it was held that a proceeding by the United States to condemn land for a public building was a suit at common law within the meaning of the act as to the jurisdiction of the circuit courts of the United States.

⁶⁹ *Warren v. First Div. of St. Paul etc. R. R. Co.*, 18 Minn. 384.

⁷⁰ *State v. Rapp*, 39 Minn. 65, 38 N. W. Rep. 926.

⁷¹ *Henderson v. Adams*, 5 Cush. 610; and see *Valentine v. Boston*, 20 Pick. 201.

⁷² *Hull v. Decker*, 48 Me. 255.

⁷³ *Converse v. Grand Rapids & Indiana R. R. Co.*, 18 Mich. 459.

⁷⁴ *People v. Brighton*, 20 Mich. 57.

⁷⁵ *Scott v. Lasell*, 71 Ia. 180.

⁷⁶ *Hyde Park v. Wiggin*, 157 Mass. 94, 31 N. E. Rep. 693; and see *Colorado Eastern R. R. Co. v. Union Pac. R. R. Co.*, 94 Fed. Rep. 312.

⁷⁷ *Dunn v. Town of Pownal*, 65 Vt. 116, 26 Atl. Rep. 484.

⁷⁸ *Evansville etc. R. R. Co. v. Swift*, 128 Ind. 34, 27 N. E. Rep. 420.

⁷⁹ 91 U. S. 367.

Similar decisions have been made in some of the circuits.⁸⁰ It may also be regarded as settled that a condemnation proceeding pending in the State courts, whether by appeal from commissioners or otherwise, may be removed to the federal court of the proper district when a proper case is made out.⁸¹ From these cases it would seem to follow that such proceedings, when instituted in a court in the first instance, may be brought in the federal court, provided the requisite conditions as to citizenship and value exist.

§ 315a. **Proceedings by the United States.**—In a recent case in the United States Circuit Court of Appeals for the Sixth Circuit, it is said: "The right of eminent domain is a common-law right, inherent in every sovereignty unless denied by its fundamental law. It is a right which exists in the federal government, and may be exercised by it within the States, so far as necessary to the enjoyment of the powers conferred upon it by the constitution."⁸² Congress may create a special tribunal for condemnation purposes, adopt the tribunals of the States, or authorize purely common-law proceedings in the courts of the United States.

⁸⁰ *United States v. Block* 121, 3 Biss. 208; *United States v. Oregon Ry. & Nav. Co.*, 9 Sawyer 61. See *Missouri etc. R. R. Co. v. Texas & St. Louis Ry. Co.*, 4 Wood 360.

⁸¹ *Boom Co. v. Patterson*, 98 U. S. 403; *Affirming S. C.* 3 Dillon 465; *Searl v. School District No. 2*, 124 U. S. 197; *Northern Pacific Terminal Co. v. Lowenberg*, 9 Sawyer 348; *Warren v. Wisconsin Valley R. R. Co.*, 6 Biss. 425; *Hale v. Burwell*, 2 Patten & Heath 608; *Mineral Range Ry. Co. v. Detroit & Lake Superior Copper Co.*, 25 Fed. Rep. 515; *Reed v. Chicago, M. & St. P. Ry. Co.*, 25 Fed. Rep. 886; *Colorado Midland Ry. Co. v. Jones*, 29 Fed. Rep. 193; *Banigan v. Worcester*, 30 Fed. Rep.

392; *Simplot v. Worcester*, 5 McCrary 158; *Minneapolis etc. R. R. Co. v. Nestor*, 50 Fed. Rep. 1; *Mt. Washington R. R. Co. v. Coe*, 50 Fed. Rep. 637; *Seattle & M. R. R. Co. v. State*, 52 Fed. Rep. 594; *Hudson Riv. R. & T. Co. v. Day*, 54 Fed. Rep. 545; *Bellaire v. B. & O. R. R. Co.*, 146 U. S. 117, 13 S. C. Rep. 16; *Illinois Cent. R. R. Co. v. Chicago etc. R. R. Co.*, 122 Ill. 473; *New Orleans etc. R. R. Co. v. Rabasse*, 44 La. An. 178, 10 S. C. Rep. 708; *Trotier v. St. Louis etc. R. R. Co.*, 180 Ill. 471.

⁸² Citing *Cooley*, Const. Lim. 526; *Kohl v. United States*, 91 U. S. 367; *United States v. Jones*, 109 U. S. 513, 3 S. C. Rep. 346. But see *Fostoria v. Fox*, 60 Ohio St. 340.

In the absence of direction by congress, as to the tribunal or mode of procedure, an action at common law will lie in the name of the United States in the district in which the land to be condemned lies.⁸³ Federal statutes providing for the condemnation of property by the United States frequently provide that the proceedings shall conform as near as may be to the practice in like cases under the State laws. Some cases applying such statutes are referred to in the note.⁸⁴

§ 316. **Venue.**—In the absence of provisions to the contrary, proceedings should be instituted in the county or district in which the land taken or affected is situated.⁸⁵ When the works executed are in one county or jurisdiction and the property affected is in another, the proceedings should be in the county or jurisdiction where the affected property lies. Thus, water was diverted from a stream for the purpose of supplying a village with water, and thereby damaged a mill situated below. The point of diversion was in one judicial district and the mill in another. It was held the proceedings were properly had in the district in which the mill was situated.⁸⁶ A bill to enjoin a city from polluting a stream with sewage was held properly brought in the county where the nuisance was committed, though the injury was to a village situated in another county.⁸⁷ In

⁸³ *High Bridge Lumber Co. v. United States*, 69 Fed. Rep. 320, 16 C. C. A. 460. Also *Chappell v. United States*, 81 Fed. Rep. 764.

⁸⁴ *Luxton v. North River Bridge Co.*, 147 U. S. 337, 13 S. C. Rep. 356; *High Bridge Lumber Co. v. United States*, 69 Fed. Rep. 320, 16 C. C. A. 460; *United States v. Engeman*, 45 Fed. Rep. 546, 46 Fed. Rep. 176; *United States v. Tennant*, 93 Fed. Rep. 613.

⁸⁵ *Missouri Pacific Ry. Co. v. Carter*, 85 Mo. 448; *Dotson v. Sibert*, 4 Bibb 464; *Commission-*

ers v. Thompson, 18 Ala. 694; *Damrell v. Board of Supervisors*, 40 Cal. 154; *Commissioners v. Tarver*, 25 Ala. 480; *Wooster v. Great Falls Manf. Co.*, 39 Me. 246; *Casey v. Kilgore*, 14 Kan. 478; *Sutherland v. Holmes*, 78 Mo. 399; *Cox v. Little Rock & M. R. R. Co.*, 55 Ark. 454, 18 S. W. Rep. 630; *East Georgia & F. R. R. Co. v. King*, 91 Ga. 519, 17 S. E. Rep. 939.

⁸⁶ *Stamford Water Co. v. Stanley*, 39 Hun 424.

⁸⁷ *Horne v. Buffalo*, 49 Hun 76, 17 N. Y. St. 212, 1 N. Y. Supp. 801.

Indiana it is held that proceedings to establish a ditch which is partly in two counties may be had in either county.⁸⁸ Where the works producing the injury are in one State, and the property damaged in another, it is held the action may be brought in either State.⁸⁹ Where the property is in two or more counties the proceedings may be in either.⁹⁰

⁸⁸ Updegraff v. Palmer, 107 Ind. 181; Merinda v. Spurlin, 100 Ind. 380.

⁸⁹ Thayer v. Brooks, 17 Ohio 489; Little v. Chicago etc. R. R. Co. (Minn.), 67 N. W. Rep. 846.

⁹⁰ St. Louis etc. R. R. Co. v. Postal Tel. Co., 173 Ill. 508; Houston etc. R. R. Co. v. Postal Tel. Cable Co., 18 Tex. Civ. App. 502, 45 S. W. Rep. 179.

CHAPTER XIII.

THE PARTIES TO PROCEEDINGS AND THE VARIOUS ESTATES AND INTERESTS TO BE CONSIDERED.

§ 317. **General view.**—There is much discrepancy in practice as to who are necessary or proper parties to condemnation proceedings. Some of this may be accounted for by differences in constitutions and statutes; some of it is due to the different views taken by different courts of the same questions. We shall not attempt to reconcile conflicting decisions, but to point out what seems to us the correct law and practice in the matter and give the decisions pro and con. It has already been shown that the owner of property taken for public use is entitled to have the compensation ascertained by an impartial tribunal, and is entitled to a reasonable opportunity to be heard before such tribunal.¹ As a general rule, then, all persons who have any proprietary interest in the property taken, or proposed to be taken, should be made parties to the proceedings, and also all other persons, if any, who are required to be made parties by statute. By a proprietary interest is meant any interest which is recognized as property by the laws of the State, and will be more fully explained in the following sections.

§ 318. **Grantor and grantee.**—It is plain that the one who is entitled to receive the compensation is the one who should be made a party in proceedings to ascertain its amount. Where the proceedings have reference to a future acquisition of title by the condemning party, the owner at the time proceedings are instituted is the proper party defendant.² Where, under the constitution and laws as inter-

¹ Ante, § 313; post, chap. 15.

² *Elizabethtown & Paducah R. Co. v. Helm's Heirs*, 8 Bush 681; *Smith v. Chicago etc. R. R.*

Co., 67 Ill. 191; *Kiebler v. Holmes*, 58 Mo. App. 119; *Liverman v. Roanoke etc. R. R. Co.*, 114 N. C. 692, 19 S. E. Rep. 64;

preted by the courts, the title vests before compensation is made, by virtue of the location or other acts, such as the filing or recording of a survey or other instrument describing the property to be taken, the owner at the time the title vests is the proper party.³ In such case the title vests subject to the duty of making compensation and this obligation is in the nature of a vendor's lien upon the property.⁴ The right to compensation is a personal claim, and after it has once accrued does not pass by a deed of the land.⁵ Where land is occupied wrongfully or by mere consent of the owner, expressed or implied, no right or title to the land so occupied passes, and a subsequent deed by the owner vests the entire estate in the grantee, and such grantee, in the absence of any reservation, is entitled to the just compensation for the land so occupied.⁶ The grantor

McGee v. Brooklyn, 144 N. Y. 265.

³ Davidson v. Boston & Maine R. R. Co., 3 Cush. 91; Wood v. Comrs. of Bridges, 122 Mass. 394; Drury v. Midland R. R. Co., 127 Mass. 571; Tenbrooke v. Jahke, 77 Pa. St. 392; Inge v. Police Jury, 14 La. An. 117; Johnston v. Callery, 173 Pa. St. 129, 33 Atl. Rep. 1036; Smith v. Nashville etc. R. R. Co., 88 Tenn. 611, 13 S. W. Rep. 128.

⁴ Post, § 621.

⁵ Tenbrooke v. Jahke, 77 Pa. St. 392; Liverman v. Roanoke etc. R. R. Co., 114 N. C. 692, 19 S. E. Rep. 64.

⁶ Donald v. St. Louis etc. R. R. Co., 52 Ia. 411; Harrington v. St. Paul & Sioux City R. R. Co., 17 Minn. 215; Hetfield v. Central R. R. Co., 29 N. J. L. 571; reversing S. C., 29 N. J. L. 206; Galveston etc. R. R. Co. v. Pfeuffer, 56 Tex. 66 (compare with last case Central Ry. Co. v. Merkel, 32 Tex. 723); San An-

tonio, etc. R. R. Co. v. Ruby, 80 Tex. 172, 15 S. W. Rep. 1040; Liverman v. Roanoke and T. R. R. Co., 109 N. C. 52, 13 S. E. Rep. 734; S. C., 114 N. C. 692, 19 S. E. Rep. 64; Pittsburgh & W. R. R. Co. v. Perkins, 49 Ohio St. 326, 31 N. E. Rep. 350.

Contrary decisions are Pomeroy v. Chicago & Northwestern Ry. Co., 25 Wis. 641; Indiana etc. Ry. Co. v. Allen, 100 Ind. 409; McLendon v. Railroad Co., 54 Ga. 293; McFadden v. Johnson, 72 Pa. St. 335; Davis v. Titusville & Oil City Ry. Co., 114 Pa. St. 308; Sherlock v. Louisville etc. R. R. Co., 115 Ind. 22, 17 N. E. Rep. 171; Harshbarger v. Midland R. R. Co., 131 Ind. 177, 27 N. E. Rep. 352, 30 N. E. Rep. 1083; Roberts v. Northern Pac. R. R. Co., 158 U. S. 1, 15 S. C. Rep. 756; Essery v. Grand Trunk R. R. Co., 21 Ontario 224; Partridge v. Great Western R. R. Co., 8 U. C. C. P. 97. In Rand v. Townshend, 26 Vt. 670,

in such case who has not consented to the occupation of his land may recover for all damages sustained up to the time of the deed, to be estimated as in an action of trespass.⁷ These rules apply as well to flowage cases as to other forms of taking. If the owner of land flowed conveys, after the flowing and before the easement has been acquired, the right to compensation for the easement passes to the grantee.⁸ But the right to recover such damages as have been sustained up to the time of the conveyance remains with the grantor.⁹ The right to recover for damages which are consequential in their nature is in the owner at the time the injury is done.¹⁰ So under statutes giving damages for a change of grade in a street¹¹ or by reason of the

the statute provided that any person interested in lands through which a highway is laid out might petition for damages. This was held to mean the owner at the time the highway was laid. In *Lewis v. Wilmington etc. R. R. Co.*, 11 Rich. Law 91, the statute gave the right to apply to have compensation assessed to the owner at the time the railroad was finished, and the court held that a grantee of such owner could not apply. The Wisconsin case cited is virtually overruled by the case of *Sabine v. Johnson*, 35 Wis. 185; and the Pennsylvania case probably went on the theory that title passed to the railroad company upon its location upon and occupying the land which was before the conveyance in question. For other cases and a further discussion of the question involved, see ante, § 298; post, §§ 625a, 653c.

⁷ Ibid.

⁸ *Newell v. Smith*, 15 Wis. 101; *Sabine v. Johnson*, 35 Wis. 185;

overruling *Mead v. Hein*, 28 Wis. 533; *Pick v. Rubicon Hydraulic Co.*, 27 Wis. 433; *Sweaney v. United States*, 62 Wis. 396.

⁹ *Walker v. Oxford Woolen Manf. Co.*, 10 Met. 203; *Sabine v. Johnson*, 35 Wis. 185.

¹⁰ *Illinois Central R. R. Co. v. Allen*, 39 Ill. 205; *Toledo etc. Ry. Co. v. Morgan*, 72 Ill. 155; *Chicago & Alton R. R. Co. v. Maher*, 91 Ill. 312; *Chicago & Eastern Ill. R. R. Co. v. Loeb*, 118 Ill. 203; *Wabash, St. Louis & Pacific Ry. Co. v. McDougal*, 118 Ill. 229; *Chicago & Eastern Illinois R. R. Co. v. Loeb*, 8 Ill. App. 627; *Zimmerman v. Union Canal Co.*, 1 W. & S. 346; *Heilman v. Union Canal Co.*, 50 Pa. St. 268; *Chicago, etc. R. R. Co. v. Shepard*, 39 Neb. 523, 58 N. W. Rep. 189; *Chicago v. Altgeld*, 33 Ill. App. 23; *City of Seymour v. Cummins*, 119 Ind. 148, 21 N. E. Rep. 549; *Stein v. La Fayette*, 6 Ind. App. 414, 33 N. E. Rep. 912. For a more complete discussion of the subject, see post, §§ 625a, 653c.

¹¹ *Sargent v. Machias*, 65 Me.

discontinuance of a highway.¹² It is held that the person condemning is not affected by an unrecorded deed of which he has no notice, and that good title is acquired by making the owner of record a party.¹³ And, where the grantee in an unrecorded deed is present and makes no claim for damages, he cannot afterwards intervene for the purpose of quashing the proceedings.¹⁴ Where the conveyance reserves a water power, the right to recover for injury to that remains with the grantor.¹⁵ The city of Worcester had taken certain waters and lands and constructed valuable works and improvements for the purpose of supplying the city with water, but doubt existed as to the city's title. In 1871 an act was passed that the city should, within sixty days from the time the council should vote to take any lands, ponds or streams of water, file in the office of the registry of deeds an instrument describing the lands, etc., taken, and stating the purposes for which the same were taken, and that title thereto should vest in the city from the time of filing such instrument. The act also provided that any land-owner injured by the taking might petition for damages. It was held that under this act a corporation which acquired land in 1870 could recover for injuries thereto occasioned by a former taking in 1864,—that the city must take the act with its burdens.¹⁶ A deed reserved to the grantor "all the damages sustained in consequence of the railroad crossing the lands conveyed." At the time the deed was made a railroad was in possession of a strip across the land, but had no title. Afterwards the company paid the grantee and took a deed from him. The grantor sued the grantee for the money so received. It was held that he

591; *Dixon v. Baltimore etc. R. Co.*, 1 Mackey (D. C.) 78.

¹² *King v. New York*, 102 N. Y. 171.

¹³ *Cool v. Crommet*, 13 Me. 250. But possession under the deed would be notice, and, in such case, if the grantee is not made a party he will not be bound.

Owen v. St. Paul etc. R. R. Co., 12 Wash. 313, 41 Pac. Rep. 44; *Western Ave.*, 7 Pa. Co. Ct. 233.

¹⁴ *Brown v. County Comrs.*, 12 Met. 208.

¹⁵ *Galena etc. R. R. Co. v. Haslam*, 73 Ill. 494.

¹⁶ *Crompton Carpet Co. v. Worcester*, 123 Mass. 498.

could not recover, and that the only effect of the provision in the deed was to reserve the damages which had already accrued.¹⁷ Where lots were conveyed, excepting such portions as had been taken for widening B street and only a map had been filed showing the proposed widening but no proceedings had, it was held that as no land had been taken for B street, the exception was inoperative and that the right to compensation for widening B street was in the grantee.¹⁸ Where the statute gave the right to compensation to the owner at the time a railroad was finished over the land, it was held to control.¹⁹ Where land flowed by a mill dam was conveyed after the damages had been assessed, reserving the right to damages, it was held that a complaint for the reassessment of the damages must be in the name of the grantee.²⁰

§ 319. In case of executory contracts.—In case of an executory contract of sale it is generally held that the vendee is entitled to the compensation, on the ground that he is the equitable owner of the property, and that what is taken is subtracted from what he is to receive by his contract, while the vendor remains entitled to the whole amount of purchase money agreed to be paid.²¹ The better course, however, would seem to be to make both the vendor and vendee parties, and then the compensation can be paid to the one or the other, or apportioned between them as may seem just to the court. This has been held proper in Massa-

¹⁷ *Dennison v. Taylor*, 15 Abb. (N. C.) 439.

¹⁸ *Matter of Board of Street Opening*, 68 Hun 562, 22 So. Rep. 1021.

¹⁹ *Hendrick v. Carolina Central R. R. Co.*, 101 N. C. 617, 8 S. E. Rep. 236.

²⁰ *McClellan v. Fisher*, 16 Gray 185.

²¹ *St. Louis, Lawrence & Denver R. R. Co. v. Wilder*, 17 Kan. 239; *Kuhn v. Truman*, 15 Kan.

423, 426; *Hastings & Grand Island R. R. Co. v. Ingalls*, 15 Neb. 123; *Pinkerton v. Boston & Albany R. R. Co.*, 109 Mass. 527; *Fulton County v. Amorous*, 89 Ga. 614, 16 S. E. Rep. 201; *Fremont etc. R. R. Co. v. Setright*, 34 Neb. 253, 51 N. W. Rep. 833; *Stokes v. Parker*, 53 N. J. L. 183, 20 Atl. Rep. 1074; but see *Smith v. Ferris*, 6 Hun 553, which holds that the vendor only can give a valid release.

chusetts.²² One in possession of land under a verbal contract to purchase the same, and who has paid no money, has no interest in the land entitling him to compensation.²³ Land was taken for a railroad by the filing of location and bond on July 31, 1885. On July 11, 1885, plaintiff purchased the property at sheriff's sale and his title was perfected by a deed issued in 1887. It was held that his deed related back to the sale and that he was entitled to maintain a petition for compensation.²⁴

§ 320. **Heirs, devisees and personal representatives.**—The transfer of title which takes place at the death of a person, whether by will or by descent, corresponds to the transfer by deed. What has been said in regard to grantors and grantees will apply if, in place of grantors, we substitute personal representatives, and, in place of grantees, we substitute heirs and devisees. If the right to compensation had accrued to the decedent in his life time, then it is personally, and passes to his administrators or executors, and they are the proper parties plaintiff or defendant, as the case may be; otherwise the right is in the heirs or devisees, and they are the proper parties. In those States where it is held that title vests by virtue of certain acts done before compensation is made, and those acts are done before the death of the owner, then the right to compensation is complete in him, and, upon his death, vests in his personal representatives.²⁵ In other cases the heirs or devisees are the proper parties.²⁶ But, where an estate is insolvent, the

²² Proprietors of Locks & Canals v. Nashua & Lowell R. R. Co., 10 Cush. 385; Fremont etc. R. R. Co. v. Setright, 34 Neb. 253, 51 N. W. Rep. 833; Thomas v. St. Louis etc. R. R. Co., 164 Ill. 634, 46 N. E. Rep. 8.

²³ Clark v. Close, 43 Ia. 92; Louisville etc. R. R. Co. v. Day, 67 Miss. 227, 7 So. Rep. 349.

²⁴ Pennsylvania S. V. R. R. Co. v. Clary, 125 Pa. St. 442, 17 Atl. Rep. 468.

²⁵ Church v. Grand Rapids etc. R. R. Co., 70 Ind. 161; Neal v. Knox & Lincoln R. R. Co., 61 Me. 298; Moore v. Boston, 8 Cush. 274; Whitman v. Boston & Maine R. R. Co., 3 Allen 133; Howcott v. Warren, 7 Ired. L. 20; Howcott v. Coffield, 7 Ired. L. 24; St. Albans v. Seymour, 41 Vt. 579.

²⁶ Pittsburgh etc. R. R. Co. v. Swinney, 97 Ind. 586; McLaughlin v. Dorsey, 1 Harris & Mc-

administrator is entitled to the compensation.²⁷ So where legatees were interested it was held that the award should be paid to the executor, to be distributed in the Probate Court.²⁸ The right to consequential damages vests in the owner at the time they are inflicted and, in case of his death, pass to his personal representatives.²⁹ Heirs should be made parties by name and not under the collective title of heirs.³⁰ In like manner personal representatives should be made parties by name instead of using the description of the "Estate of ———." ³¹ But "Estate of Thomas Carr and Clarka Carr, of which Joseph Booth is Executor," was held sufficient in a petition.³²

§ 321. **Trust estates.**—In case of trust estates the trustee is the proper party, and not the cestui que trust.³³ The former represents the entire estate and is entitled to receive the compensation. But, where one of two partners held property in trust for the firm, it was held proper for both to join in a petition for damages.³⁴ In one case a convey-

Henry 224; *Boynton v. Peterborough & Shirley R. R. Co.*, 4 Cush. 467; *Boonville v. Ormrod's Admr.*, 26 Mo. 193; *Shepard v. Manhattan R. R. Co.*, 117 N. Y. 442, 23 N. E. Rep. 30; *Lawrence R. R. Co. v. O'Harra*, 50 Ohio St. 667, 36 N. E. Rep. 14; *Pittsburgh etc. R. R. Co. v. Oliver*, 131 Pa. St. 408, 19 Atl. Rep. 47; *Indianapolis etc. R. R. Co. v. Price*, 153 Ind. 31.

²⁷ *Goodwin v. Milton*, 25 N. H. 458; see *Boynton v. Peterborough & Shirley R. R. Co.*, 4 Cush. 467.

²⁸ *Detroit v. Schilling*, 93 Mich. 429, 53 N. W. Rep. 565.

²⁹ *City of Seymour v. Cummins*, 119 Ind. 148, 21 N. E. Rep. 549; *Mortimer v. Manhattan R. R. Co.*, 129 N. Y. 81, 29 N. E. Rep. 5; post, §§ 625a, 653c.

³⁰ *Hughes v. Sellers*, 34 Ind. 337.

³¹ Post, § 349.

³² *Carr v. State*, 103 Ind. 548.

³³ *Hidden v. Davisson*, 51 Cal. 138; *Davis v. Charles River Branch R. R. Co.*, 11 Cush. 506; *Hawkins v. County Comrs.*, 2 Allen 254; *State v. Orange*, 32 N. J. L. 49; *State v. Easton & Amboy R. R. Co.*, 36 N. J. L. 181; *People v. Robinson*, 29 Barb. 77; *Wrightsville & T. R. R. Co. v. Holmes*, 85 Ga. 668, 11 S. E. Rep. 658; *Small v. Georgia etc. R. R. Co.*, 87 Ga. 602, 13 S. E. Rep. 692; *Roberts v. New York El. R. R. Co.*, 12 Misc. 345, 33 N. Y. Supp. 685; compare *McIntyre v. Easton & Amboy R. R. Co.*, 26 N. J. Eq. 425.

³⁴ *Reed v. Hanover Branch R. R. Co.*, 105 Mass. 303.

ance of a right of way by the cestui que trust was held to give good title.³⁵

§ 322. **Husband and wife.**—Where the fee is in the husband, his interest may undoubtedly be divested by making him a party without the wife. If the fee is in the wife, it is certain that she must be a party in order to divest her title; notice to the husband alone would not affect the wife's interest.³⁶ Whether the wife's interest can be divested without joining the husband would depend upon the local law. Such joinder has been held to be proper,³⁷ and in some States is expressly required by statute.³⁸ But, where land is vested in the wife to her sole and separate use as if single, it is sufficient to make the wife alone a party.³⁹ It has also been held that the husband may sue alone for consequential injuries to his real estate caused by a change of grade.⁴⁰ It has been held that a homestead interest may be divested by making the husband only a party, although he cannot dispose of the interest by contract without the wife's consent.⁴¹ If husband and wife are joint tenants or tenants in common, both are necessary parties.⁴² The safest

³⁵ *Tutt v. Port Royal & A. R. R. Co.*, 28 S. C. 388, 5 S. E. Rep. 831.

³⁶ *Whitcher v. Benton*, 48 N. H. 157; *Watson v. Sewickley*, 91 Pa. St. 330; *Bixby v. Goss*, 54 Mich. 551; *Butis v. Geddes*, 54 Mich. 608; *Covey v. Probate Judge*, 56 Mich. 524. Where the title was in the wife and the proceedings against the husband and the award in his name, it was held the wife was entitled to the award. *Mitchell v. White Plains*, 62 Hun 231, 41 N. Y. St. 787, 16 N. Y. Supp. 828.

³⁷ *East Tennessee etc. R. R. Co. v. Love*, 3 Head 63; and see *St. Louis v. Lanigan*, 97 Mo. 175, 10 S. W. Rep. 475.

³⁸ *Colorado Central R. R. Co. v. Allen*, 13 Col. 229, 22 Pac. Rep. 605.

³⁹ *State v. Hulick*, 33 N. J. L. 308.

⁴⁰ *Hutchinson v. Parkersburg*, 25 W. Va. 226.

⁴¹ *Cowan v. Southern R. R. Co.*, 118 Ala. 354, 23 So. Rep. 754; *County v. Lattemer*, 31 Minn. 239, 243; *Randall v. Texas Central Ry. Co.*, 63 Tex. 586. Both were held proper parties in *Chicago etc. R. R. Co. v. Anderson*, 42 Kan. 297, 21 Pac. Rep. 1059. The husband may dispose of the compensation without the wife's consent, though he cannot of the homestead itself. *County v. Lattemer*, 31 Minn. 239.

⁴² *Grosser v. Rochester*, 148 N.

and best course in all cases would seem to be to join both husband and wife, for then the interests of both can be divested, both can have an opportunity to be heard, and the compensation can be apportioned between them as may be right and just.⁴³

§ 323. **Dower.**—Dower may be considered with reference to its three stages, inchoate dower, dower after the death of the husband and before assignment, and dower after assignment. After assignment the widow is seized of a freehold estate in the premises assigned to her and stands upon the same footing as an owner in fee. She must be a party to proceedings and have an opportunity to be heard upon the question of compensation.⁴⁴ After the death of the husband, and before assignment, dower is a very peculiar interest. There is no seizin and no right of possession, but all the authorities agree that there is a vested interest which is beyond the control of the legislature.⁴⁵ It is a vested interest and a proprietary interest, and the owner should therefore be made a party and have notice.⁴⁶ In regard to inchoate dower, the authorities are in conflict, both

Y. 235, 42 N. E. Rep. 672; affirming S. C. 60 Hun 379, 38 N. Y. St. 572, 15 N. Y. Supp. 62.

⁴³ *Dwiggins v. Denver*, 24 Ohio St. 629; *East Tennessee etc. R. R. Co. v. Love*, 3 Head 63; *Parke v. Seattle*, 8 Wash. 78, 35 Pac. Rep. 594. And see next section.

⁴⁴ *Matter of William and Anthony Streets*, 19 Wend. 678.

⁴⁵ *Scribner on Dower*, chap. 2, sec. 3; 1 Wash. Real Prop. b. 1 c. vii. sec. vi, 2.

⁴⁶ In *Todernier v. Aspinwall*, 43 Ill. 401, a contrary view is implied, so far as can be made out from the report. A bill was filed to enjoin the opening of a road through a tract of land belonging to the estate of Frederick Kohlermeier, deceased. Pro-

ceedings had been had to establish the way, and an award was made to the "unknown heirs" of Kohlermeier. His widow had an unassigned right of dower in the land. No award was made to her, and no notice taken of her interest. The court said it was unnecessary to do so. It is said that her dower may be assigned in a part of the tract unaffected by the lay-out, or, if so assigned as to be affected by it, the fact that the heirs have received the compensation may be taken into account. It is plain that this reasoning would not apply to a case where the entire tract was taken, which shows that it is altogether unsound.

as to the nature of the interest and the power of the legislature over it. The weight of authority seems to be that it is competent for the legislature to modify or abolish it at pleasure;⁴⁷ although there is also a strong dissent from this view.⁴⁸ Scribner, in his work on Dower, after reviewing the cases, concludes as follows: "It has been already shown that inchoate dower is a valuable right, and regarded as such by the courts and the law. When the marriage takes place, it attaches at once upon all the lands of which the husband is then seized. It attaches also upon all the lands subsequently acquired by him, the instant that he is clothed with the title. By the common law, when lands are conveyed to the husband, the contingent interest of the wife is held to be impliedly embraced in the grant; and a provision that she shall not have dower is considered as repugnant thereto, and therefore void. In respect to the inchoate interest thus invested in the wife by virtue of the conveyance to the husband, she has been regarded as a purchaser, and as such entitled to the benefit of statutory privileges extended to alien purchasers. The right, when once fixed, is paramount to all subsequent titles derived through the husband. In several of the States it is

⁴⁷ *Barbour v. Barbour*, 46 Me. 9; *Weaver v. Gregg*, 60 Ohio St. 547; *Gwynne v. Cincinnati*, 3 Ohio 24; *Noel v. Ewing*, 9 Ind. 37; *Strong v. Clem*, 12 Ind. 37; *Wiseman v. Beckwith*, 90 Ind. 185; *Lucas v. Sawyer*, 17 Ia. 517; *Melizet's Appeal*, 17 Pa. St. 449; *Moore v. New York*, 4 Sandf. 456; S. C., 8 N. Y. 110; *Matter of Central Park Extension*, 16 Abb. Pr. 56, 68; *Morrison v. Rice*, 35 Minn. 436; *Hensen v. Moore*, 104 Ill. 403; *Venable v. Wabash Western R. R. Co.*, 112 Mo. 103, 20 S. W. Rep. 493, 7 Am. R. R. & Corp. Rep., 190; *Chouteau v. Missouri Pac. R. R. Co.*, 122 Mo. 375, 22 S. W. Rep.

458, 30 S. W. Rep. 299; *Baker v. Atchison etc. R. R. Co.*, 122 Mo. 396, 30 S. W. Rep. 301; *Cooley Const. Lim.* (6th ed.) 440-442.

⁴⁸ *Royston v. Royston*, 21 Ga. 161; *Johnston v. Vandyke*, 6 McLean 422; *Wheeler v. Keitland*, 27 N. J. Eq. 534; *Morean v. Ditchemendy*, 18 Mo. 522; *Williams v. Courtney*, 77 Mo. 587; *Kelly v. Harrison*, 2 Johns. Cas. 29; *Jackson v. Edwards*, 22 Wend. 498, 513; S. C., *Ibid.* 519; *Lawrence v. Miller*, 1 Sandf. 516; S. C., 2 N. Y. 245; *Simar v. Canaday*, 53 N. Y. 298; *In re New York & B. Bridge*, 75 Hun 558, 27 N. Y. Supp. 597; S. C., 89 Hun 219, 34 N. Y. Supp. 1002.

protected upon sales made in legal proceedings in the lifetime of the husband. An agreement to release it forms a good consideration for an undertaking to pay money or convey lands to the wife. It constitutes an incumbrance for which the vendee may insist upon a proportionate deduction from the purchase money of the estate. Thus recognized and established as a valuable property interest, it would seem reasonable that it should receive the same protection against legislative encroachments as is extended to other rights of property. Legislation abolishing dower, or modifying it to the prejudice of the wife, should, it is believed, be held to operate prospectively only.⁴⁹ In New York it has been expressly decided that the wife's inchoate right of dower was extinguished by a condemnation for public use, although she was not a party to the proceedings and the entire compensation was paid to the husband.⁵⁰ The same doctrine has been announced in Ohio in a case where property was dedicated to public use by the husband.⁵¹ So also in Missouri.⁵² In New Jersey it has been held by the Court of Errors and Appeals that, while the wife's interest

⁴⁹ Scribner on Dower, c. 1, § 318.

⁵⁰ *Moore v. New York*, 4 Sandf. 456; S. C., 8 N. Y. 110. This was a proceeding for assignment of dower. The court, by Gardiner, J., say: "In the case under consideration the land was taken against the consent of the husband, by an act of sovereignty, for the public benefit. The only person owning and representing the fee, was compensated by being paid its full value. The wife had no interest in the land, and the possibility which she did possess was incapable of being estimated with any degree of accuracy. Under these circumstances the legislature had the power, which I think they have rightfully ex-

ercised, to direct that the value of the entire fee should be paid to the husband of the appellant; and that the corporation by such payment, in pursuance of the statute, has acquired an indefeasible title to the premises. The judgment of the superior court should be affirmed." And so under Canadian statutes: *Chewett v. Great Western R. R. Co.*, 26 U. C. C. P. 118.

⁵¹ *Gwynne v. Cincinnati*, 3 Ohio 24. In *Weaver v. Gregg*, 6 Ohio St. 547, the case of *Moore v. New York*, 8 N. Y. 110, is fully approved.

⁵² *Venable v. Wabash Western R. R. Co.*, 112 Mo. 103, 20 S. W. Rep. 493, 7 Am. R. R. & Corp. Rep. 190; *Chouteau v. Missouri Pac. R. R. Co.*, 122 Mo. 375, 22 S.

in the land may be extinguished by condemnation proceedings to which the husband alone is a party, yet her interest is in equity transferred to the damages awarded, and that she is entitled to an equitable proportion thereof.⁵³

In the New Jersey case just cited it is said that "while not technically an estate, it cannot, at this day, be denied that inchoate dower is a valuable interest in land."⁵⁴ In a recent case in the Court of Appeals of New York, it is said that "it must be considered as settled in this State, notwithstanding *Moore v. The Mayor*, and some dicta in other cases, that, as between a wife and any other than the State, or its delegates or agents exercising the right of eminent domain, an inchoate right of dower in land is a subsisting and valuable interest which will be protected and preserved to her, and that she has a right of action to that end." It was held that she could maintain an action for damages against one who had fraudulently procured a conveyance of real estate from herself and husband.⁵⁵ It is a

W. Rep. 458, 30 S. W. Rep. 299; *Baker v. Atchison etc. R. R. Co.*, 122 Mo. 396, 30 S. W. Rep. 301.

⁵³ *Wheeler v. Kirtland*, 27 N. J. Eq. 534. So in recent New York cases: *In re New York & B. Bridge*, 75 Hun 558, 27 N. Y. St. 597; S. C., 89 Hun 219, 34 N. Y. Supp. 1002.

⁵⁴ *Wheeler v. Kirtland*, 27 N. J. Eq. at p. 535.

⁵⁵ *Simar v. Canaday*, 53 N. Y. 298, 303. In deciding the case the court say: "But, notwithstanding, there are authorities that the inchoate right of dower is a valuable right, and will be guarded and preserved to the wife by the judgments of the court. There are cases in which it has been held that the release of an inchoate right of dower is a good consideration in equity for an agreement by the husband

with the wife, and she has been assisted in enforcing the same (*Garlick v. Strong*, 3 Paige 440). A wife who executes a mortgage jointly with her husband, is nevertheless entitled to dower in the equity of redemption of which her husband is seized, notwithstanding the mortgage, which right is not affected in equity unless she is made a party to the foreclosure. If omitted, she can come in at any time and redeem, notwithstanding a decree and sale in the foreclosure suit. *Mills v. Van Voorhies*, 20 N. Y. 412, where it was held that the existence of an inchoate right of dower in the equity of redemption of mortgaged premises, was a good objection to title by a vendee in an action against him for specific performance of his contract. In that case this strong

well-recognized maxim that the constitutional provisions for the protection of private property should receive a liberal construction in favor of the individual, and it may be doubted whether an interest which has been recognized in so many ways by the courts as valuable should be considered beyond the pale of their protection. But, however this may be, it seems clear that an intent to interfere with the right of dower or divest it without compensation should not be imputed to the legislature by implication. The intent ought to be found in language that is clear and unmistakable. Now, all eminent domain statutes require compensation to be made to the owners or persons interested in the property taken. This means the owners of any valuable interest therein,⁵⁶ and may well be held to include the owner of an inchoate right of dower. In *Moore v. New York*,⁵⁷ already cited, the statute under which proceedings were had, required compensation to be made "to the respective owners, lessees, parties and persons respectively entitled unto or *interested* in the lands, tenements and hereditaments proposed to be appropriated to the use of the city."

expression is found: The inchoate rights of the wife are as much entitled to protection as the vested rights of the widow. In *Matthews v. Duryee*, 4 Keys 525, the inchoate right of a dower of a wife was held to attach to surplus moneys arising upon a sale on foreclosure of mortgage; a judgment in her favor for the value of her dower in that fund was affirmed. There was strong dissent in that case, and *Moore v. Mayor etc.* (supra) was cited by the minority of the court with approval, though the dissent is not placed directly upon the ground that an inchoate right of dower is not an interest which will be protected and enforced. See also *Jackson v. Edwards* (7 Paige 386; S. C., 22

Wend. 498). And in the Supreme Court are cases which have been acquiesced in, and cited with approval in this court. (*Denton v. Nanny*, 8 Barb. 618; *Vartie v. Underwood*, 18 id. 561.) We think that it must be considered as settled in this State, notwithstanding *Moore v. The Mayor*, and some dicta in other cases, that, as between a wife and any other than the State or its delegates or agents exercising the right of eminent domain, an inchoate right of dower in lands is a subsisting and valuable interest which will be protected and preserved to her, and that she has a right of action to that end."

⁵⁶ Post, § 335.

⁵⁷ 8 N. Y. 110.

No general language could be more comprehensive than this, and it seems like doing violence to the words of the statute to hold that it expresses an intent on the part of the legislature to deprive a wife of her inchoate right of dower in the property taken.⁵⁸

§ 324. **Mortgagees.**—On the question whether mortgagees are necessary parties to condemnation proceedings, the authorities are not only conflicting but very unsatisfactory.⁵⁹ The cases go almost entirely upon the language of

⁵⁸ See *Lake Erie & W. R. R. Co. v. Priest*, 131 Ind. 413, 31 N. E. Rep. 77; *In re New York & B. Bridge*, 75 Hun 558, 27 N. Y. Supp. 597; *S. C.*, 89 Hun 219, 34 N. Y. Supp. 1002.

⁵⁹ Cases holding or favoring the view that they are necessary parties: *South Park Comrs. v. Todd*, 112 Ill. 379; *Deisner v. Simpson*, 72 Ind. 435; *Severin v. Cole*, 38 Ia. 463; *Wilson v. European & North Am. Ry. Co.*, 67 Me. 358; *Siman v. Rhodes*, 24 Minn. 25; *Stewart v. Raymond R. R. Co.*, 7 S. & M. 568; *Michigan Air Line Ry. Co. v. Barnes*, 40 Mich. 383; *North Hudson County R. R. Co. v. Booraem*, 28 N. J. Eq. 450; *S. C.* below, *Booraem v. Wood*, 27 N. J. Eq. 371; *Platt v. Bright*, 29 N. J. Eq. 128; *Warwick Institute for Savings v. Providence*, 12 R. I. 144; *Hagar v. Brainard*, 44 Vt. 294; *Wade v. Hennessy*, 55 Vt. 207; *Adams v. St. Johnsbury & Lake Champlain R. R. Co.*, 57 Vt. 240; *Kennedy v. Milwaukee & St. Paul Ry. Co.*, 22 Wis. 581; *Aspinwall v. Chicago & Northwestern Ry. Co.*, 41 Wis. 474; *Wooster v. Sugar River Valley R. R. Co.*, 57 Wis. 311; *Martin v. London, Chatham etc. Ry. Co.*, 1 L.

R. Eq. Cas. 145; 1 *Jones on Mortgs.*, sec. 681; *Calumet Riv. R. R. Co. v. Brown*, 136 Ill. 322, 26 N. E. Rep. 501, 4 *Am. R. R. & Corp. Rep.* 152; *S. C.*, 37 Ill. App. 113; *Sherwood v. Lafayette*, 109 Ind. 411; *Sawyer v. Landers*, 56 Ia. 422; *Jackson v. Centerville etc. R. R. Co.*, 64 Ia. 292; *Watson v. Grand Rapids & I. R. R. Co.*, 91 Mich. 198, 51 N. W. Rep. 990; *Bennett v. Minneapolis etc. R. R. Co.*, 42 Minn. 245, 44 N. W. Rep. 10; *Platt v. Bright*, 31 N. J. Eq. 81; *S. C.* affirmed, 32 N. J. Eq. 362; *Grady v. Case*, 51 N. J. Eq. 426, 26 *Atl. Rep.* 805; *In re Toronto Belt Line R. R. Co.*, 26 Ontario 413; *Dunlop v. York*, 16 Grant 216; *Briggs v. Chicago etc. R. R. Co.*, 56 Kan. 526, 43 *Pac. Rep.* 1131; *Matter of Oneida St.*, 22 *Misc. N. Y.* 235.

Cases holding or favoring the opposite view: *Whiting v. New Haven*, 45 Conn. 303; *Cool v. Crommet*, 13 Me. 250; *Breed v. Eastern R. R. Co.*, 5 Gray 470; *Paine v. Woods*, 108 Mass. 160; *Vaugh v. Wetherell*, 116 Mass. 138; *Farnsworth v. Boston*, 126 Mass. 1; *Read v. Cambridge*, 126 Mass. 427; *Bancroft v. Cambridge*, 126 Mass. 438; *Welch v. Boston*, 126 Mass. 442; *Grand*

the statutes, as though it was a matter entirely within the control of the legislature. It seems to us that a mortgagee stands upon higher ground, that his interest in the land and the rights secured to him by his mortgage are property which cannot be taken from him without notice and an opportunity to be heard. Where a right of way is taken through a farm it may be a matter of slight consequence. But, when an entire tract is taken which is mortgaged for all it is worth, and the compensation handed over to an insolvent mortgagor, it becomes a very serious matter.⁶⁰ This looks very much like depriving a man of his property without compensation and without due process of law. All

Rapids v. Grand Rapids & Indiana R. R. Co., 58 Mich. 641; *Astor v. Hoyt*, 5 Wend. 603; *Hooker v. Martin*, 10 Hun 302; *Home Ins. Co. v. Smith*, 28 Hun 296; *Bank of Auburn v. Roberts*, 44 N. Y. 192; 11 N. H. 293; *President etc. of Schuylkill Navigation Co. v. Thoburn*, 7 S. & R. 411; *Keystone Bridge Co. v. Summers*, 13 W. Va. 476; *Goodrich v. County Comrs.*, 47 Kan. 355, 27 Pac. Rep. 1006; *Rand v. Ft. Scott R. R. Co.*, 50 Kan. 114, 31 Pac. Rep. 683; *Chicago etc. R. R. Co. v. Nashua Savings Bank*, 52 Kan. 467, 35 Pac. Rep. 18; *Chicago etc. R. R. Co. v. Sheldon*, 53 Kan. 169, 35 Pac. Rep. 1105; *Wichita & W. R. R. Co. v. Thayer*, 54 Kan. 259, 38 Pac. Rep. 266; *Union Institution for Savings v. Boston*, 129 Mass. 82; *Armstrong v. Moore*, 1 Kan. App. 450, 40 Pac. Rep. 834; *Chicago etc. R. R. Co. v. Need*, 2 Kan. App. 492, 43 Pac. Rep. 997; *Hill v. Wine*, 35 N. Y. App. Div. 520; *Harkins v. Asheville*, 123 N. C. 636, 31 S. E. Rep. 853.

The following cases also bear upon the question: *Schermerhorn v. Peck*, 43 Kan. 667, 23 Pac. Rep. 1043; *Camden & R. Water Co. v. Ingraham*, 85 Me. 179, 27 Atl. Rep. 94; *Atwood v. Moosehead Paper & Pulp Co.*, 85 Me. 379, 27 Atl. Rep. 259; *Barnstable Savings Bank v. Boston*, 127 Mass. 254; *Trogden v. Winona & St. P. R. R. Co.*, 22 Minn. 198; *Boutelle v. Minneapolis*, 59 Minn. 493, 61 N. W. Rep. 554; *Thompson v. Chicago etc. R. R. Co.*, 110 Mo. 147, 19 S. W. Rep. 77; *Snyder v. Chicago etc. R. R. Co.*, 112 Mo. 527, 20 S. W. Rep. 885; *Utter v. Richmond*, 112 N. Y. 610, 20 N. E. Rep. 554; *Devlin v. New York*, 131 N. Y. 123, 30 N. E. Rep. 45; *Magee v. Brooklyn*, 144 N. Y. 265, 39 N. E. Rep. 87; *Keller's Appeal*, 2 Walker's Pa. Supm. 32; *Brenner's Appeal*, 2 Walker's Pa. Supm. 92.

⁶⁰ *Severin v. Cole*, 38 Ia. 463; *Armstrong v. Moore*, 1 Kan. App. 450, 40 Pac. Rep. 834; *In re Toronto Belt Line R. R. Co.*, 16 Ontario, 413.

the courts agree that a mortgagee in possession must have notice.⁶¹ Those courts which hold that the mortgage is divested without making the mortgagee a party also hold that the mortgage lien in equity follows the fund which is a substitute for the land and that the mortgagee may have it applied upon the mortgage debt,⁶² even though the debt is not due. And in States where it is held that the mortgagee is a necessary party in order to divest his interest, it has been held that he may acquiesce in the award to the mortgagor and have it applied on his debt;⁶³ also that, where proceedings have been had to which he is not a party, his interest may be divested by a subsequent condemnation,⁶⁴ and that the damages will be assessed as of the time of entry.⁶⁵ Where the mortgagee's name as a party was omitted by mistake, and the compensation had been deposited with the county treasurer, it was held that the condemnor could maintain a bill to have the money applied on the mortgage debt.⁶⁶ A statute which requires all persons having an interest in lands to be made parties, has been held to include mortgagees even in States which hold that mortgagees are not entitled to notice as owners.⁶⁷

⁶¹ *Cool v. Crommet*, 13 Me. 250; *Parish v. Gilmanton*, 11 N. H. 293; *Parker etc.*, 36 N. H. 84; *Ballard v. Ballard Vale Co.*, 5 Gray, 468.

⁶² *Farnsworth v. Boston*, 126 Mass. 1; *Danforth v. Suydam*, 4 N. Y. 66; *Bank of Auburn v. Roberts*, 44 N. Y. 192; *Hooker v. Martin*, 10 Hun 302; *Astor v. Hoyt*, 5 Wend. 603; *Platt v. Bright*, 29 N. J. Eq. 128; *Chicago etc. R. R. Co. v. Sheldon*, 53 Kan. 169, 35 Pac. Rep. 1105; *Rand v. Ft. Scott etc. R. R. Co.*, 50 Kan. 114, 31 Pac. Rep. 683; *Boutelle v. Minneapolis*, 59 Minn. 493, 61 N. W. Rep. 554; *Union Institution for Savings v. Boston*, 129 Mass. 82; *Thompson v. Chicago etc. R.*

R. Co., 110 Mo. 147, 19 S. W. Rep. 77; *Utter v. Richmond*, 112 N. Y. 610, 20 N. E. Rep. 554.

⁶³ *Sawyer v. Landers*, 56 Ia., 422; *Platt v. Bright*, 29 N. J. Eq. 128 31 N. J. Eq. 81, 32 N. J. Eq. 32.

⁶⁴ *Kennedy v. Milwaukee & St. Paul Ry. Co.*, 22 Wis. 581; *Aspinwall v. Chicago & Northwestern Ry. Co.*, 41 Wis. 474.

⁶⁵ *Ibid.*

⁶⁶ *Calumet Riv. R. R. Co. v. Brown*, 136 Ill. 322, 26 N. E. Rep. 501, 4 Am. R. R. & Corp. Rep. 152; *S. C. 37 Ill. App. 113.*

⁶⁷ *Wilson v. European etc. Ry. Co.*, 67 Me. 358; *Michigan Air Line Ry. Co. v. Barnes*, 40 Mich. 383; *In re Toronto Belt Line R.*

§ 325. **Judgment creditors and other lienholders.**—In regard to judgment liens the authorities are uniformly to the effect that they may be divested without making the judgment creditors parties.⁶⁸ The grounds upon which these decisions are based are well stated in *Watson v. New York Central R. R. Co.*, which is the leading case upon the question: "A judgment creditor of an owner has no estate or proprietary interest in the land. He stands wholly upon the law, which gives him a remedy for the collection of his debt by a sale of the land under execution, in case sufficient personal property of the debtor should not be found. This remedy is not secured by contract, but is purely statutory, and in aid of it acts have been passed, from time to time, authorizing a sale of the land which the debtor owned at the time of the recovery or docketing of the judgment, or at any subsequent period, and making the judgment a lien upon the land. The duration of this lien and the mode of its enforcement and discharge are subjects which appertain to the laws for collection of debts; and the rules upon those subjects have been changed, from time to time, according to the will of the legislature. The power of the legislature to regulate those matters cannot be doubted. Acts have been passed shortening and lengthening the duration of the liens of existing judgments, and even providing for their extinguishment without any proceeding to which the judgment creditor was a party." * * * * "It is clearly within the power of the legislature to abolish the lien of all judgments at any time before rights have become vested or estates acquired under them, and, placing real estate on the same footing as personal property, to confine the remedies of the

R. Co., 26 Ontario, 413. Under the English Land Clauses Act special provision for compensation to mortgages, and they may enjoin possession until the statute is complied with, 8 and 9 Vict. C. 18, §§ 85, 114; *Ranken*

v. East & West India Docks etc. Co. 12 Beav. 298.

⁶⁸ *Gimbel v. Stolte*, 59 Ind. 446; *Watson v. New York Central R. R. Co.*, 47 N. Y. 157, 162; S. C., 1, *Sheldon*, 159; *Bean v. Kulp*, 7 Phila. 650; *Philadelphia v. Dyer*, 41 Pa. St. 463.

creditor to the property held by the debtor at the time of issuing the execution.

“This would be no greater exercise of power than the abolition of the right of distress for rent, or of the lien of the landlord on property taken in execution, or of the right of imprisoning the debtor. Yet the validity of such laws has been fully recognized even where they affected existing claims or judgments. They do not take away property, or affect the obligation of contracts, but simply affect legal remedies. There can, therefore, be no doubt of the validity of a provision causing the lien of a judgment, not ripened into a title by a sale, to be superseded by the taking of the land under proceedings in exercise of the right of eminent domain, on payment of compensation to the owner of the land.

“We think that the act of 1836 had that effect. It is claimed on the part of the appellant, that if the judgment creditor is not an owner, the act makes no provision for divesting his interest; and therefore the effect of the order of condemnation is to vest in the company the right to the land, subject to the lien of the judgment, in the same manner as if the company had taken by deed from the owners. But such a construction cannot be admitted.

“The object of the act was to delegate to the company the right of eminent domain, to the extent necessary to enable it effectually to secure its roadway, etc., in case it should fail to obtain it by contract with the owners. It provides for the appraisement, on notice to the owner or owners, of the value of the land taken, and of any further damages which the owners may sustain by the construction of the road, injury to buildings, etc. The whole amount of this appraisement is directed to be paid to the owners. There is no provision for assessing the value of the interest of the owners, subject to the lien of judgments, or for retaining any part of the value of the land as indemnity against such judgments. The whole value must be paid to the owners, or deposited in bank, and the owners are left to pay their own debts.

“The act then states what right the company shall obtain by virtue of such payment to the owners, and the order

made thereupon. On the completion of the proceedings, the company is declared to be possessed of the land during its corporate existence, with the right to use the same for the purposes of the road.

"This declaration excludes the implication, that, after the owners have been compensated, the right of any other person to interfere with the possession or use of the land is reserved, or that, in order to retain such use the company is bound to satisfy liens of judgment creditors, after having been compelled to pay the whole value of the land to the owner."

In regard to other statutory liens we find no adjudications, but presume the same rule would be applied.⁶⁹

In regard to the correctness of these decisions reference is made to a subsequent section of this chapter.⁷⁰

§ 326. **Life tenants, lessees, and reversioners.**—That life tenants,⁷¹ lessees,⁷² and reversioners⁷³ are entitled to com-

⁶⁹ See *Alexander v. Platts-mouth*, 30 Neb. 117, 46 N. W. Rep. 213; *York Borough v. Welsh*, 117 Pa. St. 174, 11 Atl. Rep., 390.

⁷⁰ Post, § 341.

⁷¹ *Bentonville R. R. Co. v. Baker*, 45 Ark. 252; *Howe v. Ray*, 110 Mass. 298; *Harrisburg v. Crangle*, 3 W. & S. 460; *Railroad Co. v. Boyer*, 13 Pa. St. 497; *Ross v. Elizabethtown etc. R. R. Co.*, 20 N. J. L. 230; *Chicago etc. R. R. Co. v. Ellis*, 52 Kan. 41, 33 Pac. Rep. 478; *S. C.* 52 Kan. 48, 34 Pac. Rep. 352.

⁷² *McCauley v. Brooks*, 16 Cal. 11; *Storm Lake v. Iowa Falls & Sioux City Ry. Co.*, 62 Ia. 218; *Baltimore & Ohio R. R. Co. v. Thompson*, 10 Md. 76; *Turnpike Road Co. v. Brosi*, 22 Pa. St. 29; *Brown v. Powell*, 25 Pa. St. 229; *North Penn. R. R. Co. v. Davis*, 26 Pa. St. 238; *Getz v. Phila. &*

Reading R. R. Co., 105 Pa. St. 547; *Penn. R. R. Co. v. Eby*, 107 Pa. St. 166; *Gilligan v. Providence*, 11 R. I. 258; *Colcough v. Nashville etc. R. R. Co.*, 2 Head, 171; *Telephone & Telegraph Co. v. Forke*, 2 Tex. App. Civil Cas. p. 318; *Lister v. Lobley*, 7 A. & E. 124; *S. C.* 34 E. C. L. R. 86; *Rhodes v. Clivesdale Drainage Comrs.*, 45 L. J. Com. Pleas 337, 861; *Rogers v. Dock Co.*, 34 L. J. Eq. 165; *Chattanooga etc. R. R. Co. v. Brown*, 84 Ga. 256, 10 S. E. Rep. 730; *Gluck v. Baltimore*, 81 Md. 315, 32 Atl. Rep. 515; *Welch v. Hodge*, 94 Mich. 493, 54 N. E. Rep. 175; *Board of Levee Comrs. v. Johnson*, 66 Miss. 248, 6 So. Rep. 199; *Lafferty v. Schuylkill Riv. etc. R. R. Co.*, 124 Pa. St. 297, 16 Atl. Rep. 869; *Ebert v. Schuylkill Riv. E. S. R. R. Co.*, 151 Pa. St. 158, 24 Atl. Rep. 1068; *Justice v. Philadelphia*, 169

pensation has never been doubted, and they must be made parties in order to divest their interests. The duration of the lease is immaterial and parol leases from year to year are as much within the protection of the constitution as longer terms, evidenced by more formal contracts.⁷⁴ The lessee of a stall in a market house was held not to have such an interest as would enable him to maintain trespass against a railroad company taking possession under a bond given to the market company.⁷⁵ Where a lease is made after the passage of an ordinance to widen a street on which the property abuts, or after the location of a right of way over

Pa. St. 503, 32 Atl. Rep. 592; *Shaw v. Philadelphia*, 169 Pa. St. 506, 32 Atl. Rep. 593; *Mine Hill etc. R. R. Co. v. Zerbe*, 2 Walker's Pa. Supm. 409; *Alexandria etc. R. R. Co. v. Faunace*, 31 Gratt. 761; *Baltimore & O. R. R. Co. v. Parrette*, 55 Fed. Rep. 50; *Regina v. Comrs.*, 2 Jur. N. S. 861; *Barnsley Canal Co. v. Twibell*, 13 L. J. Ch. 434; *Johnson v. Ontario etc. R. R. Co.*, 11 U. C. 203, 246; *Little Rock etc. R. R. Co. v. Alister*, 62 Ark. 1, 34 S. W. Rep. 82; *Matter of Grade Crossing Comrs.*, 17 App. Div. N. Y. 54.

⁷³ *Bentonville R. R. Co. v. Baker*, 45 Ark. 252; *Lund v. New Bedford*, 121 Mass. 286; *Folley v. Passaic*, 26 N. J. Eq. 216; *Ross v. Elizabethtown etc. R. R. Co.*, 20 N. J. L. 230; *Harrisburgh v. Craugh*, 3 W. & S. 460; *Jones v. Asheville*, 116 N. C. 817, 21 S. E. Rep. 691; *Gorrill v. Toledo etc. R. R. Co.*, 4 Ohio C. C. 391; *Owston v. Grand Trunk R. R. Co.*, 28 Grant Ch. 431; *Bass v. Met. W. S. El. R. R. Co.*, 82 Fed. Rep. 857 (Ct. of App.)

⁷⁴ *Gilligan v. Providence*, 11 R.

I. 258; *Getz v. Phila. & Reading R. R. Co.*, 105 Pa. St. 547; *Board of Miss. Levee Comrs. v. Johnson*, 66 Miss. 248, 6 So. Rep. 199. A lease expired Dec. 15, 1883. The tenant owned the buildings with right of removal. Proceedings to condemn were commenced May 1, 1883; the tenant held out his term unmolested, and continued to hold and pay rent. It was held that he was not entitled to compensation, that he could have removed the buildings during the term, and that after the lease expired and while the petition was pending he could not acquire new rights in the premises as or against the petitioner. *Schreiber v. Chicago & Evanston R. R. Co.*, 115 Ill. 340; see also *Matter of Palmer etc.*, 9 A. & E., 463; S. C. 36 E. C. L. R. 253; *In re Marylebone Improvement Act*, L. R. 12 Eq. Cas. 389; S. C. 40 L. J. Eq. 697; *Alexandria etc. R. R. Co. v. Faunce*, 31 Gratt. 761.

⁷⁵ *Strickland v. Pennsylvania R. R. Co.*, 154 Pa. St. 348, 26 Atl. Rep. 431. But it is not decided that he has no remedy.

it and before the right to take is perfected as against the landlord, the lessee acquires an interest which cannot be divested without his consent or making him a party to proceedings.⁷⁶ Where premises were conveyed in fee, reserving a ground rent to the grantor and his heirs forever, it was held that the owner of the ground rent was not an owner within the statute nor a necessary party to proceedings, although he might in equity be entitled to have part of the damages impounded to meet the accruing rent.⁷⁷ One railroad company leased to another the right to use a certain portion of its tracks for 999 years, the lessor company reserving its franchises and right to exercise its corporate powers and the general control, supervision and management of its line of road and the full and sole control of the management, use, location, improvement and repair of the same. It was held that the lessee company had not such an interest as entitled it to be made a party to proceedings by a third company to condemn a crossing, and that it could not enjoin such crossing until compensation was made.⁷⁸ The apportionment of damages between landlord and tenant and the right of either to maintain suits for damages to the estate by reason of public works, are elsewhere considered.⁷⁹

§ 327. **Tenants in common and joint tenants.**—The interest of a joint tenant or tenant in common cannot be divested without he is made a party. Notice to one tenant in common only is not sufficient.⁸⁰ The proper course would

⁷⁶ *Justice v. Philadelphia*, 169 Pa. St. 503, 32 Atl. Rep. 592; *Lafferty v. Schuylkill Riv. etc. R. R. Co.*, 124 Pa. St. 297, 16 Atl. Rep. 869.

⁷⁷ *Workman v. Mifflin*, 30 Pa. St. 362.

⁷⁸ *Englewood Connecting Ry. Co. v. Chicago & Eastern Illinois R. R. Co.*, 117 Ill. 611; reversing S. C. in 17 Ill. App. 141.

⁷⁹ *Post*, §§ 483, 653d.

⁸⁰ *Whitcher v. Benton*, 48 N.

H. 157; *Railroad Co. v. Bucher*, 7 Watts 33; *State v. District Courts*, 52 Minn. 283, 53 N. W. Rep. 1157; *New Madrid County v. Phillip*, 125 Mo. 61, 28 S. W. Rep. 321. One tenant in common cannot bind his co-tenant by a waiver or agreement as to damages. *Merrill v. Berkshire*, 11 Pick. 269; but a tender to one of the damages awarded is good as a tender to all. *Dyckman v. New York*, 5 N. Y. 434.

seem to be to join all in the same proceeding,⁸¹ and some courts have held that all must be joined and that the omission of one tenant in common will be fatal to the proceedings.⁸² Much must necessarily depend upon local statutes.⁸³ The common law doctrine in regard to tenants in common, joint tenants, etc., as parties, will be found fully discussed by Mr. Freeman in his work upon Cotenancy and Partition, to which the reader is referred.⁸⁴

§ 328. **Infants.**—Infants should be brought in by personal service or by notice to their legally appointed guardians,⁸⁵ or a guardian ad litem should be appointed for them by the court.⁸⁶ This may be done by the court under its common law powers.⁸⁷ In New York it has been held that it is the duty of the condemning party to see to it not only that a guardian ad litem is appointed but that he attends to his duty, and that a failure of the guardian to appear and defend for his ward rendered the proceedings void collaterally.⁸⁸ Ordinarily the mode of proceeding in

⁸¹ *State v. Fischer*, 26 N. J. L. 129; *Columbia etc. Bridge Co. v. Geise*, 34 N. J. L. 268; *Whitcher v. Benton*, 48 N. H. 157; *Dyckman v. New York*, 5 N. Y. 434; *S. C. 7 Barb.* 498; *Pittsburg etc. R. R. Co. v. Hall*, 25 Pa. St. 336; *Watson v. Milwaukee & Madison Ry. Co.*, 57 Wis. 332.

⁸² *Morgan's Louisiana etc. R. R. Co.*, 1 McGloin, La. 232; *Grand Rapids etc. R. R. Co. v. Alley*, 34 Mich. 16; *Same v. Same*, *Ibid.* 18; *Tucker v. Campbell*, 36 Me. 346; *Davis v. Stevens*, 57 Me. 593; *Webster v. Holland*, 58 Me. 168; *Phillips v. Sherman*, 61 Me. 548; *Merrill v. Berkshire*, 11 Pick. 269.

⁸³ Under Massachusetts statutes relating to flowage it was held, in the following case, that one tenant in common could maintain a complaint for flow-

age: *Dwight v. County Comrs.*, 7 Cush. 533.

⁸⁴ *Freeman on Cotenancy etc.* chap. xv.

⁸⁵ *Neeld's Road*, 1 Pa. St. 353; *Missouri Pacific Ry. Co. v. Carter*, 85 Mo. 448; *Peavey v. Wolfborough*, 37 N. H. 286; *Charleston etc. Bridge Co. v. Comstock*, 36 W. Va. 263, 15 S. E. Rep. 69.

⁸⁶ *Jones' Heirs v. Barclay*, 2 J. Marsh, 73; *Missouri Pacific Ry. Co. v. Carter*, 85 Mo. 448; *Clarke v. Gilmanton*, 12 N. H. 515; *Hotchkiss v. Auburn & Rochester R. R. Co.*, 36 Barb. 600; *McBride v. State*, 130 Ind. 525, 30 N. E. Rep. 699; *Charleston etc. Bridge Co. v. Comstock*, 36 W. Va. 263, 15 S. E. Rep. 69.

⁸⁷ *Clarke v. Gilmanton*, 12 N. H. 515.

⁸⁸ *Hotchkiss v. Auburn &*

order to divest the title of infants is prescribed by statute, and in such case the statute must be strictly pursued.⁸⁹

§ 329. **Towns and public authorities as parties.**—In New England, where highways are laid out on the petition of individuals, it is held that the town in which the road petitioned for is to be laid out is a necessary party to the proceedings.⁹⁰ This is put on the ground that the burden of maintaining the road will be cast upon the town, and that the public, through the town, should have a voice in the matter. When property belonging to public corporations is taken for public use, they are entitled to compensation the same as individuals, and must be made parties to proceedings.⁹¹ In Maine it has been held that a town may recover against a mill-owner for flooding a highway, in an action on the case,⁹² but that it cannot proceed under the statute in regard to mill-dams for such flowing.⁹³ But if the damage to, or use of, a highway is authorized by the legislature, no action can be maintained by the town.⁹⁴

§ 330. **Persons in possession of public lands.**—Persons in possession of public lands without right have no interest in the land and are not entitled to any compensation by virtue of their possession, but may be for crops or improve-

Rochester R. R. Co., 36 Barb. 600.

⁸⁹ Ibid. As to persons of unsound mind see *Sullivan v. Wilson*, 101 Ky. 427.

⁹⁰ *Gifford v. Norwich*, 30 Conn. 35; *Williams et al. Petitioners*, 59 Me. 517; *Commonwealth v. Chase*, 2 Mass. 170; *Same v. Coombs*, 2 Mass. 489; *Same v. Peters*, 3 Mass. 229; *Same v. Cambridge*, 4 Mass. 627; *Same v. Egremont*, 6 Mass. 491; *Brown v. Lowell*, 8 Met. 172; *Hinckley et al. Petitioners*, 15 Pick. 447; *Lanesborough v. County Comrs.*, 22 Pick. 278; *Thetford v. Kilburn*, 36 Vt. 179.

⁹¹ In the Matter of Church Street, 49 Barb. 455; *Fagan v. Chicago*, 84 Ill. 227.

⁹² *Monmouth v. Gardiner*, 35 Me. 247.

⁹³ *Calais v. Dyer*, 7 Me. 155; and see *Cheshire v. Adams etc. Reservoir Co.*, 119 Mass. 356. To same effect: *Louisville & N. R. Co. v. Whitley County Court*, 95 Ky. 215, 24 S. W. Rep. 604; *Hooksett v. Amoskeag Mfg. Co.*, 44 N. H. 105. But see *Town of Galen v. Clyde etc. Plank R. Co.*, 27 Barb. 543.

⁹⁴ *Millbury v. Blackstone Canal Co.*, 8 Pick. 473.

ments thereon.⁹⁵ But one who has taken steps to acquire title to public lands under the homestead or preëmption laws has a valuable vested right and is entitled to compensation and must be made a party.⁹⁶

§ 331. Other rights and interests which must be considered.—Any person having a property interest in the land should be made a party.¹ A person in possession under a parol gift, who has lived on the property for fourteen years and made improvements on it, should be made a party.² So persons in adverse possession whose title might become absolute in time.³ Where the owners of lots covenant that certain portions shall not be built upon, or not above a certain height, each acquires an easement of light, air and prospect in all the others, and this easement is property which cannot be taken without compensation.⁴ So of one's right in a public common.⁵ If the title is doubt-

⁹⁵ California Northern R. R. Co. v. Gould, 21 Cal. 254; Doran v. Central Pacific R. R. Co., 24 Cal. 245; Western Pacific R. R. Co. v. Tevis, 41 Cal. 489; Rosa v. Missouri etc. Ry. Co., 18 Kan. 124; Knoth v. Barclay, 8 Col. 300; Allard v. Loban, 3 Martin, N. S. 293; Gillan v. Hutchinson, 16 Cal. 153.

⁹⁶ Red River & Lake of the Woods R. R. Co. v. Sture, 32 Minn. 95; Burlington etc. R. R. Co. v. Johnson, 38 Kan. 142, 16 Pac. Rep. 125; Chicago etc. R. R. Co. v. Hurst, 41 Kan. 740, 21 Pac. Rep. 781; Chicago etc. R. R. Co. v. Van Cleave, 52 Kan. 665, 33 Pac. Rep. 472; Kinion v. Kansas City etc. R. R. Co., 118 Mo. 577, 24 S. W. Rep. 636; St. Joseph & D. R. R. Co. v. Baldwin, 7 Neb. 247; Larsen v. Oregon R. R. Co., 19 Or. 240, 23 Pac. Rep. 974; Yakima County v. Fuller, 3 Wash. Ter. 393, 17 Pac. Rep. 885;

Enoch v. Spokane Falls & N. R. R. Co., 6 Wash. 393, 33 Pac. Rep. 966; Jones v. Florida etc. R. R. Co., 41 Fed. Rep. 70. As to railroads through Indian lands see Bell v. Atlantic & P. R. R. Co., 63 Fed. Rep. 417, 11 C. C. A. 271; United States v. Choctaw etc. R. R. Co., 3 Oka. 404, 41 Pac. Rep. 729.

¹ Stoneham v. London, Brighton etc. Ry. Co., 7 L. R. Q. B. 1; Lexington etc. Turnpike Road Co. v. McMurty, 3 B. Mon. 516.

² Anderson v. Pemberton, 89 Mo. 61.

³ In re Jane Evans, 42 L. J. Ch. 357; ex parte Winder, L. R. 6 Ch. Div. 696; Andrew v. Nantasket Beach R. R. Co., 152 Mass. 506, 25 N. E. Rep. 966.

⁴ Ladd v. Boston, 151 Mass. 585, 24 N. E. Rep. 858.

⁵ Bell v. Ohio etc. R. R. Co., 1 Grant. 105.

ful, all persons claiming an interest should be made parties.⁶

§ 332. **Claims or interests for which compensation need not be made.**—One who has a license to hunt and fish on land has no interest entitling him to compensation.⁷ So one who has been permitted to erect structures across a public highway cannot have compensation for a withdrawal or destruction of the privilege.⁸ A right which one has only as a member of the public does not entitle him to be made a party to proceedings which may affect that right.⁹ One who puts a building upon land as a trespasser is not entitled to compensation and need not be made a party.¹⁰ So of one who has an easement of way in land taken for a street.¹¹ Persons not in possession and having no record title and whose interests are unknown are not necessary parties.¹²

§ 333. **The proper plaintiff in condemnation proceedings.**—Ordinarily no question can arise in this regard, the proceedings being usually carried on in the name of the person or corporation to whom the authority is given and in whom the title will become vested. Where a railroad is leased it has been held that proceedings may be carried on in the name of either lessor or lessee to condemn additional property.¹³ And it has been held that a railroad company which has sold and conveyed its rights may still condemn property in its own name.¹⁴ In another case it was held that proceedings were rightly carried on in the name of the "Board of Water Commissioners of the City of Rochester," to acquire land for water works, although the title would vest in the city of Rochester, the board having authority

⁶ Bentonville R. R. Co. v. Stroud, 45 Ark. 278.

⁷ Bird v. Great Eastern Ry. Co., 34 L. J. C. P. 366.

⁸ Shepard v. Third Municipality of New Orleans, 6 Rob. La. 349.

⁹ Creswell v. Comrs., 24 Ala. 282. See North Riv. Boom Co. v. Smith, 15 Wash. 138, 45 Pac. Rep. 750.

¹⁰ Norris v. Pueblo, 12 Col. App. 290, 55 Pac. Rep. 747.

¹¹ Allen v. Chicago, 176 Ill. 113, 52 N. E. Rep. 33.

¹² Phipps v. Kansas etc. R. R. Co., 58 Kan. 142.

¹³ Gottschalk v. Lincoln etc. R. R. Co., 14 Neb. 389.

¹⁴ Corey v. Chicago etc. R. R. Co., 100 Mo. 282, 13 S. W. Rep. 346.

to secure the condemnation.¹⁵ In a case in Missouri it is intimated that proceedings might be in the name of an agent of a railroad company.¹⁶ Where condemnation proceedings on behalf of the United States were to be had pursuant to the laws of the State, which provided that they should be in the name of the governor, it was held they were properly commenced in the name of the United States.¹⁷ Where the supervisors of a county are authorized to institute and carry on proceedings to lay out a road, the proceedings were held properly brought in the name of the county.¹⁸ Where roads between two townships were required to be laid out by the action of the commissioners of both townships, proceedings by the commissioners of one township were held to be void.¹⁹ Where a railroad was in the hands of a receiver, it was held that a petition to condemn land for the company should be in the company's name.²⁰ Where the statute required the petition to be in the name of the people, and it was in the name of certain persons as commissioners, the proceedings were held to be void.²¹

§ 334. **Proper parties where the initiative is in owner: Mill acts.**—In the foregoing sections it has been assumed that the proceedings were initiated and carried on in the name of the party seeking to appropriate the property. Where the initiative is given to the owner, the conditions are simply reversed. Those who would be the proper defendants in the one case become the proper plaintiffs in the other. The defendant would be the person or corporation who has appropriated or is seeking to appropriate the property.

¹⁵ *Matter of Rochester Water Comrs.*, 66 N. Y. 413.

¹⁶ *Hannibal etc. R. R. Co. v. Morton*, 27 Mo. 317. The proceedings were in the name of A. B., agent for the Hannibal R. R. Co. The objection seems to have been passed over as immaterial.

¹⁷ *United States v. Dumplin Island*, 1 Barb. 24.

¹⁸ *Monterey County v. Cushing*, 83 Cal. 507, 23 Pac. Rep. 700.

¹⁹ *Brewer v. Grow*, 83 Mich. 250, 47 N. W. Rep. 113.

²⁰ *Bigelow v. Draper*, 6 N. D. 152. But see *Minneapolis etc. R. R. Co. v. Minneapolis etc. R. R. Co.*, 61 Minn. 502, 63 N. W. Rep. 1035.

²¹ *Stanford v. Worn*, 27 Cal. 171.

Most of the cases in which the initiative is given to the owner arise under the mill acts. Many of these cases have already been referred to in the preceding sections of this chapter. The proceedings under these acts, being purely statutory, must conform to the statute and can only be maintained as provided by the statute. The proper plaintiffs are the persons entitled to the damages as already explained. The proper defendant is the owner or occupant of the dam.²² If the dam has been transferred before damages were assessed, the former owner is liable for damages up to the time of such transfer,²³ and the grantee for all subsequent damages.²⁴ If the dam is transferred by the builder before any damage is done, he is not liable.²⁵ A grantee of record who had given back a defeasance which was not recorded was held liable for flowage, though not in possession, and only a mortgagee as between the parties.²⁶ Where a dam is maintained by a corporation for the use of several mills belonging to different parties who own the stock of the corporation, the proceeding must be against the corporation and not against the mill-owners.²⁷

§ 335. Construction of statutes in regard to parties.—The word *owner* in statutes, when used to describe those to whom compensation should be made or who should be made parties to proceedings, has been held in a general way to include all persons having an interest in the land to be taken.²⁸ More particularly, the term owner has been held

²² Nelson v. Butterfield, 21 Me. 220; Davis v. Brigham, 29 Me. 391; Sampson v. Bradford, 6 Cush. 303.

²³ Charles v. Monson & Brimfield Manf. Co., 17 Pick. 70; Bean v. Hinman, 33 Me. 480.

²⁴ Holmes v. Drew, 7 Pick. 141; Sutliff v. Johnson, 17 Neb. 575; Sabine v. Johnson, 35 Wis. 185.

²⁵ Blunt v. Aiken, 15 Wend. 522.

²⁶ Hennessey v. Andrews, 6 Cush. 170.

²⁷ Norton v. Hodges, 100 Mass. 241; and see Watuppa Reservoir Co. v. Fall River, 134 Mass. 267.

²⁸ Board of Commissioners v. Labore, 37 Kan. 480; Baltimore & Ohio R. R. Co. v. Thompson, 10 Md. 76; Gerrard v. Omaha etc. R. R. Co., 14 Neb. 270; Colcough v. Nashville etc. R. R. Co., 2 Head 171; Georgia etc. R. R. Co. v. Scott, 38 S. C. 34, 16 S. E. Rep. 185, 839; Lawrence County v. Deadwood etc. Co., 11 S. D. 74; Matter of Board of Street Open-

to include lessees, whether for years or from year to year,²⁹ tenants for life,³⁰ mortgagees,³¹ vendees in possession,³² and the owner of a ground rent.³³ When used in connection with more comprehensive words, as "owners and persons interested," it has been held to mean the owner of any legal estate.³⁴ The word "owner" has been held not to include a dower interest.³⁵ The words, "persons interested," or their equivalent, are often used in such statutes, and have been construed as follows in New Jersey: "Under the more comprehensive expression of persons interested, are included not only the person in whom is vested the legal title which the company proposes to acquire, as indicated by their application, but also other individuals having some inde-

ing, 27 N. Y. App. Div. 265. In the case of *Watson v. New York Central R. R. Co.*, 47 N. Y. 157, the words "owner or owners" were the only words used in the statute under consideration, to designate the parties entitled to compensation, and they are interpreted as follows: "The terms 'owner or owners,' as used in these statutes, being intended to designate the parties entitled to the compensation which is substituted for the land taken, should be held to embrace all persons having estates in the land in possession, reversion or remainder. All persons having proprietary interests are entitled to compensation, for the aggregate of those interests constitute the ownership or fee." p. 162.

²⁹ *Baltimore & Ohio R. R. Co. v. Thompson*, 10 Md. 76; *Turnpike Road Co. v. Brosi*, 22 Pa. St. 29; *Brown v. Powell*, 25 Pa. St. 229; *North Penn. R. R. Co. v. Davis*, 26 Pa. St. 238; *Pennsylvania R. R. Co. v. Eby*, 107 Pa.

St. 166; *Gilligan v. Providence*, 11 R. I. 258; *Colcough v. Nashville etc.*, R. R. Co., 2 Head 171; *Lester v. Lobley*, 7 A. & E. 124; S. C., 34 E. C. L. R. 86; *Mine Hill etc. R. R. Co. v. Zerbe*, 2 Walker's Pa. Supm. 409.

³⁰ *Harrisburgh v. Crangle*, 3 W. & S. 460; *Railroad Co. v. Boyer*, 13 Pa. St. 497.

³¹ *Severin v. Cole*, 38 Ia. 463; *Dodge v. Omaha & Southwestern R. R. Co.*, 20 Neb. 276; *Wade v. Hennessy*, 55 Vt. 207. The same word has also been held not to include mortgagees. *Parish v. Gilmanton*, 11 N. H. 293; *Goodrich v. Board of Comrs.*, 47 Kan. 355, 27 Pac. Rep. 1006.

³² *Smith v. Ferris*, 6 Hun 553.

³³ *Workman v. Mifflin*, 30 Pa. St. 362.

³⁴ *McIntyre v. Easton & Amboy R. R. Co.*, 26 N. J. Eq. 425; *State v. Easton & Amboy R. R. Co.*, 36 N. J. L. 181.

³⁵ *Chouteau v. Mo. Pac. R. R. Co.*, 122 Mo. 375, 22 S. W. Rep. 458.

pendent right or interest therein, not amounting to an actual legal estate, such as an easement of a right of way, inchoate rights of dower, or curtesy, or encumbrances, such as by judgments or mortgages, which are charges or liens on the legal estate. The object attained in making the latter class of individuals parties to the proceedings, is that their interests may be extinguished by payment out of the money awarded or compensated for under the provisions of the general statute, which authorizes the court into which the money may be paid, to make allowance out of the fund in satisfaction of such interest."³⁶ "Persons interested" would undoubtedly include mortgagees.³⁷ Where notice is required to "any person owning improved land," it will include a railroad company.³⁸ Where notice was required to be given to the "owner, occupant or agent" of land, notice to either was held sufficient to bind the land.³⁹

§ 336. **Joinder of parties.**—The question of the joinder of parties has already been alluded to in considering the interests of joint tenants and tenants in common.⁴⁰ In general it may be said that this is a matter of statutory regulation, it being competent for the legislature to provide for a separate proceeding for each separate interest, or a joint proceeding for all. It may also provide for a separate proceeding for each tract or parcel, or permit any number of distinct tracts or parcels to be included in one proceeding. It follows, therefore, that recourse must be had to the statute in determining the proper course in regard to joinder. If the statute is silent on the subject, or its language doubtful, the courts favor a construction which permits the joinder in one proceeding of all parties in interest.⁴¹ Thus

³⁶ *State v. Easton & Amboy R. Co.*, 36 N. J. L. 181, 184.

³⁷ *Wilson v. European etc. Ry. Co.*, 67 Me. 358; *Michigan Air Line Ry. Co. v. Barnes*, 40 Mich. 383.

³⁸ *Road in Lancaster City*, 68 Pa. St. 396.

³⁹ *Porter v. Stout*, 73 Ind. 3;

Ryder v. Horsting, 130 Ind. 104, 29 N. E. Rep. 567.

⁴⁰ *Ante*, § 327.

⁴¹ *Hot Springs R. R. Co. v. Tyler*, 36 Ark. 205; *Evergreen Cemetery Assn. v. Blecher*, 53 Conn. 551; *Hill v. Baker*, 28 Me. 9; *Davis v. Stevens*, 57 Me. 593; *Webster v. Holland*, 58 Me. 168;

it has been held that the lessor and lessee,⁴² tenant for life and remainder man,⁴³ vendor and vendee where the contract is executory,⁴⁴ mortgagor and mortgagee and trustee and cestui que trust⁴⁵ were properly joined in the same proceeding. Where the owner of land joins with another in erecting and carrying on a mill thereon they may join in a suit for damages to the mill by a railroad.⁴⁶ Where two persons, each owning in severalty a mill, join in erecting one dam for the use of both mills, they are properly joined in a complaint for flowage.⁴⁷ Where A maintained a dam across the north channel of the Fox River, and B a dam across the south channel, and flowage of the same land was caused by both, it was held that the complaint must be against each separately, and that the joinder of A and B in one suit was improper.⁴⁸ So it was held that the owners of two ferries on the Delaware River, one chartered by New Jersey from one side, and the other by Pennsylvania from the other side, and operated jointly, could not join in a suit for damages by a bridge.⁴⁹ Where a statute provided that "any number of owners, residents in the same county or circuit, may be joined in one petition," it was held equivalent to

Goodwin v. Gibbs, 70 Me. 243; Proprietors of Locks & Canals v. Nashua & Lowell R. R. Co., 10 Cush. 385; Ashby v. Eastern R. R. Co., 5 Met. 368; Reed v. Hanover Branch R. R. Co., 105 Mass. 303; McKee v. St. Louis, 17 Mo. 184; Troy etc. R. R. Co. v. Cleveland, 6 How. Pr. 238; Schuylkill Navigation Co. v. Farr, 4 W. & S. 362; Railroad v. Boyer, 13 Pa. St. 497; Getz v. Philadelphia & Reading R. R. Co., 105 Pa. St. 547; Colcough v. Nashville etc. R. R. Co., 2 Head 171; Rand v. Townshend, 26 Vt. 670. But all need not be joined. Matter of the Village of Middletown, 82 N. Y. 196.

⁴² Getz v. Phila. & Reading R.

R. Co., 105 Pa. St. 547; Colcough v. Nashville etc. R. R. Co., 2 Head 171.

⁴³ Railroad Co. v. Boyer, 13 Pa. St. 497.

⁴⁴ Proprietors of Locks & Canals v. Nashua & Lowell R. Co., 10 Cush. 385.

⁴⁵ Reed v. Hanover Branch R. Co., 105 Mass. 303; Schuylkill Navigation Co. v. Farr, 4 W. & S. 362.

⁴⁶ Hot Springs R. R. Co. v. Tyler, 36 Ark. 205.

⁴⁷ Goodwin v. Gibbs, 70 Me. 243.

⁴⁸ Lull v. Fox & Wisconsin Improvement Co., 19 Wis. 100.

⁴⁹ Columbia Delaware Bridge Co. v. Geisse, 38 N. J. L. 39.

prohibiting the joinder of those who did not reside in the same county or circuit.⁵⁰

§ 337. **New parties, misjoinder, etc.**—Modern practice favors such amendments as will render the proceedings effectual. New parties may be added,⁵¹ and the proceedings discontinued as to improper parties.⁵² But, where leave was asked to make new parties on the eve of trial, and their interest was not made to appear, it was held that the request was properly refused.⁵³ In a proceeding by a railroad company to condemn a right of way, it was held that it was not entitled to have another party substituted as plaintiff, on the ground that the latter had agreed to indemnify it for the cost of such right of way.⁵⁴ An objection on the ground of misjoinder was held to come too late after the close of the evidence,⁵⁵ or on appeal from commissioners.⁵⁶ Where pending proceedings by a corporation the plaintiff is consolidated with other companies, the consolidated company may be substituted as plaintiff.⁵⁷

§ 338. **Death of a party, or change of title pending proceedings.**—If the owner dies pending proceedings, the same should be revived in the name of the heirs and not of the personal representatives.⁵⁸ In those States in which it is

⁵⁰ Quincy etc. R. R. Co. v. Kellog, 54 Mo. 334; Railroad Co. v. Carter, 85 Mo. 448. But see Union Depot Co. v. Frederick, 117 Mo. 138, 21 S. W. Rep. 1118, 1130, 26 S. W. Rep. 350, where the former cases are partly overruled.

⁵¹ Matter of New York, Lackawanna etc. R. R. Co., 26 Hun 194; Wood v. Comrs. of Bridges, 122 Mass. 394; Missouri Pac. R. Co. v. Wilson, 45 Mo. App. 1; Zumbro v. Parnin, 141 Ind. 430.

⁵² Fitch v. Stevens, 2 Met. 505; Missouri Pacific Ry. Co. v. Carter, 85 Mo. 448.

⁵³ Chicago, St. Louis & Western R. R. Co. v. Gates, 120 Ill. 86.

⁵⁴ Omaha Southern R. R. Co. v. Beeson, 36 Neb. 361, 54 N. W. Rep. 557.

⁵⁵ Ehret v. Schuylkill Bridge E. S. R. R. Co., 151 Pa. St. 158, 24 Atl. Rep. 1068.

⁵⁶ Board of County Comrs. v. Mann, 43 Kan. 676, 23 Pac. Rep. 1038.

⁵⁷ California etc. R. R. Co. v. Hooper, 76 Cal. 404. See Chicago etc. R. R. Co. v. Butts, 55 Kan. 660, 41 Pac. Rep. 948; Bradley v. Mo. Pac. R. R. Co., 38 Minn. 234, 36 N. W. Rep. 345.

⁵⁸ Peoria etc. Ry. Co. v. Rice, 75 Ill. 329; Satterfield Admx. v. Crow, 8 B. Mon. 553; Ballon v. Ballon, 78 N. Y. 325; Valley Ry.

held that title passes by virtue of a location made or other acts done, the reviver should be in the name of the personal representatives.⁵⁹ So where the owner dies pending an appeal, the right to the damages having vested in the confirmation of the award.⁶⁰ When notice was given of proceedings to open a highway, and four days before the time specified one of the owners died, the lay-out was sustained, though no further notice was given and no one appeared in behalf of the heirs or the estate.⁶¹ Where the owner conveys, pending proceedings, the grantee takes subject to the proceedings,⁶² but may, by a proper application, be substituted as a party in place of the grantor.⁶³ Such a grantee cannot prosecute an appeal in his own name, but should either be substituted before appeal, or appeal in the name of the vendor and then be substituted.⁶⁴ Where a street was opened over the lands of J. L., and an assessment of damages confirmed to him on March 3, 1883, and on

Co. v. Bohm, Admr., 29 Ohio St. 633; Hale v. Burwell, 2 Patt. & Heath (Va.) 608; Burlington etc. R. R. Co. v. Billings, 38 Kan. 243, 16 Pac. Rep. 473; Mitchell v. Met. El. R. R. Co., 134 N. Y. 11, 31 N. E. Rep. 260; affirming S. C. 56 Hun 543, 31 N. Y. St. 625, 9 N. Y. Supp. 829.

⁵⁹ Upper Appomattox Co. v. Hardings, 11 Gratt. 1; Darling's Admr. v. Blackstone Manf. Co., 16 Gray 187.

⁶⁰ Conklin v. Keokuk, 73 Ia. 343, 35 N. W. Rep. 444.

⁶¹ Taylor v. County Comrs., 18 Pick. 309.

⁶² Plumer v. Wausau Boom Co., 49 Wis. 449; Drinkhouse v. Spring Valley Water Works, 87 Cal. 253, 25 Pac. Rep. 420; Chicago v. Messler, 38 Fed. Rep. 308. But see Madden v. Louisville etc. R. R. Co. 66 Miss. 258, 6 So. Rep. 181.

⁶³ Bean v. Warner, 38 N. H. 247; Carli v. Stillwater & St. Paul R. R. Co., 16 Minn. 260; Curran v. Shattuck, 24 Cal. 427; Roberts v. Williams, 15 Ark. 43; Central Land Co. v. Providence, 15 R. I. 246, 2 Atl. Rep. 553. Where one party acquires the interest of another pending proceedings, he may show the fact and recover the damages for the interest so acquired. North-eastern Neb. R. R. Co. v. Frazier, 25 Neb. 42, 40 N. W. Rep. 604. Where one owner, being plaintiff in a proceeding under a mill act, parted with his title pending proceedings, it was held he might still recover damages sustained up to the time of conveying his title. Turner v. Whitehouse, 68 Me. 221. See also Fordyce v. Wolfe, 82 Tex. 145, 18 S. W. Rep. 145.

⁶⁴ Connable v. Chicago etc. R.

March 20, 1883, he conveyed the premises to C. L., it was held that the damages did not pass by the deed, and that C. L. had no standing to prosecute an appeal.⁶⁵

§ 339. **Effect of omitting a necessary party.**—If a necessary party is omitted, the proceedings will be nugatory as to such party.⁶⁶

§ 340. **What constitutes making a person a party?**—This question must be answered by a reference to local statutes. Whatever formality the statute requires in this respect must be complied with unless waived. The essential element, however, is notice, and what is sufficient and reasonable notice will be considered in a future chapter.⁶⁷

§ 341. **General conclusions and principles in regard to parties.**—The examination which has now been given to the authorities on the subject of parties to proceedings, justifies what we said at the outset, viz: that the authorities are not only conflicting but very unsatisfactory. They do not reason from sound premises. The plenary power of the legislature over the subject is practically assumed in all the cases. They treat the matter as one of statutory construction merely. The policy of favoring public works in the early history of the country inspired decisions which, though acquiesced in at the time, involved doctrines that

R. Co., 60 Ia. 27; Chicago etc. R. Co. v. Chicago etc. R. R. Co. 60 Ia. 35.

⁶⁵ Losch's Appeal, 109 Pa. St. 72.

⁶⁶ Columbus & Western Ry. Co. v. Witherow, 82 Ala. 190; Smith v. Chicago etc. R. R. Co., 67 Ill. 191; Lane v. Miller, 17 Ind. 58; Garmoe v. Sturgeon, 65 Ia. 147; Sanders v. McCracken, Hardin (Ky.) 266; Detroit etc. R. R. Co. v. Detroit, 49 Mich. 47; State v. Easton & Amboy R. R. Co., 36 N. J. L. 181; Hagar v. Brainard, 44 Vt. 294; Welch v. Hodge, 94 Mich. 493, 54 N. W.

Rep. 175; State v. District Courts, 52 Minn. 283, 53 N. W. Rep. 1157; New Madrid County v. Phillips, 125 Mo. 61, 28 S. W. Rep. 321; Harris v. Brewster, 154 Pa. St. 22, 25 Atl. Rep. 829; Alexander etc. R. R. Co. v. Faunce, 31 Gratt. 761; Baltimore & O. R. R. Co. v. Parrette, 55 Fed. Rep. 50; Charleston etc. R. R. Co. v. Hughes, 105 Ga. 1, 30 S. E. Rep. 972; Baltimore v. Cowen, 88 Md. 447, 41 Atl. Rep. 900; Napier v. Brooklyn, 41 N. Y. App. Div. 274.

⁶⁷ Post, chap. xv.

are destructive of some of the most valuable rights and interests which pertain to private property. In view of the condition of the authorities, we shall venture to give our own conclusions upon the subject of parties and the proper canons to be applied in construing constitutions in that respect.

First. The constitutional provisions which in substance declare that private property shall not be taken for public use without just compensation, and that no person shall be deprived of his property without due process of law, should be liberally construed for the protection of private rights.

Second. The word "property," therefore, in these provisions should be held to include every valuable right and interest which a person can have in or appurtenant to land.

Third. Due process of law requires that the owner of any such right or interest should have a reasonable opportunity to be heard upon the question of compensation before he can be deprived thereof for public use.⁶⁸

Fourth. This is a matter of constitutional right, and not dependent upon the will of the legislature.⁶⁹

Fifth. Statutes should be so construed, if possible, as to harmonize with the constitution, and, consequently, words descriptive of parties to proceedings or of the persons entitled to compensation or notice should be held to include the owner of any such right or interest as above indicated. Thus, the word owner may always be so construed without any violence whatever to its ordinary meaning, and we do not call to mind the language of any statute which is incapable of such construction.

Sixth. The intent to deprive a person of a right or interest created by law, and whose continuance is dependent upon the will of the legislature, if any such there be, should never be imputed to the legislature unless expressly declared or necessarily implied; and it is never necessarily implied if the language admits of any other possible construction.⁷⁰ Thus, if we suppose a judgment lien to be such

⁶⁸ Post, § 365.

⁷⁰ Ante, § 325.

⁶⁹ Post, §§ 363-369.

an interest, as has been held by some courts,⁷¹ it is much more reasonable and consonant with right and justice to hold that the judgment creditor is an owner within the statute, than to hold that the legislature intended to abolish the judgment lien of the one man whose property happened to be taken for public use, while it left all other judgment liens in force.

⁷¹ This language is substantially adopted in *Schneider v. Rochester*, 160 N. Y. 165, 172.

CHAPTER XIV.

OF THE PETITION, COMPLAINT OR OTHER FORM OF APPLICATION.

§ 342. **Scope of the chapter.**—The proceedings to condemn property for public use are ordinarily instituted by an application in writing to the officer or tribunal whose jurisdiction is to be invoked. The form of this application is necessarily dependent upon local statutes, which not only vary in the different States, but vary in the same State with respect to different classes of improvements, and are constantly undergoing changes with respect to the same kinds of public uses. In a matter which is subject to so much variation, and which is entirely within the discretion of the legislature, it would be useless to look for any general principles underlying the subject. We have in this chapter, therefore, simply brought together such of the decisions of the various States relating to the petition or application as seem to us to have any interest beyond the boundaries of the States to which they respectively belong.

§ 343. **When a petition is necessary.**—If the statute requires a petition, it is indispensable to jurisdiction.¹ And, even where it is not required in express terms, it is usually held to be the only proper mode of making the application.²

¹ *State v. Berry*, 12 Ia. 58; *Oliphant v. Commissioners of Atkinson County*, 18 Kan. 386; *Commonwealth v. Peters*, 3 Mass. 229; *People v. Judge of Recorder's Court*, 40 Mich. 64; *State v. Otoe Co.*, 6 Neb. 129; *Wiggin v. Exeter*, 13 N. H. 304; *Hayward v. Charlestown*, 34 N. H. 23; *Clement v. Burns*, 43 N. H. 609; *Bennett v. Cutler*, 44 N. H. 69; *State v. Morse*, 50 N. H. 98; *Darst v. Griffen*, 31 Neb. 668,

48 N. W. Rep. 819; *Eames v. Northumberland*, 44 N. H. 67; *Mills v. Board of Comrs.* 50 Kan. 635, 32 Pac. Rep. 361; *Hentzler v. Bradbury*, 5 Kan. App. 1.

² *Commonwealth v. Combs*, 2 Mass. 489; *Kroop v. Forman*, 31 Mich. 144; *Vail v. Morris & Essex R. R. Co.*, 21 N. J. L. 189; and see *White v. County Comrs.*, 70 Me. 317; *In re Rugheimer*, 36 Fed. Rep. 369.

In Virginia it has been held that the application to build a dam might be ore tenus, the statute not requiring it to be in writing.³ In Tennessee, under a similar statute, it was held that a written application was not indispensable, but would be the better practice.⁴

§ 344. **When not necessary.**—In some of the States, where it is held that compensation need not precede the taking, authority is conferred upon officers and boards to take property for highways and other purposes, giving the owners the right to apply within a certain time for an assessment of compensation and damages. In such cases such officers or boards can act of their own motion, if the statute does not require a petition.⁵

§ 345. **Addressing, signing, verifying and filing.**—The petition should be addressed to the court or tribunal having jurisdiction to act in the matter. If a petition is actually presented to and acted upon by the proper tribunal, informalities in the address are not usually regarded. Thus, a statute provided that a petition for a highway should run to the board of supervisors. A petition which was addressed to the county auditor, who was clerk of the board, was held sufficient to give jurisdiction.⁶ In another case a petition was addressed to the mayor and aldermen and common council of the city of Worcester, when it should have been addressed to the mayor and aldermen only. It was acted upon by the mayor and aldermen without objection. It was held sufficient.⁷ It was also held that the

³ Mead v. Haynes, 3 Randolph, 33; Whitworth v. Pucket, 2 Gratt, 531. So as to section-line roads in Nebraska: Barry v. Deloughery, 47 Neb. 354, 66 N. W. Rep. 410; Oyler v. Ross, 48 Neb. 211, 66 N. W. Rep. 1099. A petition which has served in one proceeding is functus officio and cannot be made the basis of a new proceeding. State v. Groffam, 74 Wis. 643, 43 N. W. Rep. 727.

⁴ Hawkins v. Justices of Troups County, 12 Lea 351.

⁵ Howard v. Hutchinson, 10 Me. 335; McCarthy v. Whalen, 19 Hun 503; Rose v. Washington County, 42 Neb. 1, 60 N. W. Rep. 352.

⁶ State v. Barlow, 61 Ia. 572.

⁷ Worcester v. Keith, 5 Allen, 17. To same effect: State v. Smith, 100 N. C. 550, 6 S. E. Rep. 251. See also Tucker v. Eden, (Vt.) 34 Atl. Rep. 698,

objection was one which must be made in the first instance, or it was waived. Unless otherwise expressly required, a petition signed in the name of the petitioner by his attorney is sufficient.⁸ The same rule holds good when the petitioner is a corporation.⁹ Where a petition was required to be in the name of a city and signed by the city attorney in his official capacity, it was held that a petition signed as follows,—“City of D. by A. B., City Attorney,”—was correct.¹⁰ Where parties were named as petitioners and appeared and prosecuted it, it was held no objection that they had not signed it.¹¹ The petition need not be verified unless the statute requires it.¹² If required by statute, the same rules would apply as in other cases, in determining what is a sufficient and proper verification.¹³ Consenting to the appointment of commissioners or going to trial on the merits, will be a waiver of any objection to the verification.¹⁴ Where the statute required the petition of a railroad company to be verified by an officer of the company, a verification by a general agent to purchase lands for the company was held sufficient.¹⁵

If the statute requires the petition to be filed within a certain specified time, as thirty days before the term of court, a failure to comply will be fatal to the proceedings.¹⁶

⁸ *Gammel v. Potter*, 2 Ia. 562; *Harvey v. Lloyd*, 3 Pa. St. 331; *Sharett's Road*, 8 Pa. St. 89. In the last two cases the statute required a petition by the owner, and a petition signed in the owner's name by his attorney was held good. But see *Shafferstown Road*, 30 Watts, 475, which seems to be contra.

⁹ *Skinner v. Lake View Avenue Co.*, 57 Ill. 151; *Tucker v. Erie etc. R. R. Co.*, 27 Pa. St. 281.

¹⁰ *City of Detroit v. Beecher*, 75 Mich. 454, 42 N. W. Rep. 986.

¹¹ *Smith v. Goldsborough*, 80 Md. 49, 30 Atl. Rep. 574.

¹² *Gammel v. Potter*, 2 Ia. 562;

Trester v. Mo. Pac. R. R. Co., 33 Neb. 171, 49 N. W. Rep. 1010.

¹³ A certificate of a notary in these words, “Sworn and subscribed, 13th, 1883,” was held sufficient, *Updegraff v. Palmer*, 107 Ind. 181.

¹⁴ *Matter of New York etc. R. R. Co.*, 33 Hun 148; *Matter of Boston etc. Ry. Co.*, 79 N. Y. 64; *Detroit v. Beecher*, 75 Mich. 454, 42 N. W. Rep. 986.

¹⁵ *Matter of New York etc. R. R. Co.*, 33 Hun 148; *In re St. Lawrence & A. R. R. Co.*, 133 N. Y. 270, 31 N. E. Rep. 218.

¹⁶ *Road Case*, 6 Phila. 143.

§ 346. When the signers must include a certain proportion of the property involved, or of the owners thereof.— This is not an infrequent requirement, in case of laying out or extending highways and streets, or of constructing works for the drainage or improvement of land. There is no question but what the statute must be complied with in such cases,¹⁷ but questions frequently arise as to what is a compliance. A statute permitted the proprietors of meadow and swamp land, “*or the greater part of them in interest,*” to petition for their improvement. The italics was held to mean the greatest interest in value, not in territorial area.¹⁸ A statute that the owners of property may petition “for the opening, widening or straightening of a street or streets through their property and through other real property adjacent thereto,” was held to mean that some of the signers must own property through which the street would extend.¹⁹ A statute provided that the trustees of a village on the petition of a majority of the persons owning lots on a street might extend the street. It was held the trustees might act on the application of a majority of the lot owners on the original street.²⁰ Where a petition by the owners of a majority of the frontage on a street is required, the signatures of the officers of a corporation not duly authorized, or of executors, administrators or agents of estates, or of one tenant in common, cannot be counted.²¹ The owners of a private way abutting on the street must be included.²² If, after some have signed, the petition is changed without their privity, it is void as to them, and if they are necessary to make up the required majority there is no jurisdiction.²³ The petition should show on its face that it is signed by

¹⁷ Richman v. Board of Supervisors, 70 Ia. 627; Godchaux v. Carpenter, 19 Nev. 415, 14 Pac. Rep. 140.

¹⁸ Henry v. Thomas, 119 Mass. 583.

¹⁹ New Orleans v. Sohr, 16 La. An. 393.

²⁰ People v. Port Jervis, 100 N. Y. 283.

²¹ Mulligan v. Smith, 59 Cal. 206; State v. Bayonne, 54 N. J. L. 293, 23 Atl. Rep. 648.

²² State v. Orange, 32 N. J. L. 49.

²³ Graves v. Otis, 2 Hill, 466.

the requisite number or majority.²⁴ Where the common council could not permit a horse railroad to be laid on a street without a majority in interest of the owners of property on the street consented, it was held the decision of the council was not conclusive.²⁵ It has been held in Indiana that signers may withdraw their names before the petition is acted upon.²⁶ A petition good on its face has been held to give jurisdiction so as to make the finding of the tribunal that it was properly signed, conclusive in a collateral proceeding.²⁷

§ 347. When required to be signed by a certain class of persons:—In the matter of laying out highways, drains and the like, it is common to require a petition signed by a certain number of freeholders, householders, legal voters, or persons of similar description, who reside in the vicinity of the proposed improvement. When so required, a petition signed by the requisite number having the prescribed qualifications is jurisdictional.²⁸ By some courts it is held that

²⁴ Sharp v. Johnson, 4 Hill, 92; Bay City Belt Line R. R. Co. v. Hitchcock, 90 Mich. 533, 51 N. W. Rep. 808; but see St. Louis v. Gleason, 15 Mo. App. 25.

²⁵ Roberts v. Easton, 19 Ohio St. 78.

²⁶ Black v. Campbell, 112 Ind. 122.

²⁷ Ely v. Board of Comrs. 112 Ind. 361.

²⁸ Bradford v. Cole, 8 Fla. 263; Warne v. Baker, 35 Ill. 382; S. C., 24 Ill. 351; Forsyth v. Kreuter, 100 Ind. 27; Commissioners of Wabaunsee Co. v. Muhlenbacker, 18 Kan. 129; Shaffer v. Weech, 34 Kan. 595; Whiteford v. Probate Judge, 53 Mich. 130; Frost v. Leatherman, 55 Mich. 33; Blize v. Castlio, 8 Mo. App. 290; Jefferson County v. Cowan, 54 Mo. 234; Whitely v. Platte Co., 73 Mo. 30; Zimmer-

man v. Snowden, 88 Mo. 218; Doody v. Vaughn, 7 Neb. 28; Matter of Highway, 3 N. J. L. 242; Road in Sussex and Morris, 13 N. J. L. 157; Hewes v. Andover, 16 Vt. 510; Howe v. Jamaica, 19 Vt. 607; Williams v. Homes, 2 Wis. 129; Damp v. Dane, 29 Wis. 419; Whittaker v. Gutheridge, 52 Ill. App. 460; Howell v. Redlon, 44 Kan. 558, 24 Pac. Rep. 1109; Schade v. Theel, 45 Kan. 628, 26 Pac. Rep. 38; Newcastle v. Commissioners, 87 Me. 227, 32 Atl. Rep. 885; Palmer v. Rich, 12 Mich. 414; Roberts v. Highway Commissioners, 25 Mich. 23; Wilson v. Township Board, 87 Mich. 240, 49 N. W. Rep. 572; Chicago etc. R. R. Co. v. Young 96 Mo. 39, 8 S. W. Rep. 776; Conaway v. Ascherman, 94 Ind. 187; Nischen v. Hawes, (Ky.) 21 S. W. Rep.

this must appear upon the face of the petition itself.²⁹ Others hold that it need not so appear, but may be shown at the proper stage in the proceedings.³⁰ Again, some courts hold that the fact that the petition is signed by the requisite number of persons having the prescribed qualifications must appear somewhere upon the face of the record, or the proceedings will be void,³¹ even when called in question collaterally.³² Other courts hold the contrary.³³ The fact that the signers described themselves as having the necessary qualifications was held to be *prima facie* evidence of the fact in Wisconsin,³⁴ while in New Jersey it has been held that the allegation of the fact in the petition was not sufficient without proof.³⁵ Without attempting to reconcile the authorities, it may be safely said that the better practice is to have the facts in question appear on the face of the petition itself. But if the statute does not require it,

1049; *Thatcher v. Crisman*, 6 Col. App. 49, 39 Pac. Rep. 887; *Howard v. Board of County Comrs.*, 25 Neb. 229, 41 N. W. Rep. 185; *Shull v. Brown*, 25 Neb. 234, 41 N. W. Rep. 186; *Wallace v. Winkler*, 60 N. J. L. 105.

²⁹ *Whiteford v. Probate Judge*, 53 Mich. 130; *Frost v. Leatherman*, 55 Mich. 33; *Matter of Highway*, 3 N. J. L. 242; *Road in Sussex and Morris*, 13 N. J. L. 157; *Conaway v. Archerman*, 94 Ind. 187; *Nischen v. Hawes*, (Ky.) 21 S. W. Rep. 1049; *Hewes v. Andover*, 16 Vt. 510; *Howe v. Jamaica*, 19 Vt. 607. In the last case it was held the petition could be amended so as to show the requisite facts in this respect.

³⁰ *Keyes v. Tait*, 19 Ia. 123; *Browne v. McCord*, 20 Ind. 270; *Washington Ice Co. v. Lay*, 103 Ind. 48; *Willis v. Sproule*, 13 Kan. 257; *Snoddy v. County of Pettis*, 45 Mo. 361; *Austin v.*

Allen, 6 Wis. 134; *Humboldt County v. Dinsmore*, 75 Cal. 604; *Bewley v. Graves*, 17 Or. 274, 20 Pac. Rep. 322.

³¹ *Commissioners of Wabaunsee Co. v. Muhlenbacker*, 18 Kan. 129; *Blize v. Castlio*, 8 Mo. App. 290; *Jefferson County v. Cowan*, 54 Mo. 234; *Whitely v. Platte Co.*, 73 Mo. 30; *Roberts v. Commissioner*, 25 Mich. 23.

³² *Doody v. Vaughn*, 7 Neb. 28; *Zimmerman v. Snowden*, 88 Mo. 218.

³³ *Keyes v. Tait*, 19 Ia. 123; *Robinson v. Rippey*, 111 Ind. 112; *Snoddy v. County of Pettis*, 45 Mo. 361; *Bause v. Clark*, 69 Minn. 53. The Missouri case appears to be overruled by later decisions. See last note.

³⁴ *State v. Nelson*, 57 Wis. 147. And see *In re Swanson St.*, 163 Pa. St. 323, 30 Atl. Rep. 207.

³⁵ *Matter of Highway*, 3 N. J. L. 242.

it would seem that it need not necessarily so appear, but that it might be shown by proper proof that the signers possess the qualifications required. This proof should be made before the tribunal is called upon to take jurisdiction or to act.³⁶

A petition for a highway extending into two or more counties was required to be signed by twenty legal voters resident in the said counties. It was held they might all reside in the same county.³⁷ Where a petition for a highway was required to be signed by twelve legal voters residing within three miles of the highway, it was held that they must also reside within the town in which the lay-out was to be.³⁸ Where it is to be signed by freeholders resident in the town, they must have freeholds in the town.³⁹ Bachelors with house and servants have been held to be householders within such statutes.⁴⁰ After jurisdiction has once attached by presenting a petition duly signed, the withdrawal of one or more, whereby the number remaining is reduced below that required by law, does not defeat jurisdiction.⁴¹ In Ohio it was held that the objection that the petitioners were not freeholders came too late on appeal.⁴² The finding of county commissioners that the signers were freeholders was held conclusive in Indiana, unless objection was made before the appointment of viewers.⁴³ Where the face of the petition shows, and the order of court recites, that the signers possess the necessary qualifications, it is sufficient collaterally.⁴⁴ A statute provided that the county commissioners, being satisfied that the petitioners are re-

³⁶ As to what finding is sufficient, see *Howell v. Redlon*, 44 Kan. 558, 24 Pac. Rep. 558; *Schade v. Theel*, 45 Kan. 628, 26 Pac. Rep. 38.

³⁷ *State v. McDonald*, 28 Minn. 445.

³⁸ *Warne v. Baker*, 35 Ill. 382; S. C., 24 Ill. 351.

³⁹ *Damp v. Dane*, 29 Wis. 419; *Commissioners of Highways v. Meserole*, 10 Wend. 122.

⁴⁰ *Kamer v. Clatsop Co.*, 6 Or. 238.

⁴¹ *Little v. Thompson*, 24 Ind. 146; *Grinnel v. Adams*, 34 Ohio St. 44.

⁴² *Matter of Wells Co. Road*, 7 Ohio St. 16.

⁴³ *Forsyth v. Kreuter*, 100 Ind. 27.

⁴⁴ *Dougherty v. Brown*, 91 Mo. 26.

sponsible, should proceed. It was held that the record need not show that they were satisfied.⁴⁵ It has been held that a petition may be amended by adding new names, so as to make the petition sufficient.⁴⁶

§ 348. **General requisites as to form and substance.**—The petition should comply with the statute in all respects, and should contain all the facts necessary to give jurisdiction.⁴⁷ The cases cited not only illustrate the general proposition above stated, but discuss a great variety of questions as to the sufficiency of the petition, which cannot be noticed in detail without too much prolixity. Though the

⁴⁵ *Cyr v. Dufour*, 68 Me. 492.

⁴⁶ *Bronnenburg v. O'Bryant*, 139 Ind. 17, 38 N. E. Rep. 416.

⁴⁷ *Daggy v. Green*, 12 Ind. 303; *Indianapolis etc. R. R. Co. v. Newsom*, 54 Ind. 121; *Farrington v. Blish*, 14 Me. 423; *Pettengill v. County Comrs.*, 21 Me. 377; *Whitney v. Gilman*, 33 Me. 273; *Bryant v. Glidden*, 36 Me. 36; *Jones v. Skinner*, 61 Me. 25; *Morton v. Franklin County*, 62 Me. 455; *Spofford v. Bucksport etc. R. R. Co.*, 66 Me. 26; *Vandusen v. Comstock*, 9 Mass. 203; *Barnard v. Fitch*, 7 Met. 605; *Powers v. Irish*, 23 Mich. 429; *Clay v. Pennoyer Creek Improvement Co.*, 34 Mich. 204; *Fox v. Holcomb*, 34 Mich. 298; *Fairbault v. Hulett*, 10 Minn. 30; *St. Louis v. Frank*, 9 Mo. App. 579; *In re Merchant Street*, 9 Phila. 590; *Church Road*, 5 W. & S. 200; *Burgess v. Georgia*, 11 Vt. 134; *Martin v. Beverley*, 5 Call 444; *Waller v. McConnell*, 19 Wis. 417; *Matter of Marsh*, 10 Hun 49; *Lake Shore etc. R. R. Co. v. Baltimore etc. R. R. Co.*, 149 Ill. 272, 37 N. E. Rep. 91; *Rogers v. Venis*, 137

Ind. 221, 36 N. E. Rep. 841; *Lehmann v. Rinehart*, 90 Ia. 346, 57 N. W. Rep. 866; *Weymouth v. Commissioners*, 86 Me. 391, 29 Atl. Rep. 1100; *Toledo etc. R. R. Co. v. East Saginaw etc. R. R. Co.*, 72 Mich. 206, 40 N. W. Rep. 436; *Hall v. Pettit*, 88 Mich. 158, 50 N. W. Rep. 117; *Trester v. Missouri Pac. R. R. Co.*, 33 Neb. 171, 49 N. W. Rep. 1110; *Winter v. New York etc. R. R. Co.*, 51 N. J. L. 83, 16 Atl. Rep. 188; *In re Board of Street Opening*, 91 Hun 477, 36 N. Y. Supp. 311; *Stannards Corners Rural Cem. Ass. v. Brandes*, 35 N. Y. Supp. 1015; *Woodruff v. Douglas County*, 17 Or. 314, 21 Pac. Rep. 49; *Harbaugh Ave.*, 10 Pa. Co. Ct. 440; *Aull v. Columbia etc. R. R. Co.*, 42 S. C. 431, 20 S. E. Rep. 302; *State v. Supervisors*, 68 Wis. 502; *Winnebago Furniture Mfg. Co. v. Wisconsin M. R. Co.*, 81 Wis. 389, 51 N. W. Rep. 576; *In re Montgomery*, 48 Fed. Rep. 896; *Behrens v. Comrs.*, 169 Ill. 558; *Erie etc. R. R. Co. v. Welch*, 1 App. Div. 140, 37 N. Y. Supp. 996.

statute must be complied with, a substantial compliance is sufficient.⁴⁸ Mere verbal criticisms are not favored.⁴⁹ But where the statute required the petition to state "that in the opinion of the petitioners public interests required that the improvements asked for should be made," a petition stating that, "in the opinion of the petitioners, the improvement asked for should be made," was held to be fatally defective.⁵⁰ The allegations of the petition should be certain and positive.⁵¹ But where allegations were followed by the phrase "as we believe," they were held to be sufficiently positive.⁵² If the statute requires the petition to contain a particular statement, its omission will be fatal.⁵³ But still the substance and not the form will be looked to, and where a statute required the petition of a railroad company to state that it intended in good faith to construct and finish a road between the termini named in its articles of incorporation, it was held not to apply to a proceeding instituted after the road was built.⁵⁴ Where the initiative is given the owner,

⁴⁸ *Indianapolis etc. R. R. Co. v. Christian*, 93 Ind. 360; *Shields v. McMahan*, 101 Ind. 591; *Heick v. Voight*, 110 Ind. 279; *McCallister v. Shney*, 24 Ia. 362; *State v. Pitman*, 38 Ia. 252; *Stevens v. Board of Supervisors*, 41 Ia. 341; *Townsend v. Chicago & Alton R. R. Co.*, 91 Ill. 545; *Byron v. Blount*, 97 Ill. 62; *City of Deering v. County Comrs.*, 87 Me. 151, 32 Atl. Rep. 797; *Belk v. Hamilton*, 130 Mo. 292, 32 S. W. Rep. 656; *Warlick v. Lowman*, 103 N. C. 122, 9 S. E. Rep. 458.

⁴⁹ *Raymond v. County Comrs.* 63 Me. 112.

⁵⁰ *In re Grove St.*, 61 Cal. 438.

⁵¹ *Hays v. Campbell*, 17 Ind. 430.

⁵² *Thayer v. Burger*, 100 Ind. 262.

⁵³ *Powers v. Irish*, 23 Mich.

429; *Maxwell v. Bay City Bridge Co.*, 41 Mich. 453.

⁵⁴ *Metropolitan El. R. R. Co. v. Dominick*, 55 Hun 198, 27 N. Y. St. 576, 8 N. Y. Supp. 151; *Matter of New York etc. R. R. Co.*, 4 Hun 381; *Chicago etc. R. R. Co. v. Richardson*, 86 Wis. 154, 56 N. W. Rep. 741. Where the statute required the petition to contain "a statement that it is the intention of the plaintiff, in good faith, to complete the work or improvement for which the property is to be condemned, and the preliminaries required by law have been taken to entitle him to institute the proceeding," it was held sufficient if the averment was in the language of the statute. *Rochester R. R. Co. v. Robinson*, 133 N. Y. 242, 30 N. E. Rep. 1008.

less strictness is required of him than where the proceeding is adverse to the owner.⁵⁵

§ 349. **Statement of parties, owners and persons interested.**—Statutes quite generally require the petition to give the names of the owners, occupants or persons interested in the property to be condemned. The decisions are not uniform as to the construction and effect of such provisions. The proper course is to comply with the statute,⁵⁶ and a failure to do so would undoubtedly render the petition demurrable,⁵⁷ and could be taken advantage of at any stage in the proceedings.⁵⁸ It is held that the defect may be cured by amendment,⁵⁹ even after verdict.⁶⁰ Owners should be described by their proper names, and not as the heirs of a person.⁶¹ Where the statute required the petition to state the names of owners and occupants, a petition giving the names of owners only was held sufficient to give jurisdiction.⁶² The names and residences of owners, with a description of the property of each, may properly be given in schedules attached to the petition.⁶³ A general description of persons as owners, agents or occupants, without designating to which class each belonged, was held good.⁶⁴ If the statute requires the names of owners to be stated if known, reasonable diligence must be used to ascertain the names.⁶⁵

⁵⁵ *Martinsville etc. R. R. Co. v. Bridges*, 6 Ind. 400.

⁵⁶ *Honenstine v. Vaughn*, 7 Blackf. 520; *Trester v. Missouri Pac. R. R. Co.*, 33 Neb. 171, 49 N. W. Rep. 1110; *Godchaux v. Carpenter*, 19 Nev. 415, 14 Pac. Rep. 140; *Sieferer v. St. Louis*, 141 Mo. 586.

⁵⁷ *Martin v. Franklin Co.* 62 Me. 455.

⁵⁸ *Honenstine v. Vaughn*, 7 Blackf. 520; *Hughes v. Sellers*, 34 Ind. 337; *Matter of Flatbush Ave.*, 1 Barb. 286; *People v. Whitney's Point*, 32 Hun 508.

⁵⁹ *Milhollin v. Thomas*, 7 Ind. 165.

⁶⁰ *Russell v. Turner*, 62 Me. 496.

⁶¹ *Hughes v. Sellers*, 34 Ind. 337. But in a collateral proceeding a petition was held sufficient to give jurisdiction which described owners as "Bryant Heirs." *Miller v. Porter*, 71 Ind. 521; and see *Carr v. State*, 103 Ind. 548.

⁶² *Milhollen v. Thomas*, 7 Ind. 165.

⁶³ *Matter of Commissioners of Washington Park*, 52 N. Y. 131.

⁶⁴ *Meyers v. Brown*, 55 Ind. 596.

⁶⁵ *Harbeck v. Toledo*, 11 Ohio St. 219.

Including one as joint owner who is not such is immaterial if the true owners are named.⁶⁶ If the statute does not require the names of owners to be given in the petition, it need not be done.⁶⁷

§ 350. **Description of the property taken, or of the location of the improvement.**—Much depends in this respect upon the powers of the tribunal whose jurisdiction is to be invoked by the petition, as well as upon the requirements of the statute in the particular case. The provisions of the statute in regard to a description of the property taken, or of the location of the improvement, must be substantially complied with, or the petition will be insufficient.⁶⁸ If only a general description is required by statute, no more can be required by the courts.⁶⁹ Where the particular location of the improvement is to be determined, not by the petitioners, but by the tribunal to which the petition is addressed, or by persons appointed by that tribunal, then it is apparent that only a general description of the location can be given in the petition. This is frequently the case in the matter of establishing country roads, and also of drains and ditches. In such cases a general description of the route or location is all that can be given, and that is sufficient.⁷⁰ The termini should be definitely given,⁷¹ and the location should be

⁶⁶ *Boyd v. Negley*, 40 Pa. St. 377.

⁶⁷ *Watkins v. Pickering*, 92 Ind. 332; *Sixteenth St. Opening*, 4 Pa. Co. Ct. 124.

⁶⁸ *Matter of New York Central & Harlem River R. R. Co.*, 70 N. Y. 191; *People v. Taylor*, 34 Barb. 481.

⁶⁹ *Corey v. Swagger*, 74 Ind. 211; *Wright v. Wilson*, 95 Ind. 408.

⁷⁰ *Commonwealth v. County Commissioners*, 8 Pick. 343; *Westport v. County Comrs.*, 9 Allen, 204; *Matter of Public*

Road, 4 N. J. L. 31; *State v. Shreve*, 4 N. J. L. 297; *State v. Northrup*, 18 N. J. L. 271; *Wigin v. Exeter*, 13 N. H. 304; *Sumner v. County Comrs.*, 37 Me. 112; *Packard v. County Comrs.*, 80 Me. 43, 12 Atl. Rep. 788; *Kinnie v. Bare*, 68 Mich. 625, 36 N. W. Rep. 672; *Ziebold v. Foster*, 118 Mo. 349, 24 S. W. Rep. 155; *Cribbs v. Benedict*, 64 Ark. 555.

⁷¹ *Bryan v. Moore*, 81 Ind. 9; *Pembroke v. County Comrs.*, 12 Cush. 351; *Matter of Highway*, 16 N. J. L. 391.

given with sufficient definiteness to enable notice to be given to the owners of property to be affected.⁷²

If the location of the improvement or the property to be taken is determined by the petitioners and the tribunal has no authority to fix or change the location, but only to assess the compensation and perfect title to the property for the purpose intended, then the petition should describe the property or location with sufficient definiteness to enable one skilled in such matters to locate it on the ground.⁷³ That is certain which can be made certain by means of the description or references contained in the petition.⁷⁴ The petition may refer to a map or plat attached,⁷⁵ or on the public records,⁷⁶ or to stakes or monuments upon the

⁷² *Pembroke v. County Comrs.*, 12 Cush. 351.

⁷³ *Clift v. Brown*, 95 Ind. 53; *McDonald v. Wilson*, 59 Ind. 54; *Rising Sun & Hartford Turnpike v. Hamilton*, 50 Ind. 580; *Prescott v. Curtes*, 42 Me. 64; *Spofford v. Bucksport etc. R. R. Co.*, 66 Me. 26; *Paine v. Woods*, 108 Mass. 160; *Mansfield etc. R. R. Co. v. Clark*, 23 Mich. 519; *Wilkin v. First Division of etc.*, 16 Minn. 271; *Quincy etc. R. R. Co. v. Kellogg*, 54 Mo. 334; *Turnpike Co. v. American etc. News Co.*, 43 N. J. L. 381; *Jackson v. Rankin*, 67 Wis. 285; *Brown v. Rome etc. R. R. Co.*, 86 Ala. 206; *Adams v. Harrington*, 114 Ind. 66; *McDonald v. Payne*, 114 Ind. 359; *Portland & G. Turnpike Co. v. Bobb*, 88 Ky. 226, 10 S. W. Rep. 794; *Manistee etc. R. R. Co. v. Fowler*, 73 Mich. 217, 41 N. W. Rep. 261; *Kinnie v. Bare*, 68 Mich. 625, 36 N. W. Rep. 672; *Zeibold v. Foster*, 118 Mo. 349, 24 S. W. Rep. 155; *Nashville etc. R. R. Co. v. Hobbs*, 120 Ala. 600; *Los Angeles*

v. Pomeroy, 124 Cal. 597, 57 Pac. Rep. 585; *Omaha etc. R. R. Co. v. Rickards*, 38 Neb. 847, 57 N. W. Rep. 739; *State v. Jersey City*, 56 N. J. L. 216, 27 Atl. Rep. 1065. In the following case it is said the width of the road need not be stated in the petition when the statute does not require it. *Watson v. Crowsore*, 93 Ind. 220.

⁷⁴ *Miller v. Porter*, 71 Ind. 521; *Quincy etc. R. R. Co. v. Kellogg*, 54 Mo. 334.

⁷⁵ *Corey v. Chicago etc. R. R. Co.*, 100 Mo. 282, 13 S. W. Rep. 346; *St. Louis etc. R. R. Co. v. Fowler*, 113 Mo. 458, 20 S. W. Rep. 1069; *Fremont etc. R. R. Co. v. Mattheis*, 35 Neb. 48, 52 N. W. Rep. 698; *Duke v. Central N. J. Tel. Co.*, 53 N. J. L. 341, 21 Atl. Rep. 460. But the plat must be sufficient to show location. *California etc. R. R. Co. v. Hooper*, 76 Cal. 404.

⁷⁶ *State v. O'Connor*, 78 Wis. 282, 47 N. W. Rep. 433; *Illinois Cent. R. R. Co. v. Lostant*, 167 Ill. 85, 47 N. E. Rep. 62

ground,⁷⁷ and the description will be sufficient if it can be made out by such references. Sometimes the statute requires a map or plat to be filed with the petition. In such case the omission to comply has been held fatal.⁷⁸ The use of the word *about* does not necessarily impair a description.⁷⁹ The petition should show that the property is within the jurisdiction.⁸⁰

In complaints for flowage a general description of the property flowed or damaged is usually all that is required.⁸¹

§ 351. Descriptions held sufficient.—Describing a terminus as a point on an existing highway one and a half rods northeasterly from a marked tree standing near the intersection of said way with another road;⁸² describing a road as “beginning at the terminus of the new road now building in Newfield to Balch Mills, thence in a western direction to the New Hampshire line;”⁸³ also as commencing “at a stake in the east side of” a certain road, and extending through lands of A B “to the northwesterly corner of lands belonging to the applicant and there to end;”⁸⁴ describing a private way by reference to an existing private way long traveled and well known;⁸⁵ describing the termini of a highway as at or near a definite monument;⁸⁶ giving the last course of a highway some ten miles long as “thence northwesterly to the northwest corner of the northeast quarter of Sec. 21,

⁷⁷ Saver v. Chicago etc. R. R. Co., 123 Ill. 293.

⁷⁸ In re Rochester El. R. R. Co., 123 N. Y. 351, 25 N. E. Rep. 381.

⁷⁹ Adams v. Harrington, 114 Ind. 66.

⁸⁰ Parkhurst v. Vanderveer, 48 N. J. L. 80; Scheff v. Upper Conn. River & Lake Imp. Co., 57 N. H. 110; Collins v. Rupe, 109 Ind. 340; Casey v. Kilgore, 14 Kan. 478; Sutherland v. Holmes, 78 Mo. 399.

⁸¹ Commonwealth v. Ellis, 11 Mass. 462; Lake v. Loysen, 66 Wis. 424; Folmar v. Folmar, 71

Ala. 136; Hovey v. Perkins, 63 N. H. 516.

⁸² Wentworth v. Milton, 46 N. H. 448.

⁸³ Acton v. York County, 77 Me. 128.

⁸⁴ Biddle v. Dancer, 20 N. J. L. 633.

⁸⁵ Satterly v. Winne, 101 N. Y. 218.

⁸⁶ State v. Northrup, 18 N. J. L. 271; Smith v. Conway, 17 N. H. 586; In re Road in Sterrett Township, 114 Pa. St. 627; but see Bryant v. County Comrs., 79 Me. 128.

T. 3, S. of R. 40 E. of the Willamette meridian.”⁸⁷ A definite description of a right of way for a sewer across a forty-acre tract was held good, though the tract had been in part platted into lots and the description made no reference to the lots crossed.⁸⁸ The location of a ditch was described as beginning at about the center of the E. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of a certain section, running thence in northeasterly direction to a given point in a certain section line, thence north about forty rods, thence a little north of west until it intersected a certain creek, the ditch to follow the natural water channel the entire distance: held sufficient.⁸⁹ A petition set forth that the petitioner was desirous of constructing a railway from G to W over and across the lands of B, that the company’s railway would extend about three-fourths of a mile through the lands of said B, and that it should be one hundred feet wide. This was held sufficient to give jurisdiction.⁹⁰ Where the statute provides that the tribunal shall fix the width of a highway, it need not be specified in the petition.⁹¹ Though the petition does not give the county, State or meridian, yet if it gives the section, township and range, and it is fairly inferrable from the petition that the property is in the county where the petition is presented, it will be sufficient.⁹² A description of a private way as being from the petitioner’s dwelling to a designated public road, is good.⁹³ A petition to extend a specified street to a specified point was held good, it being understood the ex-

⁸⁷ *Amer v. Union County*, 17 Or. 600, 22 Pac. Rep. 118.

⁸⁸ *Joplin Consol. Min. Co. v. City of Joplin*, 124 Mo. 129, 27 S. W. Rep. 406. But see *Omaha etc. R. R. Co. v. Rickards*, 38 Neb. 847, 57 N. W. Rep. 739.

⁸⁹ *Metty v. Marsh*, 124 Ind. 18, 23 N. E. Rep. 702.

⁹⁰ *Ex parte Bennett*, 26 S. C. 317, 2 S. E. Rep. 576.

⁹¹ *Hill v. Board of Supervisors*, 95 Cal. 239, 30 Pac. Rep. 385;

Zeibold v. Foster, 118 Mo. 349, 24 S. W. Rep. 155; *Matter of Petition of Gardner*, 40 Mo. App. 589.

⁹² *Casey v. Kilgore*, 14 Kan. 478; *Sutherland v. Holmes*, 78 Mo. 399; *Collins v. Rûpe*, 109 Ind. 340.

⁹³ *Road Case*, 4 Yates, 514; *Case of Road*, 9 S. & R. 35; *Westport v. County Comrs.*, 9 Allen, 203; but see *Commissioners v. Mallory*, 21 Ill. App. 184.

tension would be in a straight line.⁹⁴ A number of additional cases are referred to, without particularizing, in which the descriptions were held sufficient.⁹⁵

§ 352. **Descriptions held insufficient.**—Describing the beginning of a highway as near the corner between the N. W. and N. E. quarters of a certain section, without designating which corner,¹ or at the State line in a certain section,² or at a point on a highway south of and adjacent to a certain railroad;³ or in a certain public road on the land of A;⁴ describing the course of a highway or ditch as “thence bearing southerly to avoid Flat Creek and keeping on the most favorable ground, running easterly and northerly in and through the land of A one hundred yards to the section line,”⁵ or “thence northwest fourteen rods with an angle of about ten degrees,”⁶ or “thence southerly to intersect the county road near the foot of Nevil’s Hill near the south line of A’s land claim,”⁷ or “thence southerly to the C River to low water mark,”⁸ or “extending diagonally through said tract of land from a point near the northeast corner to a

⁹⁴ Charlotte Street, 23 Pa. St. 286.

⁹⁵ McDonald v. Payne, 114 Ind. 359; Lime Rock R. R. Co. v. Farnsworth, 86 Me. 127, 29 Atl. Rep. 957; State v. Rapp, 39 Minn. 65, 38 N. W. Rep. 926; Corey v. Chicago etc. R. R. Co. 100 Mo. 282; St. Louis etc. R. R. Co. v. Fowler, 113 Mo. 458; 20 S. W. Rep. 1069; St. Louis etc. R. R. Co. v. Lewright, 113 Mo. 660, 21 S. W. Rep. 210; Fremont etc. R. R. Co. v. Mattheis, 35 Neb. 48, 52 N. W. Rep. 698; Philadelphia etc. R. R. Co. v. Railroad Co., 12 Pa. Co. Ct. 513; City of Stephenville v. Overby, 3 Tex. Civ. App. 173, 22 S. W. Rep. 121; Vedder v. Marion County, 22 Or. 264, 29 Pac. Rep. 619; State v. O’Connor, 78 Wis. 282, 47 N. W. Rep. 433; Cincinnati etc. R. R.

Co. v. Bay City etc. R. R. Co., 106 Mich. 473, 64 N. W. Rep. 471; San Francisco etc. R. R. Co. v. Gould, 122 Cal. 601; Towns v. Klamath County, 33 Or. 225, 53 Pac. Rep. 604.

¹ Farmer v. Pauley, 50 Ind. 583.

² Shute v. Decker, 51 Ind. 241.

³ McDonald v. Wilson, 59 Ind. 54.

⁴ Pocopson Road, 7 Pa. Co. Ct. 617; Montgomery Township Road, 15 Pa. Co. Ct. 384.

⁵ Scraper v. Piper, 59 Ind. 158; Sime v. Spencer, 30 Or. 340.

⁶ Smith v. Weldon, 73 Ind. 454.

⁷ Johns v. Marion County, 4 Or. 46; see Canyonville & Galesville Road Co. v. Douglas County, 5 Or. 280.

⁸ Clement v. Burnes, 43 N. H. 609.

point near the southwest corner,"⁹ or "thence east on the line of lands of B and D by the most feasible route eighty rods, thence north or south as in your (Drainage Commissioners') estimation seems most proper for outlet into Rocky River,"¹⁰ or "thence southwest above said Archambeau's barn, westerly to the premises of Joseph Champagne, on the most practicable route, and through the premises of said Champagne, leaving his house to the left and intersecting the present Cole's Valley and Rosebury county road at a point between the residence of Chas. La Point and ——— O'Brien."¹¹ A petition to lay out a road commencing at the southwest corner of section 30 gives no jurisdiction to lay out a road commencing at the southeast corner of the section.¹² Describing a drain as a line is too indefinite.¹³ So where the ditch was described as a line and the dimensions were given as twelve feet wide at the top, two feet at the bottom and five feet deep with a regular slope, the position of the ditch with reference to the line not being specified.¹⁴ A petition which describes three different surveys and locations of a railroad, but does not designate which one it desires to condemn, is a nullity.¹⁵ The use of the word *about*, in connection with distances, was held to make the description bad.¹⁶ A petition describing a road as "leading from New Sweden to Fort Kent by the most direct and feasible route, commencing in New Sweden, at the terminus of the county road and running through townships 16 R. 3, 16 R. 4, 17 R. 5, 17 R. 6, Frenchville and Fort Kent, and passing between Cross Lake and Mud Lake," was held too indefinite to give jurisdiction.¹⁷

⁹ Indianapolis etc. R. R. Co. v. Newson, 54 Ind. 121.

¹⁰ Null v. Zierle, 52 Mich. 540; S. P., Frost v. Leatherman, 55 Mich. 33.

¹¹ Woodruff v. Douglas County, 17 Or. 314, 21 Pac. Rep. 49.

¹² Butterfield v. Pollock, 45 Ia. 257.

¹³ Mathias v. Drainage Comr., 49 Mich. 465.

¹⁴ Bennett v. Drain Comr., 56 Mich. 634.

¹⁵ G. etc. R. R. Co. v. Mud Creek etc. Co., 1 Tex. App. Civil Cas., p. 169; S. P., Fort Worth & Denver City Ry. Co. v. Hogsett, Ibid., p. 200.

¹⁶ Midland Ry. Co. v. Smith, 109 Ind. 488.

¹⁷ Hayford v. County Comrs., 78 Me. 153.

A description of a railroad right of way as commencing "on the east line" of a certain section and running across the same, being fifty feet on each side of the center line of the road as shown by the map and survey and as staked out across the section, the map and survey not being attached to the petition, was held insufficient.¹⁸ Additional cases are referred to in the margin.¹⁹

§ 352a. Descriptions in certain peculiar cases of condemnation: Taking joint use of land or tracks, the right to occupy streets, to withdraw water, etc.—In most cases of condemnation, the object is to acquire the fee or the use of a certain described area of land. The description should be one, therefore, which bounds and describes the area and enables it to be located on the surface of the earth. When the object is to condemn the right to use certain property jointly with another, the right sought to be condemned should be properly described. Thus one railroad company cannot condemn a crossing over the right of way of another company, under a petition which describes a section of such right of way by metes and bounds, as though it was private property, and without showing that it is a right of way.²⁰ In a proceeding by one street railroad company to condemn

¹⁸ Toledo, Ann Arbor & North-ern Michigan R. R. Co. v. Munson, 57 Mich. 42.

¹⁹ Brown v. Rome etc. R. R. Co., 86 Ala. 206; London v. Sample Lumber Co., 91 Ala. 606, 8 So. Rep. 281; California etc. R. R. Co. v. Hooper, 76 Cal. 404; Commissioners v. Mallory, 21 Ill. App. 184; Packard v. County Comrs., 80 Me. 43, 12 Atl. Rep. 788; Newcastle v. Commissioners, 87 Me. 227, 32 Atl. Rep. 885; Manistee etc. R. R. Co. v. Fowler, 73 Mich. 217, 41 N. W. Rep. 261; Chicago etc. R. R. Co. v. Swan, 120 Mo. 30, 25 S. W. Rep. 534; Omaha & R. V. R. R. Co. v. Rickards, 38 Neb. 847, 57 N. W.

Rep. 739; Wirth v. Jersey City, 56 N. J. L. 216, 27 Atl. Rep. 1065; Road in Ross Township, 36 Pa. St. 87; Chartiers Tp. Road, 48 Pa. St. 314; Pagel v. County Comrs., 17 Mon. 586; Sime v. Spencer, 30 Or. 340; Parker v. Ft. Worth etc. R. R. Co., 84 Tex. 333, 19 S. W. Rep. 518; Derry Tp. Road, 11 Pa. Supr. Ct. 232.

²⁰ Cincinnati etc. R. R. Co. v. Danville etc. R. R. Co., 75 Ill. 113; Toledo etc. R. R. Co. v. Detroit etc. R. R. Co., 62 Mich. 564, 29 N. W. Rep. 500. And see National Docks etc. R. R. Co. v. United N. J. R. R. Co., 53 N. J. L. 217, 21 Atl. Rep. 570; Illinois Central R. R. Co. v. City of Chi-

the right to use the tracks of another company jointly, for a certain distance, the petition was "to appropriate to its use jointly with the said, the Toledo Consolidated St. R. R. Co., the right equally with said defendant, to use and occupy and run its cars over and upon" the tracks, switches, turn overs and turn outs of the defendant in a certain part of a certain street. This was held sufficient.²¹ Where the object was to condemn the right to construct a telegraph line in a street it was held that the petition should show the location, height and size of the poles, the number and size of the cross arms and the number of wires, in order that the compensation might be intelligently assessed and the owner duly protected.²² In a proceeding by an elevated railroad to condemn the rights and easements of abutting owners, a petition describing them as the easements "which are now or may be the subject of injury from a construction of a street railroad, and incidental to its use," was held sufficient.²³ In another similar case the following description was held insufficient: "So much of the property, ease-

ago, 138 Ill. 453, 28 N. E. Rep. 740. In the Michigan case the court, referring to the petition, says: "It fails to describe the rights and franchises it may condemn under the statute, or that petitioner wishes to condemn. It has a right to secure a crossing for its roadbed and cars, and make the necessary connection with the other company's track for this purpose; and it may also secure the right to cross the respondent's road with side tracks, and obtain the use of its right of way for the location of switches, provided such use is not inconsistent with the use of the road under the respondent's franchise. These rights, however, are not described in the petition, nor are they asked to be condemned. The right to the

title to sixty-six feet in length of the respondent's right of way is the property described in the petition, and nothing else. Such a description in the petition for the purpose of obtaining a right to cross another railroad is factually defective." p. 577.

²¹ Toledo Consolidated St. R. R. Co. v. Toledo Electric St. R. R. Co., 6 Ohio C. C. 362; S. C. 50 Ohio St. 603, 36 N. E. Rep. 312.

²² New York etc. Telephone Co. v. Broome, 50 N. J. L. 432, 14 Atl. Rep. 122; affirming S. C. 49 N. J. L. 624; Turnpike Co. v. News Co., 43 N. J. L. 381; Winter v. New York etc. Telephone Co., 51 N. J. L. 83, 16 Atl. Rep. 188.

²³ Brooklyn El. R. R. Co. v. Nagel, 75 Hun 590, 27 N. Y. Supp. 669. And see also Detroit etc. R. R. Co. v. Gartner, 95 Mich.

ments or other interests in said Greenwich street and intersecting streets, appurtenant to or part of or constituting the street in front or alongside of the lots and premises in this subdivision hereinafter described, respectively, as has been taken by reason of the construction and maintenance of the elevated railway of the petitioner, as the same is now constructed and maintained, with two rows of columns in said street and a superstructure carrying tracks upon transverse girders spanning the street, and, as has been and may be required by reason of the operation of said railway, with cars and trains of cars thereon necessary for the transaction of the business of the petitioner according to the statutes, conditions and requirements aforesaid.”²⁴ The use of the words, “as has been or may be required,” etc., was held to make the description very indefinite, since no one could tell what might be required. A petition to condemn all the water of a certain creek, except what the riparian owners had a right to use for domestic purposes, and for the irrigation of their riparian lands, was held to be too indefinite.²⁵ So much water from Oyster River Pond as may be required for the use of the petitioner, “not exceeding 750,000 gallons every twenty-four hours and no more,” was held a good description, since compensation must be assessed on the basis of the maximum being taken.²⁶ A petition to condemn for a water pipe was held sufficient which fixed the line of the pipe and provided that the village should have the right to maintain and repair the pipe, though no width was specified.²⁷ Cases are cited in the margin in which the description was held sufficient in proceedings to condemn the right

318, 54 N. W. Rep. 946; Trustees Atlanta University v. City of Atlanta, 93 Ga. 468, 21 S. E. Rep. 74.

²⁴ Metropolitan El. R. R. Co. v. Dominick, 55 Hun 198, 27 N. Y. St. 576, 8 N. Y. Supp. 151.

²⁵ Aliso Water Co. v. Baker, 95 Cal. 268, 30 Pac. Rep. 537.

²⁶ Ingraham v. Camden & R.

Water Co., 82 Me. 335, 19 Atl. Rep. 861. And see Hayden v. State, 132 N. Y. 533, 30 N. E. Rep. 961. For description in a case to condemn an easement for slopes in grading a street, see Kuschke v. St. Paul, 45 Minn. 225, 47 N. W. Rep. 786.

²⁷ Childs v. Newport, 70 Vt. 62, 39 Atl. Rep. 627.

to construct a telegraph line upon a railroad right of way.²⁸

§ 353. **Stating the purpose of the taking.**—The petition should show the use or purpose for which the property is desired, and that it is within the statutory powers conferred.²⁹ It should show a clear right to condemn the property described. Accordingly, it must not only show that the property is wanted for a public use, but also that it is for a use that is within the particular statute under which the proceedings are had.³⁰ Where the petition is for a private road, it must show that it is such a road, as to its termini and necessity, as the statute permits to be laid out.³¹ A petition for a cemetery should show that the privilege of interment is open to the public, as a cemetery may be private as well as public.³² A petition was as follows: "The undersigned ask that the highway (describing it) be opened for travel as required by law." Under this petition the board of supervisors went on and laid out the highway described. It was held that the petition was not to have a highway established and that it gave no jurisdiction for that purpose, and the proceedings under it were held void.³³ The effect of combining an authorized with an unauthorized

²⁸ *Mobile etc. R. R. Co. v. Postal Tel. Cable Co.*, 120 Ala. 21; *Gulf etc. R. R. Co. v. South Western Tel. & Tel. Co.*, 18 Tex. Civ. App. 500, 45 S. W. Rep. 151; *Houston etc. R. R. Co. v. Postal Tel. Cable Co.*, 18 Tex. Civ. App. 502, 45 S. W. Rep. 179.

²⁹ *Bottoms v. Brewer*, 54 Ala. 288; *Railway Co. v. Bohn*, 34 Ohio St. 114; *Randolph v. Comrs. of Highways*, 8 Ill. App. 128; *Matter of New York Central etc. R. R. Co.*, 5 Hun 86; *McCulley v. Cunningham*, 96 Ala. 583, 11 So. Rep. 694; *Dartmouth v. County Comrs.*, 153 Mass. 12, 26 N. E. Rep. 425; *Fork Ridge Baptist Cem. Ass. v. Redd*, 33 W. Va. 262, 10 S. E. Rep. 405.

³⁰ *Fork Ridge Baptist Cem. Ass. v. Redd*, 33 W. Va. 262, 10 S. E. Rep. 405. A general statement of the purpose is sufficient. The petition need not go into particulars. *Fletcher v. Chicago etc. R. R. Co.*, 67 Minn. 339.

³¹ *Powell v. Hitchner*, 32 N. J. L. 211; *Owings v. Worthington*, 10 G. & J. 283; but see *Carpenter v. Sims*, 3 Leigh, 675.

³² *Evergreen Cemetery Association v. Beecher*, 53 Conn. 551; *Farneman v. Mt. Pleasant Cem. Ass.*, 135 Ind. 344, 35 N. E. Rep. 271; *Fork Ridge Baptist Cem. Ass. v. Redd*, 33 W. Va. 262, 10 S. E. Rep. 405.

³³ *Curtis v. Pocahontas County*, 72 Ia. 151.

purpose in the same proceeding has been considered elsewhere.³⁴ As in other pleadings surplusage does not vitiate.³⁵

§ 354. *Stating the necessity for the taking.*—Where the power to lay out highways was limited to such as were of “common convenience or necessity,” it was held the petition must either allege that the road petitioned for was of common convenience or necessity, or state facts from which this might be inferred.³⁶ A statute required that a petition for a ditch should set forth the necessity therefor; held sufficient to state that it would be conducive to the public health, convenience and welfare, and of public benefit and utility.³⁷ Under a similar statute a statement that the property was required for the public use was held sufficient.³⁸ If the constitution or statute limits the taking for certain purposes, or for any purpose, to cases of necessity, the necessity must appear from the petition.³⁹ The subject of necessity in the exercise of the eminent domain power is treated more at length elsewhere.⁴⁰

§ 355. *Statement of title.*—Where the petition is by the owner of property taken or damaged, it should show the petitioner’s title or interest in the property for which compensation is claimed.⁴¹ In petitions by the party condemn-

³⁴ Ante, § 206.

³⁵ *Foster v. Chicago etc. R. R. Co.*, 10 Tex. Civ. App. 476, 31 S. W. Rep. 529.

³⁶ *Lockwood v. Gregory*, 4 Day, 407; *Windsor v. Field*, 1 Conn. 279; *S. P., Leath v. Summers*, 3 Iredell Law, 108.

³⁷ *Drisner v. Simpson*, 72 Ind. 435; *Corey v. Swagger*, 74 Ind. 211.

³⁸ *Flint etc. R. R. Co. v. Detroit etc. R. R. Co.*, 64 Mich. 350, 31 N. W. Rep. 281.

³⁹ *Grand Rapids etc. R. R. Co. v. Van Driels*, 24 Mich. 409; *Ayres v. Richards*, 38 Mich. 214; *Colville v. Judy*, 73 Mo. 651; *Barr*

v. Flynn, 20 Mo. App. 383; *Helena v. Harvey*, 6 Mon. 114; *Portland & G. Turnpike Co. v. Bobb*, 88 Ky. 226, 10 S. W. Rep. 794; *Morris v. Salle*, (Ky.) 19 S. W. Rep. 527; *Toledo etc. R. R. Co. v. East Saginaw etc. R. R. Co.*, 72 Mich. 206, 40 N. W. Rep. 436.

⁴⁰ See post, § 393. And see generally *Matter of Broadway etc. R. R. Co.*, 73 Hun 7, 25 N. Y. Supp. 1080; *Fork Ridge Baptist Cem. Ass. v. Redd*, 33 W. Va. 262, 10 S. E. Rep. 405.

⁴¹ *Nelson v. Butterfield*, 21 Me. 220; *Schoff v. Upper Conn. River*

ing, it is usual, and generally required, that the names of the owners or persons interested in the property described should be given. Such allegations do not conclude the defendant, who may show his real interest, if different from that stated in the petition.⁴² The effect of such allegations as an estoppel upon the petitioner is treated in a subsequent chapter.⁴³

§ 356. **Stating the nature of the injury or damage.**—In petitions or cross-petitions by the owner to obtain compensation under statutes for damage to property not taken, it is not generally considered necessary to state the nature of the damage specifically,⁴⁴ though it would undoubtedly be better practice to do so.⁴⁵

§ 357. **Must show inability to agree.**—⁴⁶ When the statute permits a resort to compulsory powers only after a failure to agree, the inability to agree must be alleged in the petition.⁴⁷ A general allegation in the language of the statute is held to be sufficient, without setting forth what

etc. Co., 57 N. H. 110; Faville v. Greene, 12 Wis. 11.

⁴² *Brisbine v. St. Paul & Sioux City R. R. Co.*, 23 Minn. 114.

⁴³ See post, § 441.

⁴⁴ *Lake v. Loysen*, 66 Wis. 424; *Drury v. Midland R. R. Co.*, 127 Mass. 571.

⁴⁵ *Lake v. Loysen*, 56 Wis. 424; *Union Canal Co. v. O'Brien*, 4 Rawle, 358. In the last case it was held necessary to set forth the nature of the damage.

⁴⁶ See ante, § 304.

⁴⁷ *Contra Costa R. R. Co. v. Moss*, 23 Cal. 323; *Reitenbaugh v. Chester Valley R. R. Co.*, 21 Pa. St. 100; *O'Hara v. Penna. R. R. Co.*, 25 Pa. St. 445; *Darlington v. United States*, 82 Pa. St. 382; *Matter of Lockport & Buffalo R. R. Co.*, 77 N. Y. 557; *Reed v. Ohio & Miss. R. R. Co.*, 126

Ill. 48, 17 N. E. Rep. 807; *Lake Shore etc. R. R. Co. v. Cincinnati etc. R. R. Co.*, 116 Ind. 578, 19 N. E. Rep. 440; *Portland & G. Turnpike Co. v. Bobb*, 88 Ky. 226, 10 S. W. Rep. 794; *Toledo etc. R. R. Co. v. Detroit etc. R. R. Co.*, 62 Mich. 564, 29 N. W. Rep. 500; *Grand Rapids etc. R. R. Co. v. Weiden*, 70 Mich. 390, 38 N. W. Rep. 294; *City of Springfield v. Whitlock*, 34 Mo. App. 642; *In re Montgomery*, 48 Fed. Rep. 896. Compare *Hartley v. Keokuk etc. R. R. Co.*, 85 Ia. 455, 52 N. W. Rep. 352; *Farnsworth v. Lime Rock R. R. Co.*, 83 Me. 440, 22 Atl. Rep. 373; *Rodgers v. Freemansburg*, 2 Pa. Co. Ct. 518; *Charleston etc. Bridge Co. v. Comstock*, 36 W. Va. 263, 15 S. E. Rep. 69.

has been done.⁴⁸ In some States the omission may be cured by amendment.⁴⁹

§ 358. **Showing neglect or refusal of some other tribunal to make the improvement.**—As has already been shown, some of the New England States provide that, in case of the neglect or refusal of the town authorities to lay out a highway, application may be made to another tribunal to do so.⁵⁰ In such cases the second petition must show the neglect or refusal of the town authorities, or it will be insufficient to give jurisdiction.⁵¹ Where the second application must be made within a year, the petition must show that it is within the time.⁵² It is said to be sufficient to state the neglect or refusal generally in the language of the statute.⁵³ The omission may be taken advantage of at any stage of the proceedings.⁵⁴ Whether it can be cured by amendment must depend upon local statutes. The decisions are against the right to amend, especially after report or verdict.⁵⁵

§ 359. **Joinder of improvements.**—This is a question which does not appear to have arisen except in case of highways and drains. It is held that an application to establish two highways or alleys cannot be included in one petition, even though they are connected together.⁵⁶ The ob-

⁴⁸ *Hannibal & St. Joseph R. R. Co. v. Muder*, 49 Mo. 165; *Matter of Suburban Rapid Transit Co.*, 38 Hun 553; S. C., 16 Abb. N. C., 152; *United States v. Oregon Ry. etc. Co.*, 9 Sawyer, 61; *Grand Rapids etc. R. R. Co. v. Weiden*, 69 Mich. 572, 37 N. W. Rep. 872. But an allegation that there has been no agreement is bad. *Glass v. Basin Mining Co.*, 22 Mon. 151, 55 Pac. Rep. 1047.

⁴⁹ *Pennsylvania R. R. Co. v. Porter*, 29 Pa. St. 165.

⁵⁰ *Ante*, § 309.

⁵¹ *Waterbury v. Darien*, 8 Conn. 161; *Threat v. Middletown*, 8 Conn. 243; *Plainfield v. Packer*,

11 Conn. 576; *Southington v. Clark*, 13 Conn. 370; *Torrington v. Nash*, 17 Conn. 197; *Guilford v. County Comrs.*, 40 Me. 296; *Scarborough v. Comrs.*, 41 Me. 604; *Goodwin v. County Comrs.*, 60 Me. 328; *Patten's Petition*, 16 N. H. 277; *Dinsmore v. Auburn*, 26 N. H. 356.

⁵² *Bethel v. County Comrs.*, 42 Me. 478.

⁵³ *True v. Freeman*, 64 Me. 573.

⁵⁴ Cases cited in note 51.

⁵⁵ *Waterbury v. Darien*, 8 Conn. 161; *Goodwin v. County Comrs.*, 60 Me. 328; *Dinsmore v. Auburn*, 26 N. H. 356. But see *Patten's Petition*, 16 N. H. 277.

⁵⁶ *Weckler v. Chicago*, 61 Ill.

jection, however, is not jurisdictional, but one of form only, like duplicity in pleading, and hence does not render the proceedings void collaterally.⁵⁷ Where one continuous street is opened, the fact that different portions are called by different names does not render separate proceedings necessary.⁵⁸ Where the petition, order and return were for two ditches, but the proceedings as to each were kept distinct, and there was jurisdiction to establish one and not the other, the proceedings were held good as to the one and bad as to the other.⁵⁹ It has been held that the widening, deepening and extension of a drain may be included in one proceeding.⁶⁰ The laying out of one road and vacation of another, or of part of an old road, are properly joined in one proceeding, where the new is to be used as a substitute for the old,⁶¹ and this is sometimes provided for by statute.⁶² A street cannot be widened, graded and graveled in one proceeding, unless permitted by statute.⁶³ A petition to discontinue one highway, to open another and to build a new

142; *State v. Oliver*, 24 N. J. L. 129; *State v. West Hoboken*, 37 N. J. L. 77; *Baker v. Ashland*, 50 N. H. 27; *In re Beech & Page Streets*, 91 Pa. St. 354; *In re Roads in Sadsbury Tp.*, 147 Pa. St. 471, 23 Atl. Rep. 772; *Fleetwood Streets*, 8 Pa. Co. Ct. 210. *In Matter of Highway*, 7 N. J. L. 37, there is a dictum to the contrary; and see *Warner v. County of Franklin*, 131 Mass. 348; *Barry v. Deloughery*, 47 Neb. 354, 66 N. W. Rep. 410; *Bause v. Clark*, 69 Minn. 53.

⁵⁷ *Hardy v. Keene*, 54 N. H. 449.

⁵⁸ *Detroit v. Robinson*, 93 Mich. 426, 53 N. W. Rep. 564.

⁵⁹ *In Matter of the Petition of Jacobs*, 3 Harr. Del. 321.

⁶⁰ *Tinsman v. Monroe Probate*

Judge, 82 Mich. 562, 46 N. W. Rep. 780.

⁶¹ *Pallard v. Dickinson County*, 71 Ia. 438; *Harris v. Board of Supervisors*, 88 Ia. 219, 55 N. W. Rep. 324; *Brown v. Roberts*, 23 Ill. App. 461; *West Goshen Roads*, 7 Pa. Co. Ct. 250; *Blakeley Road*, 8 Pa. Co. Ct. 498; *Conrad v. County of Lewis*, 10 W. Va. 784; *State v. Bergers*, 21 N. J. L. 342; *Green v. Loudenslager*, 54 N. J. L. 478, 24 Atl. Rep. 367. But see *Geddes v. Rice*, 24 Ohio St. 60; *Vedder v. Marion County, (Or.)* 36 Pac. Rep. 535.

⁶² *Anderson v. Word*, 80 Ill. 15.

⁶³ *Mendenhall v. Clugish*, 84 Ind. 94. But such a proceeding was held authorized by statute in *McKusick v. Stillwater*, 44 Minn. 372, 46 N. W. Rep. 769.

bridge, was held to confer no jurisdiction, because the different objects could not be united in one proceeding.⁶⁴

§ 360. **Cross petition.**—The practice of filing a cross petition for any purpose does not appear to obtain, except in Illinois. In that State it is provided by statute that any person claiming an interest in property taken or damaged by the proposed work and not made a party may intervene and file a cross petition, setting forth his claims, and thereupon his rights shall be fully considered and determined.⁶⁵ Under this statute it has been held that a defendant may file a cross petition and obtain damages to property not described in the petition, and that this is the only way such damages can be assessed in the one proceeding.⁶⁶ Where part of a lot or tract only is taken, a cross petition is not necessary in order to obtain damages to the part not taken.⁶⁷ In one case an answer describing land and claiming damages for injury thereto was held to answer the purpose of a cross petition.⁶⁸

§ 361. **Amendments.**—The question of the right or power to amend the petition depends upon various considerations: the nature of the tribunal before which the petition is pending, the statutes applicable to the particular case, the nature of the amendment proposed to be made, and the stage of the proceedings at which the amendment is moved. The practice of allowing amendments is one which should find favor with the courts, since it saves time and expense, both to the public and to the parties interested.⁶⁹ We shall

⁶⁴ *Cox v. Commissioner of Highways*, 83 Mich. 193, 47 N. W. Rep. 122.

⁶⁵ R. S. chap. 47, § 11.

⁶⁶ *Mix v. La Fayette etc. Ry. Co.*, 67 Ill. 319; *Jones v. Chicago etc. R. R. Co.*, 68 Ill. 380; *Galena etc. R. R. Co. v. Birkbeck*, 70 Ill. 208; *Peoria etc. R. R. Co. v. Sawyer*, 71 Ill. 361; *Johnson v. Freeport etc. Ry. Co.*, 111 Ill. 413; *S. C.*, 116 Ill. 521.

⁶⁷ *Bloomington v. Miller*, 84 Ill.

621; *Illinois etc. R. R. Co. v. Mayrand*, 93 Ill. 591; *St. Louis etc. R. R. Co. v. Postal Tel. Co.*, 173 Ill. 508.

⁶⁸ *Chicago & Iowa R. R. Co. v. Hopkins*, 90 Ill. 316.

⁶⁹ *Pennsylvania R. R. Co. v. Lutheran Congregation*, 53 Pa. St. 445; *Windham v. Litchfield*, 22 Conn. 226; *Grand Junction R. R. Co. v. County Comrs.*, 14 Gray, 553; *Barr v. Omaha*, 42 Neb. 342, 60 N. W. Rep. 591; *City of Syra-*

refer to the decisions without attempting to lay down any general rules. Amendments have been allowed so as to show that the signers were freeholders, as required by statute,⁷⁰ by inserting the residence of the different owners,⁷¹ by inserting an allegation that a ditch would be conducive to health and of public utility, though essential to give jurisdiction,⁷² changing the description of a highway asked for, though on appeal, so as to conform to the way actually laid out and evidently intended to be asked for,⁷³ by inserting an allegation of inability to agree,⁷⁴ or refusal of selectmen to lay out the way petitioned for,⁷⁵ by striking out the words "sitting as a court of chancery" in the address to the court,⁷⁶ by increasing the amount of damages claimed,⁷⁷ by inserting or correcting allegations as to ownership,⁷⁸ by making the description of the property sought to be taken more definite,⁷⁹ by adding new names to the petition.⁸⁰ It has been held that a petition cannot be amended by inserting an allegation essential to jurisdiction, especially after it has been acted upon.⁸¹ Amendments can-

cuse v. Stacey, 86 Hun 441, 33 N. Y. Supp. 929.

⁷⁰ Howe v. Jamaica, 19 Vt. 607.

⁷¹ Matter of Rochester, Hornellsville etc. Ry. Co., 45 Hun 126.

⁷² Coolman v. Fleming, 82 Ind. 117.

⁷³ Young v. Laconia, 59 N. H. 534; Indiana etc. R. R. Co. v. Rinehart, 14 Ind. App. 588, 43 N. E. Rep. 238; Robinson v. Pennsylvania R. R. Co., 174 Pa. St. 199, 34 Atl. Rep. 546.

⁷⁴ Pennsylvania R. R. Co. v. Porter, 29 Pa. St. 165.

⁷⁵ Patten's Petition, 16 N. H. 277.

⁷⁶ Husted v. Greenwich, 11 Conn. 383.

⁷⁷ Pennsylvania etc. R. R. Co. v. Bunnell, 81 Pa. St. 414.

⁷⁸ Russell v. Turner, 62 Me. 496; Kemp v. Smith, 7 Ind. 471; Hedrick v. Hedrick, 55 Ind. 78.

⁷⁹ Fremont etc. R. R. Co. v. Matthies, 39 Neb. 98, 57 N. W. Rep. 987; Leavenworth etc. R. R. Co. v. Atchison, 137 Mo. 218.

⁸⁰ Bronnenburg v. O'Bryant, 139 Ind. 17, 38 N. E. Rep. 416. And see Bigelow v. Draper, 6 N. D. 152.

⁸¹ Stannards Connors Rural Cem. Ass. v. Brandes, 35 N. Y. Supp. 1015; Newcastle v. Commissioners, 87 Me. 227, 32 Atl. Rep. 885. But see Poundstone v. Baldwin, 145 Ind. 139, 44 N. E. Rep. 191; Southwestern Land Co. v. Hickory etc. Co., 18 Col. 489, 33 Pac. Rep. 275.

not be made by a sheriff at the hearing before him and a jury on the assessment of damages.⁸²

§ 362. **Waiver of defects in the petition.**—Formal objections to the petition are waived by going to a hearing on the merits or taking any step which impliedly admits its sufficiency.⁸³ But jurisdictional defects may be taken advantage of at any stage of the proceedings.⁸⁴ It is held that a party cannot take advantage of defects in his own petition.⁸⁵

⁸² *Perry v. Sherborn*, 11 Cush. 388; see also on amendments *Midland Ry. Co. v. Smith*, 109 Ind. 488; *Webster v. Bridgewater*, 63 N. H. 296; *Newton v. Ala. Midland R. R. Co.*, 99 Ala. 468, 13 So. Rep. 259; *Whittaker v. Gutheridge*, 52 Ill. App. 460; *McKeen v. Porter*, 134 Ind. 483, 34 N. E. Rep. 223; *Ball v. Keokuk etc. R. R. Co.*, 71 Ia. 306; *Whitman v. Boston & M. R. R. Co.*, 16 Gray, 530; *Dartmouth v. County Comrs.*, 153 Mass. 12, 26 N. E. Rep. 425; *Matter of New York etc. R. R. Co.*, 89 N. Y. 453.

⁸³ *Sowle v. Cisner*, 56 Ind. 276; *Hughes v. Sellers*, 34 Ind. 337; *Palmer v. Highway Comr.*, 49 Mich. 45; *Bachelor v. New Hampton*, 60 N. H. 207; *Fisher*

v. Hobbs, 42 Ind. 276; *Wells v. Rhodes*, 114 Ind. 467; *Smith v. Goldsborough*, 80 Md. 49, 30 Atl. Rep. 574; *Thayer v. County Comrs.*, 10 Cush. 151; *Woodworth v. Spirit Mound*, 10 S. D. 504; *Pontiac v. Lull*, 111 Mich. 509.

⁸⁴ *Winnebago Furniture Mfg. Co. v. Wisconsin M. R. Co.*, 81 Wis. 389, 51 N. W. Rep. 576 and cases cited in prior sections of the chapter.

⁸⁵ *Rosentiel v. Miller*, 96 Mich. 99, 55 N. W. Rep. 655. And see generally on the subject *Forsyth v. Kreuter*, 100 Ind. 27; *Lawrence R. R. Co. v. O'Hara*, 50 Ohio St. 667, 36 N. E. Rep. 14; *Aull v. Columbia etc. R. R. Co.*, 42 S. C. 431, 20 S. E. Rep. 302.

CHAPTER XV.

NOTICE OF PROCEEDINGS.

I. CONSTITUTIONAL REQUIREMENTS.

§ 363. Cases holding that notice need not be given.—There are but three States in which it has been held or intimated, so far as we are aware, that it is competent for the legislature to provide for the taking of property and fixing the compensation to be paid, without notice to the parties interested in the property, of any of the proceedings by which it is accomplished. These are Illinois, Maryland and Mississippi. In the Illinois case¹ the statute provided that, in case of lands belonging to femmes covert, persons under age, non compos mentis, or out of the State, the compensation should be ascertained by three commissioners to be appointed by the governor upon the application of the company, and should be paid to the owners respectively by the company when lawfully demanded. The act made no provision for any notice of any kind to the classes of persons mentioned. The suit was trespass by Johnson, and the company justified under proceedings in accordance with the statute whereby Johnson's damages were assessed at one dollar. The court sustained the proceedings. In deciding the case the court say: "Nor do we see any conflict between that section (the statute referred to) and the eighth section, article thirteen, of our constitution, which declares 'that no freeman shall be imprisoned or disseized of his freehold, liberties or privileges, or outlawed or exiled or in any manner deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.' This clause does not apply, and has never been made to apply, to cases of this description. This is a case clearly within the eleventh section of article thirteen (the eminent domain provision),

¹ Johnson v. Joliet & Chicago R. R. Co., 23 Ill. 202.

which we have cited and commented on. It is a proceeding in the exercise of the right of eminent domain by the State to advance the public necessity and supply a want. We have no doubt the legislature in the exercise of this right can, without notice of any kind, on an emergency of which they are to judge, take a man's property for public use by making compensation, and prescribe the mode by which this compensation shall be ascertained."²

The Maryland case³ was a proceeding to condemn land for railroad purposes. The doctrine of the court may be gathered from the following extract from its opinion in the case: "It is next objected that the appellant had no notice of the application for a new inquisition and no opportunity to be heard against the petition and motion for it, and it is contended that without such notice the order directing it was passed without lawful authority. Here again the statute furnishes a complete answer to the objection. It does not require any notice to be given to the land-owner, either of the original application to the magistrate, or of that to the court for a new inquisition when the first has been set aside. However important notice in such cases may be, it is sufficient for the question we are now considering, that the law makers have not made it a prerequisite to the validity of the proceedings. It is probable the legislature thought the construction of such works of public interest ought not to be delayed by the necessity of giving notice to parties not *sui juris*, and non-residents of the county where the lands to be condemned were situated, and that the requirement of a previous attempt to purchase from resident owners *sui juris*, and failure to agree, was sufficient notice to them

² This case, though not referred to, is virtually overruled, by the decision in *Rich v. Chicago*, 59 Ill. 286, in which it is held that, in providing for ascertaining the compensation, the legislature must address itself to the judiciary. Again, in *Chicago & Alton R. R. Co. v. Smith*, 78 Ill. 96, 99, the same court says:

"It is a rule of general application, that a party cannot be deprived of his rights without having notice and an opportunity to be heard." Compare *Peoria etc. Ry. Co. v. Warner*, 61 Ill. 52.

³ *George's Creek Coal Co. v. New Central Coal Co.*, 40 Md. 425, 437.

that the company would proceed to have their lands condemned. But we need not speculate as to what was the motive of the legislature in omitting the requirement of notice in such cases; they have passed a law which confers jurisdiction upon the courts to pass orders like this without notice." The doctrine here intimated has since been repudiated by the Maryland court.⁴

The doctrine in the Mississippi case⁵ is that the proceeding to condemn property is a proceeding in rem, and that the acts done by way of marking out and fixing the location are constructive notice to all the world.⁶

⁴ Baltimore Belt R. R. Co. v. Baltzell, 75 Md. 94, 23 Atl. Rep. 74. In this case it is said that "the learned judge below, and Mr. Lewis in his treatise on Eminent Domain, have both fallen into error in construing the case of Georges Creek etc. Co., 40 Md. 426." We were referring to the cases in which it had been held or *intimated* that property might be taken and the compensation fixed without notice. It was surely intimated that this might be done in the Georges Creek Coal Co.'s case.

⁵ Stewart v. Board of Police, 25 Miss. 479, 482; New Orleans etc. R. R. Co. v. Hemphill, 35 Miss. 17.

⁶ In Stewart v. Board of Police the court say: "We consider the proceedings of the boards of police in this State, condemning lands to be used as public highways, strictly proceedings in rem, and that the orders made by them in relation thereto, are to be governed by the rules and principles applicable to such cases.

"Such was evidently the intention of the legislature, as it has

not made any provision on the subject of notice, nor directed any manner in which it shall be given. The whole community is vitally interested in the efficient exercise, by the boards of police, of the jurisdiction on the subject of roads conferred upon those tribunals by the constitution and laws. The jurisdiction conferred upon them is of a peculiar character, in which every citizen is interested. The subject-matter on which they act, is of a public nature, independent of private parties. The judgments rendered by them act upon the thing itself, which is condemned to the use of the public, and we believe the public interests imperatively require that the orders made by them, when made pursuant to the statutes, should conclude the whole world, whether actual notice was given or not to the parties interested in the premises. It is manifest, that actual notice could not be given in many instances, and it cannot be presumed that the boards of police could know, in all cases, in whom the title was vested to every tract of land in

The statute which was upheld in the case first cited from Mississippi provided for laying out public roads by commissioners appointed by the board of police, who were required to report their doings to the board. If the board confirmed a lay-out, all persons claiming damages were required to apply therefor at the next meeting of the board, and yet the statute provided for no notice whatever of any of the proceedings to the persons who would be entitled to damages. A more arbitrary statute could hardly be imagined.

An early case in Pennsylvania,⁷ and another in Wisconsin, may seem to favor the same doctrine, but the former is obscurely reported, and the latter decided on other grounds, and in both States the contrary doctrine is most firmly established by subsequent cases.⁸

§ 364. **Cases holding that notice must be given.**—The great weight of authority is in favor of the doctrine that before a man can be deprived of his property for public use he must have notice and an opportunity to protect his

the county necessary to be condemned for public roads, and under such circumstances to declare that these orders of condemnation without this notice are not valid and obligatory, would produce a degree of public inconvenience which nothing would justify, unless the rules of law demanded it. But we do not believe such to be the law. On the contrary, we believe the present case strictly a proceeding in rem, in which the order of the court is conclusive whether the party had notice of the proceeding or not.

"As before remarked, in the admiralty and exchequer courts, the seizure of the thing on which the judgment is to operate, is considered constructive notice to every party in interest to come forward and make known their

claims. So in the present case, the action of the jury, pursuant to the statute, in going upon the premises, and examining, reviewing, marking and laying out the road, is sufficient constructive notice to every party interested in the land, of the proceedings of the court on the subject. In almost every case, if there was a tenant in possession of the land, the action of the jury in laying out the route would give actual notice to him of the proceedings."

⁷ Road from App's Tavern, 17 S. & R. 388; see also *Millcreek v. Reed*, 29 Pa. St. 195.

⁸ See also *Taintor v. Morris-town*, 19 N. J. Eq. 46 and *Wilson v. Baltimore & P. R. R. Co.*, 5 Del. Ch. 524, which are decisions by chancellors only.

rights.⁹ The Supreme Court of Pennsylvania puts the matter very tersely and forcibly as follows: "The law abhors all ex parte proceedings without notice. Notice in this case to the owners of property was absolutely necessary. To take a man's property and assess his damages without notice of it, is repugnant to every principle of justice, and

⁹Koppikus v. State Capitol Comrs., 16 Cal. 248; Mulligan v. Smith, 59 Cal. 206; Lawless v. Reese, 4 Bibb 309; Walker v. Corn, 3 A. K. Marshall 167; Fletcher's Heirs v. Fugate, 3 J. J. Marshall 631; Tracey v. Elizabethtown etc. R. R. Co., 80 Ky. 259; Commonwealth v. Chase, 2 Mass. 170; Same v. Coombs, 2 Mass. 489; Same v. Peters, 3 Mass. 229; Same v. Cambridge, 4 Mass. 627; Hinckley et al. Petitioners, 15 Pick. 447; Harlow v. Pike, 3 Me. 438; Howard v. Hutchinson, 10 Me. 335; Atlantic & St. Lawrence R. R. Co. v. Cumberland County Comrs., 51 Me. 36; Williams et al. Petitioners, 59 Me. 517; Swan v. Williams, 2 Mich. 427; Strachan v. Brown, 39 Mich. 168; Whiteford Township v. Probate Judge, 53 Mich. 130; Langford v. County Comrs., 16 Minn. 375; Groce v. Zumwalt, 4 Mo. 567; Boonville v. Ormrod's Admr., 26 Mo. 193; Dickey v. Tonnison, 27 Mo. 373; Jamison v. Springfield, 53 Mo. 224; Zimmerman v. Snowden, 88 Mo. 218; State v. Reed, 38 N. H. 59; Vantilburgh v. Shann, 24 N. J. L. 740; State v. Trenton, 36 N. J. L. 499; People v. Tallman, 36 Barb. 222; Savage, C. J., in Owners of Ground v. Albany, 15 Wend. 374, 376; Earl, J., in Stewart v. Palmer, 74 N. Y. 183, 190; Sawyer v. Hamilton, 1 Mur-

phy N. C. 253; Gamble v. McCrady, 75 N. C. 509; Zimmerman v. Canfield, 42 Ohio St. 463; Neeld's Road, 1 Pa. St. 353; Reitenbaugh v. Chester Valley R. R. Co., 21 Pa. St. 100; Rutherford's Case, 72 Pa. St. 82; Road in South Abington, 109 Pa. St. 118; Anderson v. Turbeville, 6 Coldw. 150; Thetford v. Kilburn, 36 Vt. 179; Baltimore & Ohio R. R. Co. v. Pittsburgh etc. R. R. Co., 17 W. Va. 812; Seifert v. Brooks, 34 Wis. 443; State v. Fond du Lac, 42 Wis. 287; Chesapeake & Ohio Canal Co. v. Union Bank, 4 Cranch, C. C. 75; Burns v. Multoomah Ry. Co., 8 Sawyer, 543; Union Pacific Ry. Co. v. Leavenworth etc. Ry. Co., 29 Fed. Rep. 728; United States v. Jones, 109 U. S. 513; Wurts v. Hoagland, 114 U. S. 606; Davies v. Los Angeles, 86 Cal. 37, 24 Pac. Rep. 771; Shelton v. Town of Derby, 27 Conn. 414; Savannah etc. R. R. Co. v. Savannah, 96 Ga. 680, 23 S. E. Rep. 847; Gilmore v. Sapp, 100 Ill. 297; Campbell v. Dwiggins, 83 Ind. 473; Tyler v. State, 83 Ind. 563; Davis v. Lake Shore etc. R. R. Co., 114 Ind. 364; Garvin v. Dausman, 114 Ind. 429; Ryder v. Horsting, 130 Ind. 104, 29 N. E. Rep. 567; Board of Comrs. v. Fahlor, 132 Ind. 426, 31 N. E. Rep. 1112; Abney v. Clark, 87 Ia. 726, 55 N. W. Rep. 6; Kansas

such a proceeding is utterly void.”¹⁰ The Supreme Court of Missouri, in one of the cases cited, says: “The constitution may not require notice to be given of the taking of private property for public use, yet when the legislature prescribes a mode by which private property may be taken for such purpose, we will, out of respect to it, suppose that it did not contemplate a violation of that rule, recognized and enforced in all civil governments, that no one shall be injuriously affected in his rights by a judgment or decree resulting from a proceeding of which he had no notice and against which he could make no defense. Nothing would so much impair that just self-respect arising from the ownership of property fairly acquired, as the reflection that it is subject to be defeated by others without notice to the possessor. The times require that courts should be zealous in carrying out that great aim of government—the defence

Pac. R. R. Co. v. Streeter, 8 Kan. 133; Hughes v. Milligan, 42 Kan. 396; 22 Pac. Rep. 313; Morris v. Salle, (Ky.) 19 S. W. Rep. 527; Weymouth v. Commissioners, 86 Me. 391, 29 Atl. Rep. 1100; Ullman v. Baltimore, 72 Md. 587, 20 Atl. Rep. 141, 21 Atl. Rep. 709; Baltimore Belt R. R. Co. v. Baltzell, 75 Md. 94, 23 Atl. Rep. 74; Kimball v. Hornan, 74 Mich. 699, 42 N. W. Rep. 167; Pearsall v. Board of Supvrs., 74 Mich. 558, 42 N. W. Rep. 77; Sligh v. Grand Rapids, 84 Mich. 497, 47 N. W. Rep. 1093; Curry v. Rozell, 99 Mich. 524, 58 N. W. Rep. 472; McGavock v. Omaha, 40 Neb. 64, 58 N. W. Rep. 543; Matter of Union Elevated R. R. Co., 112 N. Y. 61, 19 N. E. Rep. 664; People v. Gilon, 121 N. Y. 551, 24 N. E. Rep. 944; People v. Brown, 47 Hun 459, 14 N. Y. St. 457; People v. Gray, 49 Hun 465, 18 N. Y.

St. 17, 2 N. Y. Supp. 251; People v. Board of Assessors, 59 Hun 407, 36 N. Y. St. 226, 13 N. Y. Supp. 404; Branson v. Gee, 25 Or. 462, 36 Pac. Rep. 527; Harbaugh Ave., 10 Pa. Co. Ct. 440; Vogt v. Bexor County, 5 Tex. Civ. App. 272, 23 S. W. Rep. 1044; Smith v. Cochrane, 9 Wash. 85, 37 Pac. Rep. 311, 494; State v. Oshkosh, 84 Wis. 548, 54 N. W. Rep. 1095; Baltimore Traction Co. v. Baltimore Belt R. R. Co., 151 U. S. 137, 14 S. C. Rep. 294; Scott v. Toledo, 36 Fed. Rep. 385; Barry v. Deloughery, 47 Neb. 354, 66 N. W. Rep. 410; Grady v. Dundon, 30 Or. 333; Ft. Wayne v. Ft. Wayne etc. R. R. Co., 149 Ind. 25; Matter of Oneida St., 22 Misc. N. Y. 235; Matter of Oneida St., 37 App. Div. N. Y. 266; Hutchinson v. Storrie, 92 Tex. 685, 51 S. W. Rep. 848.

¹⁰ Neeld's Road, 1 Pa. St. 353.

of men and their children in the enjoyment of property acquired by their diligence, toil and labor. No man can cherish a warm affection for a government that suffers others, without notice and behind his back, to seize and appropriate his property on occasions justified by no emergency."¹¹ Similar expressions will be found in most of the cases cited.

§ 365. "Due process of law" requires notice.—The argument put forth in some of the cases cited in the first section of this chapter, that the constitutional prohibition against depriving a citizen of his property without due process of law does not apply to the exercise of the eminent domain power, is wholly without foundation. The provision that private property shall not be taken for public use without just compensation, is simply an additional guaranty. The one provision is not exclusive of the other. Both may stand together, and both have full effect and operation in every case of the exercise of the eminent domain power. The one prevents the property of the citizen being taken under that power for any purpose except a public use, and then only upon making just compensation; while the other prevents his property being taken even for public use without due process of law. What then is due process of law? Without attempting to answer this question by a general definition, it is sufficient for the present inquiry to say that all the authorities agree that due process of law requires that a person shall have reasonable notice and a reasonable opportunity to be heard before an impartial tribunal before any binding decree can be passed affecting his right to liberty or property.¹² "This provision is the most important

¹¹ *Boonville v. Ormrod's Admr.*, 26 Mo. 193, 195. In *Mad-dox v. Ware*, 2 Bailey 314, it was held that slight alterations in the course of a highway could be made without the notice required in laying out a new highway. An established ditch may be repaired and taxes levied to

pay therefor without notice. *Yeomans v. Riddle*, 84 Ia. 147, 50 N. W. Rep. 886. But see *Campbell v. Dwiggins*, 83 Ind. 473; *Tyler v. State*, 83 Ind. 563.
¹² *Stuart v. Palmer*, 74 N. Y. 183; *Davidson v. New Orleans*, 96 U. S. 97; *Weiner v. Bunbury*, 30 Mich. 201; *Mulligan v. Smith*,

guaranty of personal rights to be found in the Federal or State constitutions. It is a limitation upon arbitrary power, and is a guaranty against arbitrary legislation. No citizen shall arbitrarily be deprived of his life, liberty, or property. This the legislature cannot do or authorize to be done. 'Due process of law,' is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty, or property, whether the proceedings be judicial, administrative, or executive in its nature. This great guaranty is always and everywhere present to protect the citizen against arbitrary interference with these sacred rights."¹³ In some of the cases cited in the first section it is said that the proceeding to condemn property for public use is a proceeding in rem, and that consequently notice to the owner is not necessary.¹⁴ This, however, is a mistake. Proceedings in rem, to be valid, require not only a seizure of the property by the court or its officers, but also notice in some form to all persons interested therein.¹⁵ "The jurisdiction acquired by the seizure is not to pass upon the question of forfeiture absolutely, but to pass upon that question after opportunity has been afforded to its owner and parties

59 Cal. 206; *Eddy v. People*, 15 Ill. 386; *Chase v. Hatheway*, 14 Mass. 222; *Garvin v. Daussman*, 114 Ind. 429; *Salt Creek Val. Turnpike Co. v. Parks*, 50 Ohio St. 568, 35 N. E. Rep. 304. In *Happy v. Mosher*, 48 N. Y. 313, 317, it is said: "An approved definition of due process of law is 'law in its regular course of administration through courts of justice.' It need not be a legal proceeding according to the course of the common law; neither must there be personal notice to the party whose property is in question. It is sufficient if a kind of notice is provided by which it is reasonably probable that the party proceeded against will be apprised

of what is going on against him, and an opportunity is afforded him to defend. It matters not that it may be difficult for him to defend under the law, so long as it is not impracticable for him to do so by the use of such reasonable efforts as the owners of property may generally be supposed to be capable of. His opportunity to defend, however, must not be merely colorable and illusory." And see *Weimer v. Bunbury*, 30 Mich. 201.

¹³ *Earl, J.*, in *Stuart v. Palmer*, 74 N. Y. 183, 190.

¹⁴ See also *Howard v. State*, 47 Ark. 431.

¹⁵ *Cooley*, Const. Lims, 403; *Windsor v. McVeigh*, 93 U. S. 274; *Tracey v. Corse*, 58 N. Y.

interested to appear and be heard upon the charges. To this end some notification of the proceedings, beyond that arising from the seizure, prescribing the time within which the appearance must be made, is essential. Such notification is usually given by monition, public proclamation, or publication in some other form. The manner of the notification is immaterial, but the notification itself is indispensable.”¹⁶

§ 366. What is sufficient as to the subject-matter of the notice? —Having settled that the owner of property is entitled to notice and an opportunity to be heard, before his property can be taken for public use, the questions arise, Of what steps and proceedings is he entitled to notice? Upon what questions is he entitled to a hearing? All questions relating to the exercise of the eminent domain power which are political in their nature and rest in the exclusive control and discretion of the legislature may be determined without notice to the owner of the property to be affected. Whether the particular work or improvement shall be made, or the particular property taken, are questions of this character, and the owner is not entitled to a hearing thereon as a matter of right.¹⁷ In *Zimmerman v. Canfield*, the court say: “The commissioners, in determining this preliminary question of the necessity of appropriating lands for the purposes of a ditch, are called to the exercise of political and not judicial powers. It is a question rather of public policy than of private right. It is not upon the question of the

143; *Woodruff v. Taylor*, 20 Vt. 65; *Baltimore & Ohio R. R. Co. v. Pittsburgh etc. R. R. Co.*, 17 W. Va. at p. 840, 841.

¹⁶ *Field, J.*, in *Windsor v. McVeigh*, 93 U. S. 274, 279.

¹⁷ *Lent v. Tillson*, 72 Cal. 404; *Preble v. Portland*, 45 Me. 241; *People v. Smith*, 21 N. Y. 595; *Zimmerman v. Canfield*, 42 Ohio St. 463; *Anderson v. Turbeville*, 6 Coldw. 150; *Baltimore & Ohio R. R. Co. v. Pittsburgh etc. R.*

R. Co., 17 W. Va. 812; *Holt v. Somerville*, 127 Mass. 408; *Marsh v. City of Oregon*, 105 Mo. 226, 16 S. W. Rep. 896; *Joplin Consol. Min. Co. v. City of Joplin*, 124 Mo. 129, 27 S. W. Rep. 406; *Branson v. Gee*, 25 Or. 462, 36 Pac. Rep. 527; *Hansen v. Hammer*, 15 Wash. 315, 46 Pac. Rep. 332; *Towns v. Klamath County*, 33 Or. 225, 53 Pac. Rep. 604; *Sullivan v. Kline*, 33 Or. 260, 54 Pac. Rep. 154.

appropriation of lands for public use, but upon that of compensation for lands so appropriated, that the owner is entitled, of right, to a hearing in court, and the verdict of a jury."¹⁸ But, if the constitution permits the appropriation only after the necessity is found by a jury or other tribunal, then the owner is entitled to be heard before such tribunal upon such question, as a matter of right,¹⁹ and such a hearing is sometimes provided for by statute.²⁰

Upon the question of just compensation all the authorities (except the cases referred to in the first section of this chapter) agree that the owner is entitled to be heard, as matter of right, and consequently that he is entitled to such notice as will give him an opportunity to be heard.²¹

In regard to the formation of the tribunal to ascertain the just compensation, the authorities are conflicting as to whether the owner is entitled to notice thereof or not. It has been decided by the New York Court of Appeals that the owner is not entitled to such notice.²² This view also

¹⁸ 42 Ohio St. 463. For similar language see *People v. Adirondack R. R. Co.*, 160 N. Y. 225, 238, 239.

¹⁹ *Seifert v. Brooks*, 34 Wis. 443; *Baltimore & Ohio R. R. Co. v. Pittsburgh etc. R. R. Co.*, 17 W. Va. 812, syl. 7.

²⁰ *La Farrier v. Hardy*, 66 Vt. 200, 28 Atl. Rep. 200; *Lynch v. Rutland*, 66 Vt. 570, 29 Atl. Rep. 1015; *Walbridge v. Cabot*, 67 Vt. 114, 30 Atl. Rep. 805.

²¹ *Abney v. Clark*, 87 Ia. 726, 55 N. W. Rep. 6; *St. Paul v. Nickl*, 42 Minn. 262, 44 N. W. Rep. 59; *McGavock v. Omaha*, 40 Neb. 64, 58 N. W. Rep. 543; and cases cited in §§ 364 and 365.

²² *Matter of the Village of Midletown*, 82 N. Y. 196. The court say: "It was objected that the act is unconstitutional, because

it does not provide that notice of the application for the appointment of commissioners should be given to the land-owners or parties interested. It is undoubtedly true that the latter are entitled to such notice of the proceeding as enables them to appear and be heard, but it is not essential to the validity of the act, however proper and appropriate it might be, that they should have notice of the formation of the tribunal which is to determine the damages. The act provides for notice of the hearing, and it gives ample protection in that regard to the rights of parties. If opportunity to appear and be heard is secured, it is wholly within the power of the legislature to determine the form and time and manner of notice to be given."

seems to be sanctioned in Pennsylvania²³ and Virginia,²⁴ and other States.²⁵ On the contrary, the courts of a number of the States have held that the owner is entitled to such notice as will enable him to participate in the selection or formation of the tribunal to assess his damages, in order that he may see that the persons selected or appointed to act are fair and impartial, and also that he may resist the application if he be so advised.²⁶

§ 367. What is sufficient as to the manner of giving notice?—In regard to the kind of notice which will satisfy the requirements of the constitution in proceedings to take land for public use, the authorities almost universally hold that notice by publication or by posting is sufficient, even with respect to persons residing within the jurisdiction where the proceedings are pending.²⁷ The same authorities hold, that,

²³ *Zack v. Pennsylvania R. R. Co.*, 25 Pa. St. 394.

²⁴ *Hunter v. Matthews*, 1 Rob. (Va.) 468.

²⁵ *St. Joseph etc. R. R. Co. v. Shambaugh*, 106 Mo. 557, 17 S. W. Rep. 581; *State v. Heppenheim*, 54 N. J. L. 268, 23 Atl. Rep. 664; *Branson v. Gee*, 25 Or. 462, 36 Pac. Rep. 527. See also *Chesapeake & Ohio Canal Co. v. Union Bank*, 4 Cranch, C. C. 75; *Weir v. St. Paul etc. R. R. Co.*, 18 Minn. 155; *Long Island R. R. Co. v. Bennett*, 10 Hun 91; *United States v. Jones*, 109 U. S. 513, 519.

²⁶ *Peoria etc. Ry. Co. v. Warner*, 61 Ill. 52; *Tracy v. Elizabethtown etc. R. R. Co.*, 80 Ky. 259; *Central Turnpike Corporation*, 7 Pick. 13; *Hinckley et al. Petitioners*, 15 Pick. 447; *Brown v. Lowell*, 8 Met. 172; *Porter v. County Comrs.*, 13 Met. 479; *Strachan v. Brown*, 39 Mich. 168; *Langford v. County Comrs.*, 16 Minn. 375; *People v. Tollman*, 36 Barb. 222. Compare the New

York cases cited in notes to this section. *Gamble v. McCrady*, 75 N. C. 509; *Baltimore & Ohio R. R. Co. v. Pittsburgh etc. R. R. Co.*, 17 W. Va. 812; *State v. Fond du Lac*, 42 Wis. 287, 298.

²⁷ *Wilson v. Hatheway*, 42 Ia. 173; *McIntyre v. Marine*, 93 Ind. 193; *Baltimore etc. R. R. Co. v. North*, 103 Ind. 486; *Carr v. State*, 103 Ind. 548; *Indianapolis etc. Gravel Road Co. v. State*, 105 Ind. 37; *Missouri River etc. R. R. Co. v. Shepard*, 9 Kan. 647; *Harper v. Lexington etc. R. R. Co.*, 2 Dana, 227; *Methodist Church v. Baltimore*, 6 Gill, 391; *State v. Beeman*, 35 Me. 242; *Hildreth v. Lowell*, 11 Gray, 345; *Ayres v. Richards*, 38 Mich. 214; *St. Paul etc. Ry. Co. v. Minneapolis*, 35 Minn. 141; *State v. Trenton*, 36 N. J. L. 499; *Polly v. Saratoga etc. R. R. Co.*, 9 Barb. 449; *Owners of Ground v. Albany*, 15 Wend. 374; *McMicken v. Cincinnati*, 4 Ohio St. 394; *Beebe v. Scheidt*, 13 Ohio St. 406; *Cupp v.*

unless required by statute, the notice need not name the owners or persons interested in the land sought to be con-

Comrs., 19 Ohio St. 173; *In re Road in Sterritt Township*, 114 Pa. St. 627; *Baltimore etc. R. R. Co. v. Pittsburgh etc. R. R. Co.*, 17 W. Va. 812, 839, syl. 5; *Wulzen v. Board of Suprvs.*, 101 Cal. 15, 35 Pac. Rep. 353; *Davies v. Los Angeles*, 86 Cal. 37, 24 Pac. Rep. 771; *Lent v. Tillson*, 72 Cal. 404. (Compare *Mulligan v. Smith*, 59 Cal. 206.) *Adams v. Harrington*, 114 Ind. 66; *Murphy v. Beard*, 138 Ind. 560, 38 N. E. Rep. 33; *State v. Chicago etc. R. R. Co.*, 80 Ia. 586, 46 N. W. Rep. 741; *Healey v. Newton*, 119 Mass. 480; *Brook v. Old Colony R. R. Co.*, 146 Mass. 194; *Kuschke v. St. Paul*, 45 Minn. 225, 47 N. W. Rep. 786; *Knoblauch v. Minneapolis*, 56 Minn. 321, 57 N. W. Rep. 928; *Pawnee County v. Storm*, 34 Neb. 735, 52 N. W. Rep. 696; *Matter of Union El. R. R. Co.*, 112 N. Y. 61, 19 N. E. Rep. 664; *Carpenter Street*, 3 Walker's Pa. Supm. Ct. 286; *Mathewson v. Supervisors*, 8 Pa. Co. Ct. 204; *Womelsdorf Alley*, 8 Pa. Co. Ct. 207; *Winnebago Furn. Mfg. Co. v. Wisconsin M. R. Co.*, 81 Wis. 389, 51 N. W. Rep. 576. (Compare *State v. Fond du Lac*, 42 Wis. 287.) *Huling v. Kaw Valley R. R. Co.*, 130 U. S. 559, 9 S. C. Rep. 603; *Kansas etc. R. R. Co. v. Phipps*, 4 Kan. App. 252, 45 Pac. Rep. 926; *Chicago etc. R. R. Co. v. Selders*, 4 Kan. App. 497, 44 Pac. Rep. 1012; *Leavenworth etc. R. R. Co. v. Atchison*, 137 Mo. 218; *Kansas City v. Ward*, 134 Mo. 172, 35 S. W. Rep. 600; *Kansas City v.*

Duncan, 135 Mo. 571, 37 S. W. Rep. 513; *Gately v. Old Colony R. R. Co.*, 171 Mass. 494, 51 N. E. Rep. 5.

The grounds upon which these cases go are well put in *Cupp v. Comrs.*, 19 Ohio St. 173, 182, from which we quote as follows: "Is this act in conflict with the constitutional provision referred to? That provision guarantees to the public the right to take the land, and to the owner the right to a compensation, to be paid or secured before the land is taken. One of these rights is just as sacred as the other, and neither is more sacred than any form of right to land, or to compensation therefor. Nothing is better established as law, than that such rights may be affected, and lost to the owner, by a proceeding in rem, and upon merely constructive notice. The law of all such proceedings rests in the necessity of the case, and in no instance, perhaps, is that necessity more apparent than in the construction of public roads, and other improvements of like nature. Without the aid of some such proceeding the construction of roads and ditches would be next to impracticable. A similar proceeding is provided, and a like provision as to the waiver of claims is made, in the law for the establishment of roads. (S. & C. 1286, sec. 8.) Some such provision of law seems indispensable. The owner of land necessary to be used for a road or ditch may be absent or un-

demned, but that it is sufficient if the notice describes the land, and indicates the nature of the proceeding and speci-

known. The title may be in dispute. The legal title may be in one, and the equitable title in another. One may have the present estate, and another the reversion or remainder. The owner may have a secret conveyance, on purpose to evade the law. Without the power to proceed in some such form against the land itself, the right guaranteed to the public by this provision of the constitution, to take the land for public uses, would be of little avail. In the construction of such improvements of any considerable length, personal notice, if at all practicable, would be attended with great inconvenience and uncertainty. It was the duty of the legislature to provide some reasonable means for securing, both to the public and to the owner of land, these rights so guaranteed by the constitution. To require in such cases personal notice to the owners, would in our judgment be quite as unreasonable as to require that owners of lands should, as was said in the case of *Miller v. Graham* (17 Ohio St. 1), maintain some kind of an agency in the vicinity of the lands through which they may be informed of proceedings affecting them. They are presumed to know of the existence of this act, and therefore to have notice that their lands are liable at any time, upon four weeks' publication of notice to that effect, to be taken for the use of

a ditch, and that their non-claim will be taken and held as a waiver of all right to compensation or damages. There is no greater hardship in this implied waiver, after notification beforehand that silence will be taken for consent, than there is in the analogous cases of creditors of a bankrupt or insolvent, or of claimants upon any fund in the hands of a court for distribution, whose failure to present their claims is made to work a forfeiture of the same. Nor is the necessity for such implication any the greater in the latter cases than in the former. A principal element in the determination by the commissioners, as to the expediency of constructing a road or ditch, is the amount of its cost, and that amount should, if practicable, be ascertained before the day fixed for the determination. The whole proceeding is substantially in rem. Jurisdiction over the person of the parties is not necessary. The act in question relates to and affects only the remedy, and not the rights of the parties, and is therefore within the general scope of legislative power. The constitutional provision referred to does not taken away that power. It defines and guarantees the right of the party to his land, or to a sure and adequate compensation therefor. The remedy—the proceeding by which that right is to be affected—is still left to legislative discretion.

fies the time when, and the place where, the persons interested must appear to protect their rights.²⁸ In regard to the manner or time of posting or publishing the notice in order to satisfy the requirements of the constitution, no definite rule is laid down by the authorities. Any statutory provision in this respect which did not savor of bad faith would probably be upheld. It ought to be so published as to render it reasonably probable that it will come to the knowledge of those interested.²⁹ A few cases hold or favor the view that residents are entitled to personal notice, but most of them have been overruled or explained.³⁰ In Nebraska it has been held that, while notice by publication will give the tribunal jurisdiction and enable the land to be bound by its judgment, the land owner, who does not receive actual notice of the proceedings in time to make his claim pursuant to the published notice, may present it afterwards and will be entitled to have it allowed.³¹

§ 368. Giving notice when not required by statute and validity of statutes which do not provide for notice.—It has been repeatedly adjudicated that notice must be given, even though not expressly provided for by statute, and that statutes which make no express provision for notice are valid.³² Some of those cases proceed upon the principle that, "where a statute authorizes a legal proceeding against any one, and does not expressly provide for notice to be given, it is implied that an opportunity shall be afforded him to appear in defense of his rights, unless the contrary

We fail, therefore, to see where-
in the act in question violates
the constitution."

²⁸ See, particularly, *McIntyre v. Marine*, 93 Ind. 193; *Indianapolis etc. Gravel Road Co. v. State*, 105 Ind. 37; *McMicken v. Cincinnati*, 4 Ohio St. 394.

²⁹ See *Matter of the Empire City Bank*, 18 N. Y. 199, 215.

³⁰ *Mulligan v. Smith*, 59 Cal. 206; *Kundinger v. Saginaw*, 59 Mich. 355; *Smith v. Cochrane*,

9 Wash. 85, 37 Pac. Rep. 311, 494; *State v. Fond du Lac*, 42 Wis. 287. But see the *California* and *Wisconsin* cases cited in note 27.

³¹ *Pawnee County v. Storm*, 34 Neb. 735, 52 N. W. Rep. 696.

³² *Peoria & Rock Island Ry. Co. v. Warner*, 61 Ill. 52; *Tracy v. Elizabethtown etc. R. R. Co.*, 80 Ky. 259; *Commonwealth v. Peters*, 3 Mass. 229; *Hinckley et al. Petitioners*, 15 Pick. 447;

clearly appears.”³³ By far the greater portion of the cases, however, proceed upon the principle of implying a requirement to give notice from the provisions of the statute itself. Thus the obligation to give notice has been held to be implied by a provision in the statute requiring a previous effort to agree,³⁴ or giving the right to appeal,³⁵ or authorizing the owner to strike off jurors or show cause against the confirmation of the inquisition.³⁶

Harlow v. Pike, 3 Me. 438; Howard v. Hutchinson, 10 Me. 335; Williams et al. Petitioners, 59 Me. 517; Swan v. Williams, 2 Mich. 427; Ayres v. Richards, 38 Mich. 214; Strachan v. Brown, 39 Mich. 168; Whiteford v. Probate Judge, 53 Mich. 130; Booneville v. Ormrod's Admr., 26 Mo. 193; Dickey v. Tennison, 27 Mo. 373; Vantilburgh v. Shann, 24 N. J. L. 740; State v. Trenton, 36 N. J. L. 499; Commissioners of Highways v. Claw, 15 Johns. 537; People v. Tollman, 36 Barb. 222; Gamble v. McCrady, 75 N. C. 509; Kramer v. Cleveland & Pittsburg R. R. Co., 5 Ohio St. 140; Rutherford's Case, 72 Pa. St. 82; Road in South Abington, 109 Pa. St. 118; Baltimore & Ohio R. R. Co. v. Pittsburg Ry. Co., 17 W. Va. 812; Seifert v. Brooks, 34 Wis. 443; Chesapeake & Ohio Canal Co. v. Union Bank, 4 Cranch C. C. 75; Baltimore Belt R. R. Co. v. Baltzell, 75 Md. 94, 23 Atl. Rep. 74; People v. Gilon, 121 N. Y. 551, 24 N. E. Rep. 944; People v. Gray, 49 Hun 465, 18 N. Y. St. 17, 2 N. Y. Supp. 251; People v. Board of Assessors, 59 Hun 407, 36 N. Y. St. 622, 13 N. Y. Supp. 404; State v. Hogue, 71 Wis. 384, 36 N. W. Rep. 860; Paulsen v. City of Portland, 149

U. S. 30, 13 S. C. Rep. 750.

³³ Baltimore etc. R. R. Co. v. Pittsburg etc. Ry. Co., 17 W. Va. 812, 835, citing Bostwick v. Isbell, 41 Conn. 305; Commissioners of Highways v. Claw, 15 Johns. 537; Eddy v. People, 15 Ill. 386; Chase v. Hatheway, 14 Mass. 222; Cooper v. Board of Works, 108 Eng. Com. Law 181; State v. Newark, 25 N. J. L. 399, 411; State v. Jersey City, 24 N. J. L. 662, 666; State v. Trenton, 36 N. J. L. 499. So the Supreme Court of Michigan says: "Such notice is always necessary where it is sought to deprive the citizen of his property; and if the notice is not expressly provided for in the law itself, it is in all such cases necessarily implied, and the failure to give such notice rendered the proceedings, if otherwise regular, null and void." Whiteford v. Probate Judge, 53 Mich. 130, 133.

³⁴ Tracy v. Elizabethtown etc. R. R. Co., 80 Ky. 259; Williams et al. Petitioners, 59 Me. 517; Hinckley et al. Petitioners, 15 Pick. 447; Booneville v. Ormrod's Admr., 26 Mo. 193.

³⁵ Tracy v. Elizabethtown etc. R. R. Co., 80 Ky. 259; Dickey v. Tennison, 27 Mo. 373.

³⁶ Swan v. Williams, 2 Mich.

Some of these cases go too far in the direction of judicial legislation. If the statute prescribes no notice, what notice is to be given? Some of the cases say it must be a notice prescribed by an order or rule of the court,³⁷ others that it is left to the court to see that *proper* notice is given,³⁸ and still others adopt by analogy the provisions of similar statutes,³⁹ but the majority do not attempt to define what the notice should be. The difficulties of the position are well expressed by the Supreme Court of Illinois in a case already cited: "But it may be asked, how can a court prescribe a notice, its form and mode of service, in such cases? Should a court require a notice, what other notice known to the common law is there than personal notice? Constructive notice by publication is the creature of the statute, and courts cannot make law. Had the legislature in this case prescribed the ordinary notice by posting or publishing in a newspaper, which the owner might never see, it will be perceived that his condition would be precisely as it is now, in case he should show he did not receive actual notice; and though such constructive notice, in a great majority of cases, would not reach a non-resident, yet all will admit he would be bound by it. Having power then, by the common law to require notice, and no other than personal notice coming up to its requirements, the object and purposes of the law would be defeated in every case where the owner was non-resident—he living in India or Greenland. The legislature deemed it safe to repose the power to appoint commissioners where it was confided, having a due regard to the interests of non-resident proprietors. We cannot understand by what authority courts shall say, in cases of this kind, where the State is exercising its right of eminent domain, and notice cannot be given, notice shall be given,

427; Baltimore Belt R. R. Co. v. Baltzell, 75 Md. 94, 23 Atl. Rep. 74.

³⁷ Rutherford's Case, 72 Pa. St. 82.

³⁸ Swan v. Williams, 2 Mich. 427.

³⁹ Ayres v. Richards, 38 Mich. 214; State v. Hogan, 71 Wis. 384, 36 N. W. Rep. 860; Harlow v. Pike, 3 Me. 438. But if none of the eminent domain statutes provided for notice, this principle would fail.

when the law does not say so, or how they can require any other than personal notice, if they go to legislating and require notice. The thing is impracticable."⁴⁰

It seems to us that it is just as incumbent upon the legislature to provide for notice as to provide for compensation. Both are conditions to the exercise of the power. It is conceded that a law which purports to authorize the taking of property for public use, but makes no provision for compensation, is nugatory.⁴¹ Why may not the obligation to make compensation be implied and enforced by the courts as well as the obligation to give notice? There is really but one logical and consistent position in the matter, and that is that a statute which does not provide for notice is invalid, but there are only two or three cases which so hold.⁴²

II.—STATUTORY REQUIREMENTS.

§ 369. The notice required by statute is jurisdictional and must be given.—When notice is required by statute, it must be given in strict conformity to the statute. As already ob-

⁴⁰ Johnson v. Joliet & Chicago R. R. Co., 23 Ill. 202, 206.

⁴¹ Post, § 452.

⁴² State v. Fond du Lac, 42 Wis. 287; Seifert v. Brooks, 34 Wis. 443; Savannah etc. R. R. Co. v. Savannah, 96 Ga. 680, 23 S. E. Rep. 847; dissenting opinions of Cooley, C. J., Sherwood, J., and Campbell, J., in Whiteford v. Probate Judge, 53 Mich. 130; Quære in Ayres v. Richards, 38 Mich. 214; dissenting opinion of Bartley, J., in Kramer v. Cleveland & Pittsburgh R. R. Co., 5 Ohio St. p. 165, who says (p. 167): "It is no answer to this, to say that, in this particular case notice was given to the plaintiff and he appeared before

the appraisers. The statute neither required nor authorized any such notice for appearance, nor did it authorize the plaintiff to be heard by himself or counsel. The question, however, is not what the parties actually did outside of the authority of the statute, but whether the statute prescribed a lawful and constitutional mode for divesting the plaintiff of his property, and transferring it to the defendant. If it did not I humbly conceive the constitutional deficiencies of it cannot be supplied by the extrinsic proceedings in the appropriation, and thus give to an unconstitutional enactment the force and validity of law."

served, the legislature may refuse to exercise or delegate the power, and it can accordingly annex such conditions to its exercise as it sees fit. These conditions must be strictly complied with, or no valid appropriation can be effected.⁴³ A failure, therefore, to give the notice required, is a fatal error, which, if not waived by an appearance or otherwise, may not only be taken advantage of at any stage of the proceedings to arrest or set them aside,⁴⁴ but also renders the

⁴³ See ante, § 253.

⁴⁴ Commissioners of Talladega Co. v. Thompson, 15 Ala. 134; Barnett v. State, 15 Ala. 829; Stanford v. Worn, 27 Cal. 171; Corley v. Kennedy, 28 Ill. 143; Commissioners v. Harper, 38 Ill. 103; Peabody v. Sweet, 3 Ind. 514; Little v. Thompson, 24 Ind. 146; Wright v. Wilson, 95 Ind. 408; Crawford v. Comrs. of Elk Co., 32 Kan. 555; New v. Ewing, 1 A. K. Marshall 55; Walker v. Corn, 3 A. K. Marshall 167; Crawford v. Snowden, 3 Littell 288; Jones' Heirs v. Barclay, 2 J. J. Marshall 73; Fletcher's Heirs v. Fugate, 3 J. J. Marshall 631; Shackelford's Heirs v. Coffey, 4 J. J. Marshall 40; Case v. Meyers, 6 Dana 330; Rout v. Mountjoy, 3 B. Mon. 300; Morgan's Louisiana etc. R. R. Co. v. Bourdier, 1 McGloin 232; Ware v. County Comrs., 38 Me. 492; Southard v. Ricker, 43 Me. 575; Coleman v. Andrews, 48 Me. 562; Commonwealth v. Metcalf, 2 Mass. 118; Same v. Chase, 2 Mass. 170; Same v. Sheldon, 3 Mass. 188; Same v. Hall, 8 Pick. 440; Stone v. Boston, 2 Met. 220; Osborne v. Detroit, 32 Mich. 282; Dickinson v. Van Wormer, 39 Mich. 141; Same v. Highway Comrs., 41 Mich. 638; Bixby v.

Goss, 54 Mich. 551; Bettis v. Geddes, 54 Mich. 608; Corey v. Probate Judge, 56 Mich. 524; Brazee v. Raymond, 59 Mich. 548; Simon v. Rhoades, 24 Minn. 25; State v. Otoe Co., 6 Neb. 129; State v. Orange, 32 N. J. L. 49; Matter of New York etc. R. R. Co., 62 Barb. 85; Norton v. Wal-kill Valley R. R. Co., 63 Barb. 77; People v. Kniskern, 54 N. Y. 52; Thompson v. Multnomah Co., 2 Or. 34; Frovert v. Finrock, 43 Ohio St. 335; Reitenbaugh v. Chester Valley R. R. Co., 21 Pa. St. 100; Road in Lancaster etc. City, 68 Pa. St. 396; Appeal of Central R. R. Co., 102 Pa. St. 38; Private Road etc., 112 Pa. St. 183; Commissioners v. Murray, 1 Rich. L. 335; Bernard v. Brewer, 2 Wash. Va. 76; Quackenbush v. Dist. of Columbia, 9 Mackey 300; Columbus etc. R. R. Co. v. Richardson, 7 Ind. 543; Sites v. Miller, 120 Ind. 19, 22 N. E. Rep. 82; Abney v. Clark, 87 Ia. 726, 55 N. W. Rep. 6; State v. Iowa Cent. R. R. Co., 91 Ia. 275, 58 N. W. Rep. 35; Lampson v. Drainage Comrs., 45 Mich. 150; Buskirk v. Harrod, 48 Mich. 258; Price v. Stagrays, 68 Mich. 17, 35 N. W. Rep. 815; Cook v. Covert, 71 Mich. 249, 39 N. W. Rep. 47; Dixon v. Highway Comrs., 75

proceedings absolutely void, even when called in question collaterally.⁴⁵

§ 370. Meaning of "reasonable notice" in statutes.—Some statutes have provided in general language for the giving of

Mich. 225, 42 N. W. Rep. 814; Wilson v. Township Board, 87 Mich. 240, 49 N. W. Rep. 572; Welch v. Hodge, 94 Mich. 493, 54 N. W. Rep. 175; Chicago etc. R. R. Co. v. Young, 96 Mo. 39, 8 S. W. Rep. 776; Trester v. Mo. Pac. R. R. Co., 33 Neb. 171, 49 N. W. Rep. 1110; State v. Passaic, 36 N. J. L. 382; Wilson v. City of Trenton, 53 N. J. L. 645, 23 Atl. Rep. 278; State v. City of Trenton, 53 N. J. L. 178, 20 Atl. Rep. 738; People v. Stedman, 57 Hun 280, 10 N. Y. Supp. 787; Cincinnati v. Sherike, 47 Ohio St. 217, 25 N. E. Rep. 169; Opening Taylor Ave., 146 Pa. St. 638, 23 Atl. Rep. 392; Gay & West Sts., 7 Pa. Co. Ct., 217; Cherrytree Tp. Road, 10 Pa. Co. Ct., 389; Road in Upper Fairfield Tp., 11 Pa. Co. Ct. 396; McDermott v. New Castle, 13 Pa. Co. Ct. 474; Private Road in Union Tp., 14 Pa. Co. Ct. 436; Lullamire v. Kaufman Co., 3 Tex. Ct. of App. p. 392, §§ 325, 326; Walbridge v. Cabot, 67 Vt. 114, 30 Atl. Rep. 805.

⁴⁵ Curran v. Shattuck, 24 Cal. 427; State v. Anderson, 39 Ia. 274; Barnes v. Fox, 61 Ia. 18; Commissioners of Leavenworth County v. Espen, 12 Kan. 531; Prentiss v. Parks, 65 Me. 559; Leavitt v. Eastman, 77 Me. 117; School District v. Copeland, 2 Gray 414; Prescott v. Patterson, 44 Mich. 525; Lobman v. St. Paul etc. R. R. Co., 18 Minn. 174; Zim-

merman v. Snowden, 88 Mo. 218; State v. Otoe Co., 6 Neb. 129; Doody v. Vaughn, 7 Neb. 28; Hull v. Chicago, Burlington & Quincy R. R. Co., 21 Neb. 371; People v. Robertson, 17 How. Pr. 74; Terpening v. Smith, 46 Barb. 208; Cruger v. Hudson River R. R. Co., 12 N. Y. 190; People ex rel. Johnson v. Whitney's Point, 32 Hun 508; Sessions v. Crunkilton, 20 Ohio St. 349; People v. Miller, 82 Cal. 153, 22 Pac. Rep. 935; Jacksonville etc. R. R. Co. v. Adams, 27 Fla. 443, 9 So. Rep. 2; Kidder v. Peoria, 29 Ill. 77; Scammon v. Chicago, 40 Ill. 146; Dickey v. Chicago, 152 Ill. 468, 38 N. E. Rep. 932; Chicago etc. R. R. Co. v. Ellithorpe, 78 Ia. 415, 43 N. W. Rep. 277; Missouri Pac. R. R. Co. v. Houseman, 41 Kan. 300, 21 Pac. Rep. 284; Union Pac. R. R. Co. v. Kindred, 43 Kan. 134, 23 Pac. Rep. 112; Kansas City etc. R. R. Co. v. Fisher, 53 Kan. 512, 36 Pac. Rep. 1004; Overman v. St. Paul, 39 Minn. 120, 39 N. W. Rep. 66; Town of Lyle v. Chicago etc. R. R. Co., 55 Minn. 223, 56 N. W. Rep. 820; Beatty v. Beeche, 23 Neb. 210, 36 N. W. Rep. 494; Darst v. Griffin, 31 Neb. 668, 48 N. W. Rep. 819; Town of Henderson v. Davis, 106 N. C. 88, 11 S. E. Rep. 573; McIntyre v. Luker, 77 Tex. 259, 13 S. W. Rep. 1027; Parker v. Ft. Worth etc. R. R. Co., 84 Tex. 333, 19 S. W. Rep. 518; Vogt v. Bexar County,

reasonable notice of proceedings without specifying the form or manner of notice.⁴⁶ Under such statutes it has been held that notice by publication⁴⁷ or by mail⁴⁸ was sufficient; and, in respect to time, that seven days' notice to those residing within the jurisdiction was reasonable.⁴⁹ Where the statute makes no express provision for notice, but the duty of giving notice is implied by other provisions of the statute, as has frequently been held,⁵⁰ reasonable notice will be understood.⁵¹

§ 371. **Form of notice and compliance with statute generally.**—The requirements of the different statutes are so various that no general rules can be laid down as to what the notice should contain, or how it should be issued, authenticated, served or published, further than that it must comply substantially with the statute.⁵² A statute required the notice to recite the substance of the petition. It was

5 Tex. Civ. App. 272, 23 S. W. Rep. 1044; *La Farrier v. Hardy*, 66 Vt. 200, 28 Atl. Rep. 1030; *Lynch v. Rutland*, 66 Vt. 570, 29 Atl. Rep. 1015; *State v. Logue*, 73 Wis. 598, 41 N. W. Rep. 1061; *State v. Varnum*, 81 Wis. 593, 51 N. W. Rep. 958; *Grady v. Dunden*, 30 Or. 333; *Campau v. Charbeneau*, 105 Mich. 422, 63 N. W. 435; *Cribbs v. Benedict*, 64 Ark. 555; *Hentzler v. Bradbury*, 5 Kan. App. 1; *Sieferer v. St. Louis*, 141 Mo. 586; *Self v. Gowin*, 80 Mo. App. 398; *State v. Anchard*, 22 Mon. 14, 55 Pac. Rep. 361; *People v. Allen*, 37 App. Div. N. Y. 248.

The cases of *Howard v. State*, 47 Ark. 431, and *Kidder v. Jennison*, 21 Vt. 108, present the only exceptions to the rule; and see *Pickering v. State*, 106 Ind. 228; *Leonard v. Sparks*, 117 Mo. 103, 22 S. W. Rep. 900.

⁴⁶ If the legislature must provide for notice, it would seem questionable whether such statutes could be sustained.

⁴⁷ *Freetown v. County Comrs.*, 9 Pick. 46.

⁴⁸ *Crane v. Camp*, 12 Conn. 463.

⁴⁹ *Trustees of Belfast Academy v. Salmund*, 11 Me. 109.

⁵⁰ *Ante*, § 368.

⁵¹ *Baltimore Belt R. R. Co. v. Baltzell*, 75 Md. 94, 23 Atl. Rep. 74.

⁵² *Wovéssey v. Board of Supervisors*, 32 Ia. 130; *Abbott v. Board of Supervisors*, 36 Ia. 354; *Jones v. Portland*, 57 Me. 42; *Sutherland v. Holmes*, 78 Mo. 399; *Matter of Mount Pleasant Ave.*, 10 R. I. 320; *Dorman v. Lewiston*, 81 Me. 411, 17 Atl. Rep. 316; *Williams v. Monroe*, 125 Mo. 574, 28 S. W. Rep. 853; and cases cited in § 369.

held that the substance was that "which will give the owner information that steps are being taken to have commissioners appointed to assess damages to his land." The notice stated the time and place at which the company would make application to a judge of court to appoint commissioners to view the property and assess the damages the respondent would sustain by the establishment of a railroad over his land, location of which was particularly described. It did not purport to recite the petition, but it was held sufficient.⁵³ Unless required it is not necessary to serve a copy of the petition.⁵⁴ A statute empowering a city to condemn land for a park, required notice by publication to be given to the property owners, that the city had determined to take the land described; and that an application for the appointment of commissioners to appraise the damages, would be made at a time and place specified. It was held sufficient to publish the resolution of the council, which recited performance of all the acts required and specified the date of hearing before the Supreme Court, though the resolution was not entitled in any court, or addressed to the persons to be affected, or signed by any party giving the notice.⁵⁵

§ 372. **Specifying time and place.**—Where the statute requires the notice to specify the time and place when and where the proposed action will be taken or proceedings had, an omission of either will be fatal.⁵⁶ Describing the place of meeting of commissioners as in a certain village, without designating any particular place in the village, is too

⁵³ Quincy & Palmyra R. R. Co. v. Taylor, 43 Mo. 35.

⁵⁴ Cox v. Buie, 12 Iredel L. 139.

⁵⁵ In re City of Rochester, 137 N. Y. 243, 33 N. E. Rep. 320. To same effect: Muskego v. Drainage Comrs., 78 Wis. 40, 47 N. W. Rep. 11.

⁵⁶ Logansport v. Pollard, 50 Ind. 151; Municipality No. 1, 8 La. An. 377; Corporation v. Manhattan Co., 1 Caines Rep. 507;

State v. Waterman, 79 Ia. 360, 44 N. W. Rep. 676; Matter of Broadway & Seventh Ave. R. R. Co., 69 Hun 275; Missouri Pac. R. R. Co. v. Houseman, 41 Kan. 300, 21 Pac. Rep. 284; Town of Lyle v. Chicago etc. R. R. Co., 55 Minn. 223, 56 N. W. Rep. 820; Beatty v. Butler, 23 Neb. 210, 36 N. W. Rep. 494; State v. Convery, 53 N. J. L. 588, 22 Atl. Rep. 345.

indefinite.⁵⁷ So where the place was stated as "at the right of the proposed road in said town."⁵⁸

§ 373. **Signing.**—A notice without any signature has been held to be a nullity.⁵⁹ But other cases hold that when not required by statute, it is not indispensable.⁶⁰ Where commissioners are appointed to condemn property, they may properly sign the notice required to be given.⁶¹ A statute required supervisors "to make out a notice" of the time and place of their meeting, etc. It was held they need not sign the notice themselves, but that it was sufficient if they caused it to be made and signed by their clerk.⁶² In another case the statute required a committee to lay out a highway, to cause certain notice to be given. It was held that all need not sign the notice, and a notice which was given by the direction of the chairman, and to which his name only was signed, as chairman, was held good.⁶³ So, where notice was required to be given by the petitioners for a highway, it was held that a notice signed by one only was good.⁶⁴ But in another case, where the statute required the applicants to give notice, it was held that the notice must be signed by all the applicants the same as the petition.⁶⁵

§ 374. **Describing the property taken.**—If the statute does not require a description of the property taken to be contained in the notice, it is held that no particular description is necessary.⁶⁶ Any description which indicates the

⁵⁷ Commissioners of Oran v. Hoblit, 19 Ill. App. 259; Minneapolis & St. Louis Ry. Co. v. Kanne, 32 Minn. 174; In re Johnson, 49 N. J. L. 381.

⁵⁸ Hammon v. Commissioners, 38 Ill. App. 237.

⁵⁹ Road Notices, 4 Harr. Del. 324.

⁶⁰ Wright v. Wells, 29 Ind. 354; Dougherty v. Brown, 91 Mo. 26; In re City of Rochester, 137 N. Y. 243, 33 N. E. Rep. 320; Town of Muskego v. Drainage Comrs., 78 Wis. 40, 47 N. W. Rep. 11.

⁶¹ Clement v. Wichita etc. R. R. Co., 53 Kan. 682, 37 Pac. Rep. 135.

⁶² Williams v. Mitchell, 49 Wis. 284.

⁶³ Parish v. Gilmarton, 11 N. H. 293.

⁶⁴ Kemp v. Smith, 7 Ind. 471; see also Bewley v. Graves, 17 Or. 274, 20 Pac. Rep. 322.

⁶⁵ State v. Otoe County, 6 Neb. 129.

⁶⁶ Wilkin v. First Division etc., 16 Minn. 271; Doughty v.

land affected and thereby the parties interested would seem to be sufficient under the authorities.⁶⁷ Parties being made aware that they were in some way affected, could ascertain by inquiry the exact limits of the improvement. A notice that part of a person's land on C street between certain other streets would be taken for the purpose of widening C street pursuant to a certain ordinance was held sufficient, and that persons wanting more definite information could go to the ordinance;⁶⁸ also a notice which described the property as now occupied by the New Jersey Railroad Company as the location of its tracks.⁶⁹ But a notice that C street would be widened from 33 feet to 66 feet and that a plat of the improvement was on file in a certain office was held insufficient.⁷⁰ A notice describing certain property as unimproved was held sufficient to give jurisdiction.⁷¹ If the statute requires a particular description of the property to be given, it must be complied with.⁷²

§ 375. Stating the nature or purpose of the proposed action.—A statute required that, where an application was made for a highway, the supervisors should give notice of the time and place where they would meet to decide upon such application. A notice that they would meet to make an examination and survey of the proposed road,⁷³ or to take into consideration the application,⁷⁴ was held bad. A statute which requires notice "of the intention of the selectmen to lay out or alter" a highway is not complied with by

Somerville etc. R. R. Co., 21 N. J. L. 442.

⁶⁷ Fairchild v. St. Paul, 46 Minn. 540, 49 N. W. Rep. 325; Kurchke v. St. Paul, 45 Minn. 225, 47 N. W. Rep. 786; and see State v. Wright, 54 N. J. L. 130, 23 Atl. Rep. 116.

⁶⁸ State v. Plainfield, 41 N. J. L. 138. To same effect: Kuschke v. St. Paul, 45 Minn. 225, 47 N. W. Rep. 786; State v. Oshkosh, 84 Wis. 548, 54 N. W. Rep. 1095.

⁶⁹ Coster v. New Jersey R. R.

Co., 23 N. J. L. 227; see also State v. O'Connor, 78 Wis. 282, 47 N. W. Rep. 433.

⁷⁰ Quackenbush v. District of Columbia, 9 Mackey D. C. 300.

⁷¹ Snyder v. Trumpbour, 38 N. Y. 355.

⁷² Matter of Orange Street, 50 How. Pr. 244. On the subject of the section see also § 376.

⁷³ Austin v. Allen, 6 Wis. 134.

⁷⁴ Babb v. Carver, 7 Wis. 124; see also Conrad v. County of Lewis, 10 W. Va. 784.

a notice that the selectmen will meet to view the route, hear the persons interested, and, if they adjudge that the prayer of the petition ought to be granted, then they will proceed to lay out the road, etc.⁷⁵ The notice required by the statute is to be given after the determination to lay out the road has been made. In all the cases cited the proceedings were held void in trespass.⁷⁶

§ 376. Describing the location or improvement.—The width of a proposed road need not be specified in a notice, if not required by statute.⁷⁷ A misdescription in the notice of the location of a ditch is fatal to the proceedings.⁷⁸ It is held that the notice should state definitely the termini of a proposed highway, even though not expressly required by statute.⁷⁹ A statute required a notice to state particularly the termini and course of the proposed change of a highway. A notice that the road would run northerly from one point to another over the most practicable route was held to be fatally defective.⁸⁰ Where the statute required the notice to state the nature and extent of the proposed improvement, it was held sufficient to state that it was for opening a street from A street to B street.⁸¹ Under the same statute it was held that the nature and extent of the improvement must be described in the notice, and that it was not sufficient to refer to a map on file in a public office.⁸² Where the statute in reference to opening streets provided that no ordinance should be introduced for opening a street, etc., until public notice had been given of the intention to do so, briefly describing the improvement, etc., a notice of an intention “to order and cause L street, from its present

⁷⁵ Fitchburg R. R. Co. v. Fitchburg, 121 Mass. 132.

⁷⁶ See also Specht v. Detroit, 20 Mich. 168.

⁷⁷ State v. Shreve, 4 N. J. L. 297.

⁷⁸ Miller v. Graham, 17 Ohio St. 1.

⁷⁹ Matter of Highway, 16 N. J. L. 391; State v. Green, 18 N. J.

L. 179; and see also Toppan's Petition, 24 N. H. 43.

⁸⁰ Potter v. Ames, 43 Cal. 75.

⁸¹ Opening Albany Street, 6 Abb. Pr. 273.

⁸² Matter of Comrs. of Central Park, 51 Barb. 277. Compare State v. Plainfield, 41 N. J. L. 138; also § 374, ante.

northern terminus to M street, to be laid out and opened," was held too indefinite, as it did not give the direction or point of intersection with M street.⁸³ The notice in a road case should show that the proposed road is within the proper jurisdiction.⁸⁴

§ 377. **Meaning of the terms, "owners," "occupants," etc.**—Where the statute requires notice to certain persons or classes of persons, as to the owners, occupants, persons interested, etc., it should be addressed to each of said persons by name in order to be binding.⁸⁵ Persons may be described by the initials of their first names.⁸⁶ "Actual occupants" means persons who actually reside on the land. Thus, where a statute required personal notice to "actual occupants" and notice by publication to all others, it was held the owner who had the key to a vacant house on the property but lived elsewhere was not an actual occupant thereof.⁸⁷ A railroad company had a deed "of a spring and use of water." It constructed a subterranean reservoir, and laid pipes, all of which were concealed from view in a pasture over which a highway was laid out. It was held not to be an occupant within the statute.⁸⁸ Notice was required to be served upon the owner or holder of the land. A notice served on an overseer, who resided on a farm and carried it on for the owner who resided abroad, was held good.⁸⁹ One notified as an occupant must defend for whatever interest he has.⁹⁰ The meaning and construction of the word owners in such statutes is discussed in the chapter on parties.⁹¹ Where the statute requires notice to the owner

⁸³ State v. Elizabeth, 32 N. J. L. 357.

⁸⁴ Parkhurst v. Vandevier, 48 N. J. L. 80.

⁸⁵ Chicago & Alton R. R. Co. v. Smith, 78 Ill. 96; Birge v. Chicago, Mil. & St. P. Ry. Co., 65 Ia. 440; Warwick Institution for Savings v. Providence, 12 R. I. 144. In all these cases the proceedings were held void collater-

ally as to the persons not named.

⁸⁶ Miller v. Porter, 71 Ind. 521.

⁸⁷ Hunt v. Smith, 9 Kan. 137.

⁸⁸ People v. Supervisors, 36 How. Pr. 544.

⁸⁹ Petition of James Kinney, 5 Harr. 18.

⁹⁰ McIntyre v. Eaton & Amboy R. R. Co., 26 N. J. Eq. 425.

⁹¹ Ante, § 335; see also Hildreth v. Lowell, 11 Gray 345.

or his agent, if residing in the county, and notice is served on one as agent, there must be proof of such agency in order to give jurisdiction.⁹² Notice to the tenant of the freehold was held to mean the tenant in possession appearing as the visible owner.⁹³ Where the statute required notice to the "occupant or owners of the lands to be appraised," it was held that notice must be given to both occupants and owners.⁹⁴ Where the statute provides for notifying "non-residents" by publication, persons residing out of the State and not merely out of the county are intended.⁹⁵ Notice was required to residents shown by the transfer books of the county to be owners or occupants of the land. This was held not to require notice upon heirs, though the probate records showed their names.⁹⁶

§ 378. **Serving, publishing, posting, etc.**—These matters are of course, governed by the statute. Where the statute directs notice to be served personally, it may be served by reading,¹ or by leaving a copy with some one authorized to receive service.² Petitioners for a highway were required to "cause a certified copy of the petition to be given to the town officers." It was held the copy might be served by one of the petitioners.³ Notice may be served by the petitioner, if not otherwise provided in the statute.⁴ If the statute requires notice to be mailed to non-residents whose addresses are known, and the residence is correctly stated in the petition and notice is mailed to a different place, it will be void.⁵

⁹² Commissioners of Chase County v. Carter, 30 Kan. 581.

⁹³ Supervisors of Culpeper v. Gorrell, 20 Gratt. 484.

⁹⁴ Hagar v. Brainard, 44 Vt. 294.

⁹⁵ Pacific R. R. Co. v. Perkins, 36 Neb. 456, 54 N. W. Rep. 845.

⁹⁶ Starry v. Treat, 102 Ia. 449.

¹ Green v. State, 56 Wis. 583. Where notice was to be served by reading, it was held that it could not be served by reading

part and allowing the party to read the remainder. Drainage Comrs. v. People, 26 Ill. App. 276.

² State v. City of Trenton, 53 N. J. L. 178, 20 Atl. Rep. 738; Wilson v. City of Trenton, 53 N. J. L. 645, 23 Atl. Rep. 278.

³ McClure v. Groton, 50 N. H. 49; Sanborn v. Meredith, 58 N. H. 150.

⁴ Ross v. Elizabethtown etc. R. R. Co., 20 N. J. L. 230.

⁵ Morgan v. Chicago & Northwestern Ry. Co., 36 Mich. 428.

Service by posting notices can never be made unless provided for by statute, and then the statute should be strictly followed. Proof should always be made that the posting has been done as required, by setting forth the facts, and not merely by a general statement that it has been done according to law.⁶

The same is true in regard to notice by publication. The statute must be complied with, or the proceedings cannot be sustained.⁷ A requirement of publication for three consecutive weeks is satisfied by publication once each week.⁸ Where the statute provides for notice to unknown owners and non-residents by publication, such publication cannot avail as to one who is named in the petition and is not shown by affidavit or the petition to be a non-resident.⁹ Notice was required to be published in two newspapers. It was held both must be in the English language.¹⁰ A publication begun in a daily and continued in a weekly, though both are of the same name and published in the same office, is insufficient.¹¹ An advertising sheet, distributed gratuitously and containing nothing but advertisements is not a newspaper.¹² A notice takes effect from its publication, and not from the date in the notice.¹³ Where notice of the application for the appointment of commissioners was required to be given by publishing such notice daily for two weeks in the official paper and by personal service upon certain persons, at least ten days before the time when the application was to be made, it was held that the two weeks' publication must be completed ten days before the time.¹⁴

⁶ *Whitely v. Platte County*, 73 Mo. 30; *People v. La Grange*, 2 Mich. 187; *Taylor v. Todd*, 48 Mo. App. 550; *Vedder v. Marion County*, 22 Or. 264, 29 Pac. Rep. 619; *City of Owosso v. Richfield*, 80 Mich. 324, 45 N. W. Rep. 129.

⁷ *Brush v. Detroit*, 32 Mich. 43.

⁸ *Betts v. Williamsburgh*, 15 Barb. 255.

⁹ *Dickey v. Chicago*, 152 Ill. 468, 38 N. E. Rep. 932.

¹⁰ *Road in Upper Hanover*, 44 Pa. St. 277; *Tyler v. Bowen*, 1 Pitts. Pa. 225.

¹¹ *Hull v. Chicago, Burlington & Quincy R. R. Co.*, 21 Neb. 371.

¹² *Tyler v. Bowen*, 1 Pitts. Pa. 225.

¹³ *Riche v. Bar Harbor Water Co.*, 75 Me. 91.

¹⁴ *Matter of Widening Carlton St. Buffalo*, 16 Hun 497.

The charter of Grand Rapids, in case of street improvements, required the council to pass a resolution describing the improvement and property to be taken, and designating a day on which they would apply to court for a jury to assess the damages, and to cause a copy of the resolution to be published for four successive weeks. It was held that, to make the publication effectual, the paper must be designated and the publication ordered by a resolution or ordinance of the council.¹⁵

Where notice is required to be left at the usual place of abode of a person and he is out of town, and his place is vacant, and the notice is mailed to him and he receives it and returns in time, it is sufficient.¹⁶ Where notice was required to be served by reading the notice and delivering a copy of the petition, it was held that service by reading alone would give jurisdiction, as against collateral attack.¹⁷ If a certain number of days' notice is required, a less number will render the notice ineffectual,¹⁸ but a larger notice will not vitiate.¹⁹ In one case where the statutes required "at least six days' notice," the service of process five days before the return day was held good in a collateral suit.²⁰

¹⁵ Power's Appeal, 29 Mich. 504. Where a statute provided for filing an affidavit that persons in interest were non-resident, or upon diligent inquiry could not be found, and for notice to such by publication, it was held that the filing of the affidavit must precede the publication of the notice. Brown v. St. Paul etc. R. R. Co., 38 Minn. 506, 38 N. W. Rep. 698.

¹⁶ Ives v. East Haven, 48 Conn. 272.

¹⁷ Thompson v. Chicago etc. R. R. Co., 110 Mo. 147, 19 S. W. Rep. 77.

¹⁸ Stanford v. Worn, 27 Cal. 171; Rout v. Mountjoy, 3 B. Mon. 300; Dixon v. Highway Comrs.,

75 Mich. 225, 42 N. W. Rep. 814; Rifenburg v. Muskegon, 83 Mich. 279, 47 N. W. Rep. 231. Where notice was required to be published six days, a notice published six days, one of which was Sunday, was held insufficient. Scammon v. Chicago, 40 Ill. 146.

¹⁹ Fairchild v. St. Paul, 46 Minn. 540, 49 N. W. Rep. 325. "If the full fifteen days' notice is given before the hearing and sufficiently near the date thereof to reasonably answer the purpose designed to be effected, it fulfills the requirement of the statute."

²⁰ Leonard v. Sparks, 117 Mo. 103, 22 S. W. Rep. 900.

If the time of service is not prescribed, service at any time before the appearance will be good, and it will devolve upon the person served to show that it was not sufficient.²¹ Where proof of service of notice of the filing of the petition was required to be filed with the petition, it was held the service was properly made before the filing.²² Where a statute required notice of the preparing of a petition to open a road "at least ten days before the sitting of the court," it was held to mean ten days exclusive of the day of service and of the return day.²³ Personal service made upon a non-resident out of the State has been held sufficient.²⁴ Where the statute provides a particular mode of service upon corporations, that mode must be followed.²⁵

§ 379. Waiver of notice by appearance or otherwise.—The object of notice being to give persons interested an opportunity to be present and protect their rights, it follows that a failure to give notice, or any irregularity in giving it, is waived, if the persons entitled to notice appear and take part in the proceedings in the matter or matters concerning which they are required to be notified. This position is supported by many authorities.²⁶ To be a waiver, the ap-

²¹ Muire v. Falconer, 10 Gratt. 12.

²² Gammell v. Potter, 2 Ia. 562. But see Hoag v. Denton, 20 Ia. 118, where it is held that the proof need not be filed at the same time as the petition.

²³ Public Roads, 5 Harr. 174. To the same effect: People v. Highway Comrs., 38 Mich. 247; Coquard v. Boehmer, 81 Mich. 445, 45 N. W. Rep. 996; Cox v. Commissioner, 83 Mich. 193, 47 N. W. Rep. 122.

²⁴ State v. Hudson River R. R. & T. Co. (N. J.), 25 Atl. Rep. 853; Saginaw etc. R. R. Co. v. Bordner (Mich.), 66 N. W. Rep. 62.

²⁵ Detroit v. Wabash etc. R. R.

Co., 63 Mich. 712, 30 N. W. Rep. 321; Truax v. Sterling, 74 Mich. 160, 41 N. W. Rep. 885; Evans v. Santana Live Stock & Land Co., 81 Tex. 622, 17 S. W. Rep. 232.

²⁶ Burden v. Stein, 24 Ala. 130; Ives v. East Haven, 48 Conn. 272; Milam v. Sproul, 36 Ga. 393; Skinner v. Lake View Ave. Co., 57 Ill. 151; McManus v. McDonough, 107 Ill. 95; Board of Supervisors v. Magoon, 109 Ill. 142; Huston v. Clark, 112 Ill. 344; Milhollin v. Thomas, 7 Ind. 165; Smith v. Alexander, 24 Ind. 454; Coolman v. Fleming, 82 Ind. 117; Indiana, B. & W. Ry. Co. v. Allen, 100 Ind. 409; Washington Ice Co. v. Lay, 103 Ind. 48; Sunier v. Miller, 105 Ind. 393; Updegraff v.

pearance must be such as secures to the person entitled to notice the same opportunity and the same benefit he would have had if legal notice had been given, and must be for some other purpose than merely to object for want of due notice.²⁷ Thus, where a person was entitled to notice of

Palmer, 107 Ind. 181; Carr v. Boone, 108 Ind. 241; Ford v. Ford, 110 Ind. 89; Orton v. Tilden, 110 Ind. 131; Robinson v. Rippey, 111 Ind. 112; Commissioners v. Heed, 33 Kan. 34; Akin v. Commissioners, 36 Kan. 170; Stephen v. Commissioners, 36 Kan. 664; Commonwealth v. Westborough, 3 Mass. 406; Barre Turnpike Co. v. Appleton, 2 Pick. 430; Copeland v. Packard, 16 Pick. 217; Hancock v. Boston, 1 Met. 122; New Marlborough v. County Comrs., 9 Met. 423; East Saginaw etc. R. R. Co. v. Benham, 28 Mich. 459; Dunning v. Township Drain Comr., 44 Mich. 518; Concord R. R. Co. v. Greeley, 17 N. H. 47; Petition of Guilford, 25 N. H. 124; Peavy v. Wolfborough, 37 N. H. 286; Boston & Maine R. R. Co. v. Folsom, 46 N. H. 64; Roberts v. Stark, 47 N. H. 223; Dyckman v. New York, 5 N. Y. 434; People v. Burton, 65 N. Y. 452; Little v. May, 3 Hawks N. C. 599; Cambria Street, 75 Pa. St. 357; Tingley v. Providence, 9 R. I. 388; Onken v. Riley, 65 Tex. 468; Brock v. Barnet, 57 Vt. 172; Coleman v. Moody, 4 H. & M. Va. 1; Pitzer v. Williams, 2 Rob. Va. 241; Muire v. Falconer, 10 Gratt. 12; Great Falls Manf. Co. v. Attorney General, 124 U. S. 581; Corrigan v. London etc. Ry. Co., 5 M. & G. 219; S. C., 44 E. C. L. R. 123; Taylor v. Clemson,

11 Clark & F. 610; Crouse v. Whitlock, 46 Ill. App. 260; Fisher v. Hobbs, 42 Ind. 276; Mathews v. Droud, 114 Ind. 268; Wells v. Rhodes, 114 Ind. 467; Hedeon v. State, 47 Kan. 402, 28 Pac. Rep. 203; Hooper v. Bridge-water, 102 Mass. 512; Soller v. Township of Brown, 67 Mich. 422, 34 N. W. Rep. 888; Union Depot Co. v. Frederick, 117 Mo. 138, 21 S. W. Rep. 1118, 1130; Imler v. Springfield, 30 Mo. App. 669; Candia v. Chandler, 58 N. H. 127; Collins v. Saratoga Springs, 70 Hun 583, 24 N. Y. Supp. 234; Larkin v. Scranton, 162 Pa. St. 289, 29 Atl. Rep. 910; Re Opening of Walnut St., 7 Luzerne Leg. Reg. Rep. 562; Rogers v. Freemansburg, 2 Pa. Co. Ct. 518; Croft v. Bennington etc. R. R. Co., 64 Vt. 1, 23 Atl. Rep. 922; Robinson v. Winch, 66 Vt. 110, 28 Atl. Rep. 884; Condon v. County Comrs., 89 Me. 409, 36 Atl. Rep. 626; Towns v. Klamath County, 33 Or. 225, 53 Pac. Rep. 604; Anderson v. Decona, 74 Minn. 339; Issenhuth v. Baum, 11 S. D. 222; Contra: Commissioners v. Murray, 1 Rich. L. 335; State v. Langer, 29 Wis. 68. Cruger v. Hudson River R. R. Co., 12 N. Y. 190, is not opposed to the text.

²⁷ Perkins v. Haywood, 132 Ind. 95, 31 N. E. Rep. 670; State v. Jersey City, 25 N. J. L. 309. Appearing before the commissioners' court in a highway case

the application to court for a writ of *ad quod damnum*, in a mill case, but no notice was given, his appearance upon the return of the writ and contesting the inquisition was held not to be a waiver of the failure to give notice.²⁸ Infants and persons *non compos* cannot waive notice.²⁹ Demanding or receiving the damages awarded will constitute a waiver of notice.³⁰ A report of commissioners to lay out a road, that certain owners of land taken, consent to the establishment of the road, cannot be received in lieu of the notice required by statute.³¹ Taking an appeal has been held to be equivalent to a general appearance, and to preclude the appellant from thereafter objecting for want of notice.³² Actual notice or knowledge is not equivalent to legal notice.³³ But the courts will not exercise discretionary powers in favor of persons who have had actual notice and failed to appear, unless a plain injury has been sustained.³⁴

§ 380. **Who is bound or affected by a particular notice.**— This is a matter which must necessarily depend upon local statutes. Where persons are entitled to individual notice, whether personal or constructive, only those are bound who are notified as required.³⁵ Notice to the husband is not

and protesting against the report of the jury was held not to be a waiver of notice. *McIntyre v. Luker*, 77 Tex. 259, 13 S. W. Rep. 1027.

²⁸ *Bernard v. Brewer*, 2 Wash. Va. 76. To the same effect: *Hinckley et al. Petitioners*, 15 Pick. 447. But if, on the return of the inquisition, the court had jurisdiction to quash the writ on the same grounds upon which it might have denied the application, then an appearance to contest the inquisition ought to be held a waiver of defective notice.

²⁹ *Kansas City etc. R. R. Co. v. Campbell*, 62 Mo. 585.

³⁰ *Graves v. Middletown*, 137 Ind. 400, 37 N. E. Rep. 157.

³¹ *Crawford v. Snowden*, 3 Litt. (Ky.) 228; *Roads*, 2 T. B. Mon. 91; and see *Hopkins v. Crombie*, 4 N. H. 520.

³² *Atchison etc. R. R. Co. v. Patch*, 28 Kan. 470; *Wood v. Wilson*, 12 Ind. 657; *Ellsworth v. Chicago etc. R. R. Co.*, 91 Ia. 386, 59 N. W. Rep. 78.

³³ *Rice v. Waterman*, 5 Ohio C. C. 334.

³⁴ *Summer v. County Comrs.*, 37 Me. 112; *Rutland v. County Comrs.*, 20 Pick. 71; *Peters v. Griffiee*, 108 Ind. 121; *Lawrence v. Nahant*, 136 Mass. 477.

³⁵ *Ellsworth v. Chicago etc.*

notice to the wife, and does not bind her.³⁶ So notice to the life tenant is not notice to the remainder man.³⁷ Notice to one in the occupation of property who is a trespasser does not affect the real owner.³⁸ Where land belonged to a daughter for whom the father acted as agent, and he was notified as owner, and appeared, and took an active part in the proceedings, and formal notice to the father would have been sufficient under the statute, and no substantial injury appeared to have been done, the court refused to quash the proceedings on certiorari for want of notice to the daughter.³⁹ Notice to the selectmen and town clerk of a town in their official capacity was held notice to the town.⁴⁰ Notice to a special agent of a company was held not to bind the company.⁴¹ Where one was made a party as trustee for another, a notice addressed to him, without adding the word trustee, was held sufficient.⁴²

§ 381. **The proof of notice.**—As to how proof of notice should be made, or what will be sufficient evidence of notice, will depend upon the statute applicable to the case. If the statute prescribes any particular form or manner of making proof of notice, that method must be pursued.⁴³ In the absence of any statutory requirement, proof may be made in any mode by which it is customary to establish such facts.⁴⁴ If service is made by an officer, his return would be competent; if by any other person it may be shown by the affidavit of such person,⁴⁵ or by oral evidence.

R. R. Co., 91 Ia. 386, 59 N. W. Rep. 78.

³⁶ *Whitcher v. Benton*, 48 N. H. 157; *Watson v. Sewickley*, 91 Pa. St. 330.

³⁷ *Chicago & Alton R. R. Co. v. Smith*, 78 Ill. 96.

³⁸ *Dunlap v. Toledo etc. Ry. Co.*, 46 Mich. 190.

³⁹ *Pickford v. Lynn*, 98 Mass. 491.

⁴⁰ *Whittredge v. Concord*, 36 N. H. 530.

⁴¹ *Memphis K. & C. Ry. Co. v.*

Parsons Town Co., 26 Kan. 503.

⁴² *St. Louis etc. R. R. Co. v. Fowler*, 113 Mo. 458, 20 S. W. Rep. 1069.

⁴³ *Goss v. Highway Comrs.*, 63 Mich. 608, 30 N. W. Rep. 197.

⁴⁴ *Parish v. Gilmanton*, 11 N. H. 293.

⁴⁵ *Wright v. Wells*, 29 Ind. 354; *State v. Oteo Co.*, 6 Neb. 129. Proof need not be made by affidavit unless required by statute. *Carr v. Boone*, 108 Ind. 241.

The proof of notice should in all cases state the particular facts or manner of service or of giving notice, in order that the court or other tribunal may determine whether it is sufficient.⁴⁶ Thus an affidavit that affiant served a notice on a railroad company, without stating how it was served, is insufficient.⁴⁷ So, where notices are required to be posted in a number of public places, the proof of posting should specify the places, in order that the court may judge of their publicity.⁴⁸ Service may be made and proved by an interested party, if not prohibited.⁴⁹ If the proof of service is not required to be in writing, an affidavit of service may be aided by parol evidence.⁵⁰ Where the statute required proof of service to be made by affidavit, and the affidavit filed for that purpose did not show legal notice, it was held that, after confirmation, a new affidavit showing regular notice could not be filed so as to validate the proceedings.⁵¹ But, where the only defect was the neglect of the officer to affix his jurat to the affidavit of service, and it appeared aliunde that the oath was duly administered at the proper time, the court allowed the officer to affix his jurat as of the proper date, although the report of the commissioners had been filed.⁵²

§ 382. The record must show a compliance with the statute as to notice.—The record of proceedings should show that notice has been given according to law. Upon this

⁴⁶ *State v. St. Louis*, 67 Mo. 113; *Chicago etc. R. R. Co. v. Young*, 96 Mo. 39, 8 S. W. Rep. 776; *State v. St. Louis*, 1 Mo. App. 503; *Road in Salem*, 7 Luzerne Leg. Reg. Rep. 105. Appeal of *Central R. R. Co.*, 102 Pa. St. 38, and numerous cases cited in this and the following sections.

⁴⁷ Appeal of *Central R. R. Co.*, 102 Pa. St. 38.

⁴⁸ *Road in Sussex and Morris*, 13 N. J. L. 157; *State v. Otoe County*, 6 Neb. 129; *State v.*

Waterman, 79 Ia. 360, 44 N. W. Rep. 676; but see *Opening Albany Street*, 6 Abb. Pr. 273, special term.

⁴⁹ *Matter of Highway*, 15 N. J. L. 39; *Gaines v. Linn County*, 21 Or. 425, 28 Pac. Rep. 131.

⁵⁰ *Carr v. Fayette County*, 37 Ia. 608.

⁵¹ *Scott v. Bruckett*, 89 Ind. 413.

⁵² *Williams v. Stevenson*, 103 Ind. 243; see also, on the subject of this section, ante, § 378.

point we believe all the authorities are agreed.⁵³ There is a difference of opinion, however, in regard to how this must be shown. Some courts hold that a recital that notice has been given as required by law is sufficient.⁵⁴ Others hold that the particular facts must be set forth so that it can be determined from an inspection of the record whether the

⁵³ Commissioners of Talladega Co. v. Thompson, 15 Ala. 134; Barnett v. State, 15 Ala. 829; Commissioners v. Harper, 38 Ill. 103; Commissioners of Highways v. People, 2 Ill. App. 24; Peabody v. Sweet, 3 Ind. 514; State v. Berry, 12 Ia. 58; McCollister v. Schney, 24 Ia. 362; Everett v. Cedar Rapids etc. R. R. Co., 28 Ia. 417; Woolsey v. Board of Supervisors, 32 Ia. 130; Pagels v. Oaks, 64 Ia. 198; State v. Weimer, 64 Ia. 243; Lawless v. Resse, 4 Bibb (Ky.) 309; Shackelford's Heirs v. Coffey, 4 J. J. Marsh. 40; Cool v. Crommet, 13 Me. 250; Southard v. Ricker, 43 Me. 575; Coleman v. Andrews, 48 Me. 562; Names v. Comrs. of Highways, 30 Mich. 490; Moetter v. Comrs. of Highways, 39 Mich. 726; People v. Highway Comrs., 40 Mich. 165; People v. Ruthruff, 40 Mich. 175; Milton v. Wacker, 40 Mich. 229; Shue v. Highway Comrs., 41 Mich. 638; Prescott v. Patterson, 44 Mich. 525; Lampson v. Drain Comr., 45 Mich. 150; Blodgett v. Whaley, 47 Mich. 469; Van Buskirk v. Harrod, 48 Mich. 258; Bennett v. Drain Comr., 56 Mich. 634; Brazee v. Raymond, 59 Mich. 548; Whitely v. Platte Co., 73 Mo. 30; Robinson v. Matherick, 5 Neb. 252; State v. Otoe Co., 6 Neb. 129; Doody v.

Vaughan, 7 Neb. 28; Road in Sussex and Morris, 13 N. J. L. 157; State v. Orange, 32 N. J. L. 49; Harbeck v. Toledo, 11 Ohio St. 219; Fravert v. Frinfrock, 43 Ohio St. 335; Thompson v. Multnomah Co., 2 Or. 34; Boyer's Road, 37 Pa. St. 257; Private Road, 112 Pa. St. 183; Bernard v. Brewer, 2 Wash. 76; Price v. Stagray, 68 Mich. 17, 35 N. W. Rep. 815; Overman v. St. Paul, 39 Minn. 120, 39 N. W. Rep. 66; State v. St. Louis, 67 Mo. 113; Chicago etc. R. R. Co. v. Young, 96 Mo. 39, 8 S. W. Rep. 776; Town of Henderson v. Davis, 106 N. C. 88, 11 S. E. Rep. 573; Vogt v. Bexar County, 5 Tex. Civ. App. 272, 23 S. W. Rep. 1044. See also cases cited in subsequent notes to this section. Contra: Road in South Abington, 109 Pa. St. 118.

⁵⁴ Huntington v. Birch, 12 Conn. 142; Shinkle v. Magill, 58 Ill. 422; Chicago, B. & Q. R. R. Co. v. Chamberlain, 84 Ill. 333; Wright v. Wells, 29 Ind. 354; Kissenger v. Hanselman, 33 Ind. 80; Muncey v. Joest, 74 Ind. 409; Carr v. State, 103 Ind. 548; McCollister v. Shney, 24 Ia. 362; State v. Prine, 25 Ia. 231; Everett v. Cedar Rapids etc. R. R. Co., 28 Ia. 417; Woolsey v. Board of Supervisors, 32 Ia. 130; Pagels v. Oaks, 64 Ia. 198; Venard v.

statute has been complied with.⁵⁵ Much must depend, in this respect, upon the statute, the nature of the tribunal and the manner in which the question arises.

§ 383. Who may take advantage of want or defect of notice.—One person cannot avail himself of the failure to give notice to another.⁵⁶ Where proceedings for the estab-

Cross, 8 Kan. 248; Crawford v. Commissioners, 32 Kan. 555; State v. Lewis, 22 N. J. L. 564; Coster v. New Jersey R. R. Co., 23 N. J. L. 227; State v. Justice, 24 N. J. L. 413; Ferris v. Bramble, 5 Ohio St. 109; Keys v. Williamson, 31 Ohio St. 561; Fravert v. Frinrock, 43 Ohio St. 335; Lingo v. Burford, 112 Mo. 149, 18 S. W. Rep. 1081, 20 S. W. Rep. 459; Ziebold v. Foster, 118 Mo. 349, 24 S. W. Rep. 155; Ackerman v. Huff, 71 Tex. 317, 9 S. W. Rep. 236; Sweek v. Jorgensen, 33 Or. 270. In Harbeck v. Toledo, 11 Ohio St. 219, it was held that a recital of due notice in the order of the court was overcome by a defective notice appearing in the record.

⁵⁵ Barnett v. State, 15 Ala. 829; Commissioners of Talladega Co. v. Thompson, 15 Ala. 134; Molett v. Keenan, 22 Ala. 484; Lancaster v. Pope, 1 Mass. 86; Southard v. Ricker, 43 Me. 575; Burtiss v. Parks, 65 Me. 559; Leavitt v. Eastman, 77 Me. 117; People v. Highway Comrs., 14 Mich. 528; Dupont v. Highway Comrs., 28 Mich. 362; Purdy v. Martin, 31 Mich. 455; Detroit Sharpshooters' Assn. v. Highway Comrs., 34 Mich. 36; People v. Burnap, 38 Mich. 350; People v. Township Board, 38 Mich. 558; Daniels v. Smith, 38 Mich. 660; Lane v.

Burnap, 39 Mich. 736; Taylor v. Burnap, 39 Mich. 739; Willcheck v. Edwards, 42 Mich. 105; Nielson v. Wakefield, 43 Mich. 434; Wilder v. Hubbell, 43 Mich. 487; Wright v. Rowley, 44 Mich. 557; Bruzee v. Raymond, 59 Mich. 548; Whitely v. Platte Co., 73 Mo. 30; State v. Otoe Co., 6 Neb. 129; Road in Sussex and Morris, 13 N. J. L. 157; Samon v. Trenton, 47 N. J. L. 489; People v. Smith, 7 Hun 17; Thompson v. Multnomah Co., 2 Or. 34; State v. Officer, 4 Or. 180; Appeal of Central R. R. Co., 102 Pa. St. 38; In re Road in Plum Creek Township, 110 Pa. St. 544; Private Road, 112 Pa. St. 183; Fulton County v. Amorous, 89 Ga. 614, 16 S. E. Rep. 201; Johnson v. Stephenson, 39 Ill. App. 88; People v. Commissioners, 16 Mich. 63; Van Auken v. Commissioners, 27 Mich. 414; Matter of Petition of Gardner, 41 Mo. App. 589; Cameron v. Wasco County, 27 Or. 318, 41 Pac. Rep. 160.

⁵⁶ Knox v. Epsom, 56 N. H. 14; Nichols v. Salem, 14 Gray 490; Ives v. East Haven, 48 Conn. 272; Prezinger v. Harness, 114 Ind. 491; Prezinger v. Fording, 114 Ind. 599; Pennsburg Alley, 12 Pa. Co. Ct. 213; Road in Friendsville, 16 Pa. Co. Ct. 172; Poundstone v. Baldwin, 145 Ind. 139, 44 N. E. Rep. 191.

ishment of a highway are void for want of notice as to the owner of a tract of land, a subsequent occupant of the land, who does not claim under such owner, cannot avail himself of such want of notice.⁵⁷ It has been held that one who has petitioned for an improvement, such as the laying out of a highway, cannot object to the proceedings for want of notice.⁵⁸

§ 384. Notice of adjournments, and of other steps in the proceedings. —Where parties have had due notice of the meeting of the commissioners, or other tribunal, to act upon any matter, they are bound to take notice of adjournments.⁵⁹ But, where there is a failure to meet on the appointed day,⁶⁰ or the adjournment is not to a particular day, but subject to the call of one of their number,⁶¹ there should be a new notice. Where, after notice has been given of the meeting of commissioners, there is a change of commissioners in consequence of one declining to serve, a new notice should be given.⁶² So, where notice was required to be given of the time and place of the meeting of a jury to assess damages, and, after a jury had heard numerous witnesses and was about ready to report, one of them died, and a new juror was put in his place, it was held a new notice was necessary.⁶³ Where the statute required notice of the time and place of appointing commissioners, which was given, and commissioners were appointed, one of whom refused to

⁵⁷ Commonwealth v. Weiner, 3 Met. 445.

⁵⁸ Hackett v. State, 113 Ind. 532; Graham v. Flynn, 21 Neb. 229; Hopkins v. Crombie, 4 N. H. 520.

⁵⁹ Masters v. McHolland, 12 Kan. 17; Inhabitants of New Salem, Petitioners, 6 Pick. 470; Commonwealth v. County Comrs., 8 Pick. 343; Leavenworth etc. R. R. Co. v. Meyer, 50 Kan. 25, 31 Pac. Rep. 700; Kinnie v. Bare, 80 Mich. 345, 45 N. W. Rep. 345; In re Road in

Peach Bottom, 3 Penny. Pa. 541; St. Joseph v. Geiwitz, 148 Mo. 210, 49 S. W. Rep. 1000; Matter of Brooklyn El. R. R. Co., 25 Misc. N. Y. 120; Matter of Curren, 25 N. Y. Misc. 432.

⁶⁰ Pegler v. Highway Comrs., 34 Mich. 359.

⁶¹ Memphis etc. Ry. Co. v. Parsons Town Co., 26 Kan. 503.

⁶² State v. Plainfield, 41 N. J. L. 138.

⁶³ Anderson v. St. Louis, 47 Mo. 479.

act, it was held that his place could be afterwards filled, without further notice.⁶⁴ Parties once brought into court must take notice of all subsequent proceedings of the court, such as the quashing of a writ of *ad quod damnum* and issuing a new one,⁶⁵ setting aside the appointment of commissioners and allowing the petition to be amended,⁶⁶ and the like.⁶⁷ Where a railroad company was required to give notice to actual occupants of the land condemned before entering, such notice is no part of the condemnation proceedings, and the failure to give it does not invalidate them.⁶⁸ The same particularity is not required in giving notice of matters subsequent to jurisdiction as in giving the notice by which jurisdiction is acquired.⁶⁹

§ 385. **One entitled to notice is not bound, if not notified.**—This follows from what has already been said in the present chapter.⁷⁰ As a rule, the proceedings will be valid as to those having notice, and invalid only as to those not notified.⁷¹

⁶⁴ *Matter of Broadway Widening*, 63 Barb. 572.

⁶⁵ *Burnham v. Thompson*, 35 Ia. 421.

⁶⁶ *St. Louis v. Gleason*, 15 Mo. App. 25.

⁶⁷ See *Thorndike v. County Comrs.*, 117 Mass. 566.

⁶⁸ *Chicago etc. R. R. Co. v. Griesser*, 48 Kan. 663, 29 Pac. Rep. 1082. The following are cases in which notice of certain steps in the proceedings was required by statute or held necessary: *Matter of Exchange Alley*, 4 La. An. 4; *New Orleans etc. R. R. Co. v. Bougere*, 23 La. An. 803; *Commonwealth v. Cambridge*, 7 Mass. 158; *Shaffner v. St. Louis*, 31 Mo. 264; *Chicago etc. R. R. Co. v. Swan*, 120 Mo. 30, 25 S. W. Rep. 534; *Mississippi*

Riv. etc. R. R. Co. v. Jones, 54 Mo. App. 529; *Hopewell v. Wellington*, 24 N. J. L. 127.

⁶⁹ *Behrens v. Commissioners*, 169 Ill. 558.

⁷⁰ *Smith v. Chicago etc. R. R. Co.*, 67 Ill. 191; *Alcott v. Acheson*, 49 Ia. 569; *Bixby v. Goss*, 54 Mich. 551; *Bettis v. Geddes*, 54 Mich. 608; *Corey v. Probate Judge*, 56 Mich. 524; *New Orleans etc. R. R. Co. v. Frederick*, 46 Miss. 1; *Moses v. St. Louis Sectional Dock Co.*, 84 Mo. 242; *Large v. Philadelphia*, 3 Phila. 382; *Road in Lancaster City*, 68 Pa. St. 396; *Pettis v. Providence*, 11 R. I. 372; *Hagar v. Brainard*, 44 Vt. 294; *Long v. Emporia*, 59 Kan. 46.

⁷¹ *Ante*, §§ 339, 380.

CHAPTER XVI.

OBJECTIONS AND DEFENCES TO THE APPLICATION AND PROCEEDINGS.

§ 386. **General considerations.**—Having considered the parties to proceedings, the petition or application and the notice to be given, it is next in order to consider the action which may be taken upon the application itself. This will depend in all cases upon the statute upon which the proceedings are founded. The application may be to a court, or it may be to a judge, officer or board acting in a ministerial capacity. The statute may provide for the contesting of certain questions, such as the necessity for the proposed condemnation and the like, or it may be entirely silent on the subject. It is plain that the practice must vary greatly in different cases. As there is more or less similarity in statutes, so there is more or less general importance to be attached to the decisions interpreting such statutes. Great care must be taken, however, in the use of decisions in this connection, to interpret them in connection with the statutes to which they apply.

§ 387. **Where the application is to a ministerial officer or board.**—The powers and duties of such an officer in respect to such an application are so well and fully stated by the Supreme Court of Illinois in an early case that we shall quote extensively from the opinion. The suit was for a mandamus to compel a judge to appoint commissioners upon the application of a railroad company, to take land for railroad purposes. The court say: "The remaining objection urged is, that in determining whether such a case was made before him as required the appointment of commissioners, the circuit judge acted judicially, and in such a case we cannot grant a mandamus to require him to reverse his decision. Granting the assumption, and the conclusion legitimately follows. We cannot by mandamus control the judicial action of any inferior tribunal. We can, in such a case, only

set it in motion, and require it to act one way or the other, but without determining how it shall act. And so, too, where the inferior tribunal is vested with a discretion in the performance of a duty imposed by the law. We can only compel the performance of the duty, without controlling that discretion or saying how the duty shall be performed. Here the act to be performed by the circuit judge is strictly of a ministerial character, and so it was determined by this court, in the case of *The Illinois Central Railroad Company v. Rucker*, 14 Ills. 153, where a mandamus, in precisely such a case, was awarded by this court. When such a case is made as is required by the statute, the judge has no discretion whether he will appoint commissioners or not. It is his imperative duty to do so. Necessarily he must look to see whether such a case is presented as authorizes and requires him to act, and such is the case with every officer who is called upon to discharge a ministerial duty. The sheriff, before he makes a deed, must examine and determine whether there was a valid judgment, execution and sale under it. A clerk, before he issues an attachment or a capias, must examine and see whether the affidavit, on which the application is made, is such as the law requires, and so with every other ministerial duty which any officer is required to perform, and although, in determining whether the act should be done, the officer may have to decide, in his own mind, important legal principles, as is often the case, yet that does not make such decision a judicial act, which can only be reviewed on appeal. Such is not the true test of the judicial character of an act. A distinction was attempted to be drawn between this and other similar duties, from the fact that the adverse party is required to be notified to appear before the judge, at the time of the application for the appointment of the commissioners, and hence it is inferred that he has a right to contest the right of the applicant to have the commissioners appointed. He may undoubtedly show, if he can, that such a case is not presented, as requires the judge to act at all, but the important and substantial purpose for which he is called there is, that he may be heard upon those matters in which the

judge may properly exercise discretion; that he may see that none but fair and impartial men are appointed commissioners. Beyond this the law has vested no discretion in the officer which it has appointed to make the selection for the parties. If the officer applied to may refuse to appoint them in one case where the law has been complied with, he may in all cases, although never so clear a case is made out, and as the company has no redress but by mandamus, if his determination is held to be judicial, and not examinable on such an application, it is in the power of any of the various officers to whom his application may be made, to stop the progress of a railroad altogether. Such has never been the intention of the legislature.

"It is no answer to say that if one officer erroneously refuses to make the appointment, application may be made to another. Granting this to be so, and it is no more the duty of the last to appoint than it was of the first. And there is no more certainty that he will do so, and if there is no remedy against the first refusal, there can be none as to the last, and the party may be left without remedy. It is the duty of each to act when a proper case is made, requiring action. One officer might think that the company is asking too much ground for a depot, or that it has made an injudicious selection, and that a depot is not needed at the proposed place. Another might be of opinion that the road was injudiciously located, and require it to be changed, before he would appoint the commissioners to enable it to acquire the property. It is possible, it is true, that a company may abuse the trust reposed in it, and seek to acquire property not needed for the purpose of the road or its business, but if such objections were listened to, for the purposes of vesting in the various ministerial officers, whose duty it is made to assist in acquiring the necessary property for the use of the road, the right to determine where the road shall be made, or where a depot shall be located, or how much land is wanted for a wood yard, or where a water tank shall be erected, a far greater evil would result than the one attempted to be avoided. The legislature had a very satisfactory assurance that the pow-

ers granted to these corporations would not be abused by coercing from the citizens more land than was necessary for the legitimate purposes of their roads. The land thus acquired, can only be held and used for specific purposes. They are not authorized to speculate and traffic in the land thus acquired, but can only hold it for the purpose of the railroad, and its business accommodations. With this limited right to hold land, it was not to be supposed that any company would be so blind to its own interest as to go to the expense of acquiring land which would be of no use to it. It would have been just as reasonable to have provided in the charter that the company should not throw away its money in any other useless and aimless mode. It is possible, it is true, that a company might, in disregard of its duty to itself, to the State and individuals, apply to condemn land which it did not need, and for purposes other than those authorized by the law. When such a case of bad faith, abuse of power and violation of duty occurs, the law will readily find a remedy adequate to the protection of both the public and private rights, but we can see no pretense of such a case here, it being established that the purpose for which this land is sought to be acquired is such as is authorized by the company. Had the judge been correct in his construction of the charter, that the company was not authorized to acquire land for the purpose for which this was sought, then a case had not been presented which required him to act at all, and he would have been justified, and it would have been his duty, to refuse to appoint commissioners. In pursuance of the stipulation filed, a peremptory mandamus must be awarded."¹ There are many similar decisions.²

¹ *Chicago, Burlington & Quincy R. R. Co. v. Wilson*, 17 Ill. 123, 128-130.

² See *State v. Hudson Tunnel R. R. Co.*, 38 N. J. L. 17; *aff.*, 38 N. J. L. 584; *Carpenter v. County Comrs.*, 21 Pick. 258; *Western R. Co. v. Dickson*, 30 Wis. 389; *Illinois Central R. R. Co. v.*

Rucker, 14 Ill. 353; *Matter of Thirty-fourth St. R. R. Co.*, 37 Hun 442; *S. C. 102 N. Y. 343*; *West Jersey etc. R. R. Co. v. Ocean City R. R. Co.*, 61 N. J. L. 506, 39 Atl. Rep. 1024; and see *Gillinwater v. Mississippi etc. R. Co.*, 13 Ill. 1; *Detroit etc. R. Co. v. Gartner*, 95 Mich. 318,

In such cases the owners may appear and make objections, but such objections cannot be passed upon judicially; nor is it proper for the officer to consider any objections except such as go to the sufficiency of the papers upon which the application is made. The owner stands upon his legal rights, and may present his objections at some other stage of the proceedings, as upon the report of the commissioners,³ or, if this is not allowed him, may contest the validity of the condemnation when the attempt is made to dispossess him by virtue of the proceedings.⁴

§ 388. Where the application is to a court.—As already observed, the questions which may be litigated upon the application will depend upon the statute. Where the statute permits an application to the court in a particular manner and upon certain conditions, the court necessarily has power to determine whether the conditions exist or have been complied with, and whether the application has been made in proper form. If the manner of determining these questions is pointed out in the statute, that method will control. Otherwise the court may adopt any of the usual modes of determining such questions.⁵ The adjudications upon such questions will be as binding as adjudications in any other cases, and the same questions cannot be again litigated between the same parties.

Where the application is to a court, the better practice clearly is that all objections which go to the right of the petitioner to maintain the proceedings should be determined before the assessment of damages is entered upon.⁶ The following sections treat of the various questions which may be thus raised and determined, and of the manner in which it may be done.

54 N. W. Rep. 946; *In re Front & Union St. R. R. Co.*, 1 Penn. Del. 370.

³ See post, chap. xxi.

⁴ See *Los Angeles County v. San Jose Land & W. Co.*, 96 Cal. 93, 30 Pac. Rep. 969, and post, chap. xxvi.

⁵ *New York Central etc. R. R. Co. v. New York*, 22 App. Div. N. Y. 124.

⁶ *Baltimore & Ohio R. R. Co. v. Pittsburgh etc. R. R. Co.*, 17 W. Va. 812, 847; *Hadley v. Citizens' Savings Institution*, 123 Mass. 301; *Crawford v. Rutland*, 52 Vt.

§ 389. **Manner of raising objections apparent upon the face of the papers.**—This is ordinarily done by motion to dismiss the petition or application.⁷ If the petition is defective, a demurrer,⁸ or exceptions in the nature of a demurrer,⁹ will be proper. The same benefit may be obtained by merely resisting the appointment of commissioners or the selection of a jury on the ground that the papers do not make a case for the exercise of the power.¹⁰ In any of these ways the questions whether the petition and notice are sufficient, whether the purpose contemplated is a public use, whether the power to condemn for the particular purpose has been delegated, and whether the act under which the proceedings are had is valid, may be raised and decided.¹¹

412; *South Carolina R. R. Co. v. Blake*, 9 Rich. S. C. 228; *Bent v. Brigham*, 117 Mass. 307; *Heyne-man v. Blake*, 19 Cal. 579; *Lieberman v. Chicago etc. R. R. Co.*, 141 Ill. 140, 30 N. E. Rep. 544; *Hubbard v. Great Falls Mfg. Co.*, 80 Me. 39, 12 Atl. Rep. 878; *Norfolk So. R. R. Co. v. Ely*, 101 N. C. 8, 7 S. E. Rep. 476; *Harvey v. Aurora etc. R. R. Co.*, 174 Ill. 295; *Gold v. Pittsburgh etc. R. R. Co.*, 153 Ind. 232; *Apex Transportation Co. v. Garbade*, 32 Or. 582.

⁷ *South Chicago Ry. Co. v. Dix*, 109 Ill. 237; *Chicago & Northwestern R. R. Co. v. Chicago & Evanston R. R. Co.*, 112 Ill. 589; *County Court v. Griswold*, 58 Mo. 175. The objections may be oral. *Erie R. R. Co. v. Welsh*, 1 App. Div. 140, 37 N. Y. Supp. 996; *Apex Transportation Co. v. Garbade*, 32 Or. 582.

⁸ *Lake Pleasanton Water Co. v. Contra Costa Water Co.*, 67 Cal. 659; *Village of Byron v.*

Blount, 97 Ill. 62; *Board of Health v. Van Hoesen*, 87 Mich. 533, 49 N. W. Rep. 894; *Fork Ridge Baptist Cem. Asn. v. Redd*, 33 W. Va. 262, 10 S. E. Rep. 405; *Wisconsin Water Co. v. Winans*, 85 Wis. 26, 54 N. W. Rep. 1003.

⁹ *New Orleans etc. R. R. Co. v. Southern & Atlantic Tel. Co.*, 53 Ala. 211; *Metropolitan El. R. R. Co. v. Dominick*, 55 Hun 198, 27 N. Y. St. 576, 8 N. Y. Supp. 151.

¹⁰ *Matter of Marsh*, 71 N. Y. 315; *Olmsted v. Proprietors of the Morris Aqueduct Co.*, 46 N. J. L. 495; *S. C.*, 47 N. J. L. 311; *Matter of Application for Drainage etc.*, 35 N. J. L. 497; *Matter of Poughkeepsie Bridge Co.*, 108 N. Y. 483, 15 N. E. Rep. 601; *Matter of Grand Boulevard*, 33 App. Div. N. Y. 210.

¹¹ *Dierks v. Commissioners of Highways*, 142 Ill. 197, 31 N. E. Rep. 496; *Portland & G. Turnpike Co. v. Bobb*, 88 Ky. 226, 10 S. W. Rep. 794; *Cape Girardeau v. Houck*, 129 Mo. 607, 31 S. W.

§ 390. **Manner of raising other objections. Propriety of a plea or answer.**—If the objection consists in the denial of some matter alleged in the petition, or in the existence of some extrinsic fact which constitutes a bar to the proceedings, the better practice is to make such objections in the form of a plea or answer to the petition.¹² The answer may take the form of an affidavit,¹³ or of a motion to dismiss.¹⁴

Rep. 933; Matter of Split Rock Cable Road Co., 128 N. Y. 408, 28 N. E. Rep. 506; Citizens' W. W. Co. v. Parry, 59 Hun 202, 35 N. Y. St. 640, 13 N. Y. Supp. 490, S. C., affirmed, 128 N. Y. 669; Harvey v. Aurora etc. R. R. Co., 174 Ill. 295; Gold v. Pittsburgh etc. R. R. Co., 153 Ind. 232; Scranton Gas & W. Co. v. Northern Coal & Iron Co., 192 Pa. St. 80.

¹² By Answer: Aurora & Cincinnati R. R. Co. v. Miller, 56 Ind. 88; Tracy v. Elizabethtown etc. R. R. Co., 80 Ky. 259; In re St. Paul etc. Ry. Co., 34 Minn. 227; Matter of Lockport & Buffalo R. R. Co., 77 N. Y. 557; Matter of New York, Lackawana & Western Ry. Co., 35 Hun 220; S. C., 99 N. Y. 12; South Carolina R. R. Co. v. Blake, 9 Rich. S. C. 228; Metropolitan City R. R. Co. v. Chicago W. D. R. R. Co., 87 Ill. 317; Chicago etc. R. R. Co. v. Porter, 43 Minn. 527, 46 N. W. Rep. 75; New York Central etc. R. R. Co. v. New York, 22 App. Div. 124.

By Plea: Terry v. Waterbury, 35 Conn. 526; Hadley v. Citizens' Savings Institution, 123 Mass. 301; Crawford v. Rutland, 52 Vt. 412; Baltimore & Ohio R. R. Co. v. Pittsburg etc. R. R. Co., 17 W. Va. 812; Willard v. Boston, 149 Mass. 176, 21 N. E. Rep. 298.

In St. Joseph Terminal R. R. Co. v. Hannibal etc. R. R. Co., 94 Mo. 535, 6 S. W. Rep. 691, it is held that objections, which go to the right of the petitioner to maintain the proceedings, may be presented by any appropriate pleadings, though the statute is silent on the subject. The court says: "It is true the statute makes no specific provision for raising these or like issues, but it is utterly unreasonable to say that the defendant must be notified when the petition will be heard, and yet, when he appears, he cannot be heard to show that the petitioner has no right to condemn the particular property for the alleged use. Nor is it a sufficient refutation of the right and duty of the trial court to hear and determine such questions to say or even show that the defendant has a remedy by injunction to prevent the appropriation of his property in violation of law. The policy of our code and of the body of the statute law is, to have all matters arising out of one controversy settled in a single suit." p. 543.

¹³ Matter of New York Central R. R. Co., 66 N. Y. 407.

¹⁴ Callendar v. Painesville etc. R. R. Co., 11 Ohio St. 516; Au-

In Illinois, Iowa and Arkansas an answer or plea has been held to be unnecessary and improper.¹⁵ It would seem to be a much better practice to put objections into the form of a plea or answer. Definite issues can then be made and all preliminary questions can be settled before the question of damages is entered upon. In some cases express provision is made by statute for the manner of making defence to the proceedings.¹⁶

§ 391. **Questioning the legal incorporation of the petitioner.**—Where the application is by a corporation, its corporate existence may be denied,¹⁷ and thereupon proof of incorporation must be made. It will be sufficient, however

rora etc. R. R. Co. v. Harvey, 178 Ill. 477.

¹⁵ Chicago & Iowa R. R. Co. v. Hopkins, 90 Ill. 316; Johnson v. Freeport etc. Ry. Co., 111 Ill. 413; Smith Jr. v. Chicago & Western Indiana R. R. Co., 105 Ill. 511; Bentonville R. R. Co. v. Stroud, 45 Ark. 278; Corbin v. Wisconsin etc. Ry. Co., 66 Ia. 269; West End Narrow Gauge R. R. Co. v. Almeroth, 13 Mo. App. 91; Union Pacific Ry. Co. v. Leavenworth etc. Ry. Co., 29 Fed. Rep. 728; Henry v. Centralia etc. R. R. Co., 121 Ill. 264; Chicago etc. R. R. Co. v. Chicago, 143 Ill. 641, 32 N. E. Rep. 178; Corbin v. Wisconsin etc. R. R. Co., 66 Ia. 269. See also Denver etc. R. R. Co. v. Griffith, 17 Col. 598, 31 Pac. Rep. 171. In Village of Byron v. Blount, 97 Ill. 62, 65, it is intimated that an answer would be proper.

¹⁶ Wells v. Rhodes, 114 Ind. 467; Gilbert v. Hall, 115 Ind. 549, 18 N. E. Rep. 28; Bell v. Cox, 122 Ind. 153, 23 N. E. Rep. 705; Axtell v. Coombs, 4 Me. 322; Newcomb v. Royce, 42 Neb. 323,

60 N. W. Rep. 552; Bridal Veil Lumber Co. v. Johnson, 25 Or. 105, 34 Pac. Rep. 1026.

¹⁷ Matter of Staten Island Rapid Transit R. R. Co., 38 Hun 381; Matter of Brooklyn etc. Ry. Co., 72 N. Y. 245; Miller v. Prairie du Chien & McGregor Ry. Co., 34 Wis. 533; St. Joseph etc. R. R. Co. v. Shambaugh, 106 N. C. 557, 17 S. W. Rep. 581; Orrick School Dist. v. Dorton, 125 Mo. 439, 28 S. W. Rep. 765; St. Louis etc. R. R. Co. v. Belleville City R. R. Co., 158 Ill. 390, 41 N. E. Rep. 916; East St. Louis etc. R. R. Co. v. Belleville City R. R. Co., 159 Ill. 544, 42 N. E. Rep. 974; Thomas v. St. Louis etc. R. R. Co., 164 Ill. 634, 46 N. E. Rep. 8. In Wellington etc. R. R. Co. v. Cashie etc. Co., 114 N. C. 690, 19 S. E. Rep. 646, it is held that the corporate existence of the petitioner cannot be questioned in a proceeding to condemn. Denial of corporate existence of petitioner on information and belief held insufficient to require proof. Board of Education v. Prior, 11 S. D. 292.

for the petitioner to show that it is a corporation *de facto*.¹⁸ This is in accordance with the general rule that where the existence of a corporation comes collaterally in question, it is sufficient to show a *de facto* organization.¹⁹ Some courts hold that condemnation proceedings constitute an exception to the general rule and that, in such proceedings, a *de jure* incorporation must be proved.²⁰ In some cases it is held that the incorporation of the company must be

¹⁸ *Matter of Spring Valley Water Works*, 17 Cal. 132; *Spring Valley Water Works v. San Francisco*, 22 Cal. 434; *Cincinnati etc. R. R. Co. v. Danville etc. R. R. Co.*, 75 Ill. 113; *McAuley v. C. C. & I. C. Ry. Co.*, 83 Ill. 348; *Peoria & P. N. Ry. Co. v. Peoria & F. Ry. Co.*, 105 Ill. 110; *Chicago & Northwestern Ry. Co. v. Chicago & Evanston R. R. Co.*, 112 Ill. 589; *Ward v. Minnesota etc. R. R. Co.*, 119 Ill. 287; *Brown v. Calumet Riv. R. R. Co.*, 125 Ill. 600, 18 N. E. Rep. 283; *Aurora etc. R. R. Co. v. Lawrenceburg*, 56 Ind. 80; *Aurora etc. R. R. Co. v. Miller*, 56 Ind. 88; *Reisner v. Strong*, 24 Kan. 410; *Briggs v. Cape Cod Ship Canal Co.*, 137 Mass. 71; *Schroeder v. Detroit etc. R. R. Co.*, 44 Mich. 387; *National Docks Co. v. Central R. R. Co.*, 32 N. J. Eq. 755; *S. C. below*; *Central R. R. Co. v. Pennsylvania R. R. Co.*, 31 N. J. Eq. 475; *People v. County Court*, 28 Hun 14.

¹⁹ See note to *Vanneman v. Young*, 3 Am. R. R. & Corp. Rep., p. 662. As to what constitutes a *defacto* corporation is a question discussed at length in the same note.

²⁰ *Orrick School District v. Dorton*, 125 Mo. 439, 28 S. W. Rep. 765; *New York Cable Co. v.*

New York, 104 N. Y. 1; *Matter of Union El. R. R. Co.*, 112 N. Y. 61, 19 N. E. Rep. 664; *Matter of Broadway etc. R. R. Co.*, 73 Hun 7, 25 N. Y. Supp. 1081; *Atlantic etc. R. R. Co. v. Sullivan*, 5 Ohio St. 76. See also *Atkinson v. Cincinnati etc. R. R. Co.*, 15 Ohio St. 21; *Powers v. Hazelton etc. R. R. Co.*, 33 Ohio St. 429; *Matter of Brooklyn etc. R. R. Co.*, 72 N. Y. 245; *Peavy v. Calais R. R. Co.*, 30 Me. 498; *Niemeyer v. Little Rock Junction R. R. Co.*, 43 Ark. 111. In *New York Cable Co. v. New York*, 104 N. Y. 1, it is said: "In order to sustain proceedings by which a body claims to be a corporation, and as such empowered to exercise the right of eminent domain, and under that right to take the property of the citizen, it is not sufficient that it is a corporation *defacto*. It must be a corporation *dejure*. Where it is sought to take the property of an individual under powers granted by an act of the legislature to a corporation to be formed in a particular manner therein directed, the constitutional protection of the rights of private property requires that the powers granted by the legislature be strictly pursued, and

shown at some stage of the proceedings, though not denied.²¹ Other cases hold a contrary doctrine.²² An answer setting up that the petitioner was acting for another company and denying the legal incorporation of the latter company was held insufficient.²³

Where a company was required to commence its road and expend ten per cent of its capital in five years and complete its road within a certain other time or its corporate existence and powers should cease, and it had done neither, it was held that the statute executed itself, that no proceeding to forfeit its charter was necessary, and that consequently it could not condemn after the periods specified had elapsed.²⁴

§ 392. **Controverting a compliance with the conditions imposed by the statute.**—If the statute imposes conditions to the exercise of the power, such as the inability to agree with the owner, the petition must allege a compliance with the statute,²⁵ and issue may be taken upon these allegations.²⁶ If the finding is against the petitioner the proceedings must be quashed.²⁷

all the prescribed conditions be performed." p. 43.

²¹ *State v. Hudson Tunnel Co.*, 38 N. J. L. 17; *S. C.* 38 N. J. L. 548; *Atlantic etc. R. R. Co. v. Sullivant*, 5 Ohio St. 276; *Atkinson v. Marietta & Cin. R. R. Co.*, 15 Ohio St. 21; *Powers v. Railway Co.*, 33 Ohio St. 429; *Hopkins v. Kansas City etc. R. R. Co.*, 79 Mo. 98.

²² *Ward v. Minnesota & Northwestern R. R. Co.*, 119 Ill. 287; *Mobile etc. R. R. Co. v. Postal Tel. Cable Co.*, 120 Ala. 21.

²³ *Aurora & Cinn. R. R. Co. v. Miller*, 56 Ind. 88.

²⁴ *Matter of Brooklyn etc. Ry. Co.*, 72 N. Y. 245; *S. C.* 55 How. Pr. 14. Compare *New York & L. I. Bridge Co. v. Smith*, 148 N. Y. 540, 42 N. E. Rep. 1088; *People v. Colorado Eastern R. R.*

Co., 8 Col. App. 301; and see ante, § 247; *Morrison v. Forman*, 177 Ill. 427, 53 N. E. Rep. 73.

²⁵ Ante, § 304.

²⁶ *Gilmer v. Lime Point*, 19 Cal. 47; *Matter of Lockport & Buffalo R. R. Co.*, 77 N. Y. 557; *Emigrant Ditch Co. v. Webber*, 108 Cal. 88, 40 Pac. Rep. 1061; *Derby v. Framingham etc. R. R. Co.*, 119 Mass. 516; *Wilder v. Boston & A. R. R. Co.*, 161 Mass. 387, 37 N. E. Rep. 380; *Winter v. New York etc. R. R. Co.*, 51 N. J. L. 83; *In re Rochester Electric R. R. Co.*, 123 N. Y. 351, 25 N. E. Rep. 381; *Harrisburg etc. R. R. Co. v. Harrisburg etc. Turnpike Co.*, 15 Pa. Co. Ct. 389; *Colonial City Traction Co. v. Kingston City R. R. Co.*, 153 N. Y. 540, 47 N. E. Rep. 810.

²⁷ *Ibid.*, and see ante, chap xii,

§ 393. **The question of necessity.**—The question of necessity in condemnation proceedings presents itself in various aspects.²⁸ First, there is the question of exercising the power for the purpose proposed. Is there any necessity for invoking the power of eminent domain in order to accomplish the purpose sought? This is purely for the legislature, as has been also already pointed out.²⁹ Second, the constitution or statute may require the question of the necessity of making a particular improvement or taking particular property to be passed upon in a particular manner. In such cases it is imperative that the necessity shall be ascertained as required by law.³⁰ "The term 'necessary,' when applied to a public road, is used in the statute and judicial decisions not in the sense of being absolutely indispensable to communication between two points, but with relation to the purpose for which public highways are established, namely, the reasonable accommodation of the traveling public."³¹ This same observation would doubtless apply, *mutatis mutandis*, to any public improvement or public work. Third, there is the question of the necessity of mak-

²⁸ See ante, §§ 162, 238, 239, 279; post, § 513.

²⁹ Ibid.

³⁰ *Mansfield etc. R. R. Co. v. Clark*, 23 Mich. 519; *Grand Rapids etc. R. R. Co. v. Van Driele*, 24 Mich. 409; *Arnold v. Decatur*, 29 Mich. 77; *Power's Appeal*, 29 Mich. 504; *Paul v. Detroit*, 32 Mich. 108; *Morgan's Appeal*, 39 Mich. 675; *McClary v. Hartwell*, 25 Mich. 139; *Horton v. Grand Haven*, 24 Mich. 465; *Doctor v. Hartman*, 74 Ind. 221; *Cushing v. Gay*, 23 Me. 9; *Spofford v. Buckaport etc. R. R. Co.*, 66 Me. 26; *Commonwealth v. Egremont*, 6 Mass. 491; *Commissioners of Carmel v. Judges of Putnam*, 7 Wend. 264; *Squires v. Neenah*, 24 Wis. 588; *Rundell v. Blakeslee*, 47 Mich. 575; *Truax*

v. Sterling, 74 Mich. 160, 41 N. W. Rep. 885; *Pearsall v. Board of Suprs.*, 74 Mich. 558, 42 N. W. Rep. 77; *Furman v. Furman*, 86 Mich. 391, 49 N. W. Rep. 147; *Commissioners v. Moesta*, 91 Mich. 149, 51 N. W. Rep. 903; *Grand Rapids v. Luce*, 92 Mich. 92, 52 N. W. Rep. 635; *People v. Jones*, 2 N. Y. Supm. Ct. 360; *People v. Commissioners*, 27 Barb. 94; *Rice v. Wellman*, 5 Ohio C. C. 334; *In re Road etc.*, 166 Pa. St. 132, 31 Atl. Rep. 74; *Road in Versailles Tp.*, 4 Brews. Pa. 57.

³¹ *Road in Halze Tp.*, 4 Luzerne Leg. Reg. Rep. 423. And see *Milwaukee etc. R. R. Co. v. Milwaukee*, 34 Wis. 271; *Aurora etc. R. R. Co. v. Harvey*, 178 Ill. 477.

ing the proposed work or improvement for which the property is sought to be condemned. This, too, is a purely legislative question and, unless otherwise expressly provided by statute, is exclusively for those vested with the power proposed to be exercised.³² The statute may be such as to commit the question of necessity to the courts, as where private ways were permitted to be laid out only in "cases of necessity."³³ Fourth, it may be objected that there is no necessity of condemning the particular property, because some other location might be made or other property obtained by agreement. But this objection is unavailing. Except as specially restricted by the legislature, those invested with the power of eminent domain for a public purpose, can make their own location according to their own views of what is best or expedient, and this discretion

³² *City of Santa Ana v. Harlin*, 99 Cal. 538, 34 Pac. Rep. 224; *Warner v. Gunnison*, 2 Col. App. 430, 31 Pac. Rep. 238; *Chaplin v. Highway Commissioners*, 129 Ill. 651, 22 N. E. Rep. 484; *Farne-man v. Mt. Pleasant Cem. Ass.*, 135 Ind. 344, 35 N. E. Rep. 271; *In re Cedar Rapids*, 85 Ia. 39, 51 N. W. Rep. 1142; *Barrett v. Kemp*, 91 Ia. 296, 59 N. W. Rep. 76; *Commonwealth v. Abbott*, 160 Mass. 282, 35 N. E. Rep. 782; *Lynch v. Forbes*, 161 Mass. 302, 37 N. E. Rep. 437; *Fairchild v. St. Paul*, 46 Minn. 540, 49 N. W. Rep. 325; *Knoblauch v. Minneapolis*, 56 Minn. 321, 57 N. W. Rep. 928; *City of Kansas v. Baird*, 98 Mo. 215, 11 S. W. Rep. 242, 562; *State v. Engleman*, 106 Mo. 628, 17 S. W. Rep. 759; *Hampton v. Poland*, 50 N. J. L. 367, 13 Atl. Rep. 174; *State v. Mayor etc. of Orange*, 54 N. J. L. 111; *Vedder v. Marion County*, (Or.) 36 Pac. Rep. 535; *Pennsylvania R. R. Co. v. Diehm*, 128 Pa.

St. 509, 18 Atl. Rep. 522; *Baughman v. Hemzelman*, 180 Ill. 251.

And see *Justices v. Griffen etc. Road Co.*, 15 Ga. 39; *Holt v. Somerville*, 127 Mass. 408; *St. Paul v. Nickl*, 42 Minn. 262, 44 N. W. Rep. 59; *Tate v. Greensborough*, 114 N. C. 392, 19 S. E. Rep. 767. In *State v. Mayor etc. of Orange*, 54 N. J. L. 111, 22 Atl. Rep. 1004, it is said with reference to the opening of a street: "If it should appear that there could not enure to the public any advantage whatever, and that the scheme is designed solely for the benefit of private individuals, the court could interfere in favor of the land owner whose property is menaced." But the decision of the court supports the text.

³³ *Normandale Lumber Co. v. Knight*, 89 Ga. 111, 14 S. E. Rep. 882; and see *Sand Creek Irr. Co. v. Davis*, 17 Col. 326, 29 Pac. Rep. 742; *Fulton v. Monahan*, 4 Ohio, 426.

cannot be controlled by the courts.³⁴ Fifth, the question of necessity may arise under general grants of power which expressly or by implication limit the right to such and so much property as may be necessary for the proposed purpose. If the legislature designates how much may be taken, the courts cannot interfere, except to prevent an abuse of the power.³⁵ Thus, if a railroad company is authorized by law to take two acres for depot purposes, it may do so, although one acre might perhaps answer its purpose.³⁶ But, when the statute does not designate the property to be taken, nor how much may be taken, then the necessity of taking particular property is a question for the courts.³⁷ Where the application to condemn is made

³⁴ *St. Louis etc. R. R. Co. v. Petty*, 57 Ark. 359, 21 S. W. Rep. 884; *Rialto Irr. Dist. v. Brandon*, 103 Cal. 384, 37 Pac. Rep. 484; *Fort St. Union Depot Co. v. Backus*, 92 Mich. 33, 52 N. W. Rep. 790; *State v. City of Newark*, 54 N. J. L. 62, 23 Atl. Rep. 129; *Keller v. Riverton Water Co.*, 161 Pa. St. 422, 29 Atl. Rep. 82; *Colorado Eastern R. R. Co. v. Union Pac. R. R. Co.*, 41 Fed. Rep. 293; *London etc. R. R. Co. v. Truman L. R.*, 11 H. L. 45; *Jenkins v. Central Ontario R. R. Co.*, 4 Ont. 593; *Aurora etc. R. R. Co. v. Harvey*, 178 Ill. 477; *Towns v. Klamath County*, 33 Or. 225, 53 Pac. Rep. 604. In *Fork Ridge Cem. Ass. v. Redd*, 33 W. Va. 262, 10 S. E. Rep. 405, the court says: "The necessity for the condemnation must be obvious. It must obviously appear from the location of the property, or from the character of the use to which it is to be put, that the public could not, without great difficulty, obtain the use of this or other land,

which would answer the same general purpose, unless it be condemned; and in such case the courts will judge of the necessity for condemnation." In *Wisconsin Central R. R. Co. v. Kneale*, 79 Wis. 89, 48 N. W. Rep. 248, which was a petition to condemn land for gravel and other materials, the application was denied on the ground that the taking of the particular property for the purpose proposed would be specially injurious to the neighborhood, that there was other property available for the purpose to which no such objection applied and that on the whole the taking would be unreasonable and oppressive.

³⁵ See *Pennsylvania R. R. Co. v. Diehm*, 128 Pa. St. 509, 18 Atl. Rep. 522.

³⁶ *Stockton & Darlington Ry. Co. v. Brown*, 9 House of Lords, 246; *Lund v. Midland Ry. Co.*, 34 L. J. Eq. 276.

³⁷ *People v. Blake*, 19 Cal. 579; *Spring Valley Water Works v. San Mateo Water Works*, 64 Cal.

directly to a court, the question should be raised and decided in limine.³⁸ If the owner appears and does not deny

123; *Reed v. Louisville Bridge Co.*, 8 Bush, Ky. 69; *Tracey v. Elizabethtown etc. R. R. Co.*, 80 Ky. 259; *New Orleans Ry. Co. v. Gay*, 32 La. An. 471; *In re St. Paul & Northern Pacific Ry. Co.*, 34 Minn. 227; *Olmsted v. Proprietors of the Morris Aqueduct Co.*, 46 N. J. L. 495; S. C., 47 N. J. L. 311; *Rensselaer etc. R. R. Co. v. Davis*, 43 N. Y. 137; *Matter of New York Central R. R. Co.*, 66 N. Y. 407; *Matter of New York Central & Harlem River R. R. Co.*, 77 N. Y. 248; *Matter of New York, Lackawanna & Western Ry. Co.*, 35 Hun 220; S. C. 99 N. Y. 12; *Carolina Central R. R. Co. v. Love*, 81 N. C. 434; *South Carolina R. R. Co. v. Blake*, 9 Rich. S. C. 228; *McWhirter v. Cockrell*, 2 Head 9; *Baltimore & Ohio R. R. Co. v. Pittsburgh etc. R. R. Co.*, 17 W. Va. 812; *Wisconsin Central R. R. Co. v. Cornell University*, 52 Wis. 537; *Spring Valley Water Works v. Drinkhouse*, 92 Cal. 528, 28 Pac. Rep. 681; *Santa Cruz v. Enright*, 95 Cal. 105, 30 Pac. Rep. 197; *Tedens v. Sanitary District*, 149 Ill. 87, 36 N. E. Rep. 1033; (*Compare Smith Jr. v. Chicago & Western Indiana R. R. Co.*, 105 Ill. 511; *South Chicago Railway Co. v. Dix*, 109 Ill. 237) *Creston Water Works Co. v. McGrath*, 89 Ia. 502, 56 N. W. Rep. 680; *Jefferson etc. R. R. Co. v. Hazeur*, 7 La. An. 182; *New Orleans R. R. Co. v. Gay*, 32 La. An. 471; *In re Minneapolis Terminal Co.*, 38 Minn. 157; *Cheyney v. Atlantic City*

W. W. Co., 55 N. J. L. 235, 26 Atl. Rep. 95; *Matter of Union El. R. R. Co.*, 113 N. Y. 275, 21 N. E. Rep. 81; *Matter of South Branch R. R. Co.*, 119 N. Y. 141, 23 N. E. Rep. 486, affirming 53 Hun 131, 25 N. Y. St. 328, 6 N. Y. Supp. 172; *Pocantico Water Works Co. v. Bird*, 130 N. Y. 249, 29 N. E. Rep. 246; *Matter of New York Central etc. R. R. Co.*, 59 Hun 7; *Robinson v. Pennsylvania R. R. Co.*, 161 Pa. St. 561, 29 Atl. Rep. 268; *Wisconsin Central R. R. Co. v. Cornell University*, 49 Wis. 162; *Wisconsin Central R. R. Co. v. Kneale*, 79 Wis. 89, 48 N. W. Rep. 248; *Chicago etc. R. R. Co. v. Richardson*, 86 Wis. 154, 56 N. W. Rep. 741; *Lake Shore etc. R. R. Co. v. New York etc. R. R. Co.*, 8 Fed. Rep. 858; *Coe v. Aiken*, 61 Fed. Rep. 24; *Kemp v. South Eastern R. R. Co.*, 7 L. R. Ch. 364, 41 L. J. Ch. 404, 20 W. R. 306, 26 L. T. N. S. 110; *Flower v. London etc. R. R. Co.*, 2 Drewry & Smale 330, 34 L. J. Eq. 540; *Webb v. Manchester etc. R. R. Co.*, 4 Mylne & C. 116; *Bigelow v. Draper*, 6 N. D. 152; *Schuster v. Sanitary District*, 177 Ill. 626, 52 N. E. Rep. 855; *Bennett v. Marion*, 106 Ia. 628, 76 N. W. Rep. 844; *Saginaw etc. R. R. Co. v. Bordner*, 108 Mich. 236; *Matter of Gilroy*, 32 App. Div. 216.

³⁸ *Ibid.* In *Tedens v. Sanitary District*, 149 Ill. 87, 36 N. E. Rep. 1033, which was a proceeding to condemn a strip of land a quarter of a mile wide for a drainage canal, the court says:

the necessity, it should be taken as admitted.³⁹ If the necessity is denied, the burden is on the company to establish it.⁴⁰ To warrant a denial of the application, it should appear that what is sought is clearly an abuse of power on the part of the petitioner.⁴¹ If the petitioner is acting in good faith and shows a reasonable necessity for the condemnation, in view of its present and future business, the application should be granted.⁴² If the object is to acquire lands for speculation, or to prevent competition, or for purposes collateral to those for which the petitioner is authorized to condemn property, then the application should be

"While the district, by the act under which it was organized, has ample power to condemn such a quantity of land as may be reasonably necessary to be taken and used to enable it to carry out the object and purpose contemplated by the legislature in passing the act, it has no right to abuse the power conferred, or to take more lands than are reasonably necessary to be used in the construction and maintenance of the drains and outlets. As appears from the petition, the lands proposed to be taken embraced a strip over a quarter of a mile wide. Whether it was necessary that this amount of land should be taken, or whether the condemnation of so large a tract was an abuse of power, was a question the defendants had the right to submit to the court for determination before the jury was called upon to determine the amount that should be paid for the lands taken."

³⁹ *South Carolina R. R. Co. v. Blake*, 9 Rich. S. C. 228; *Burke v. Sanitary District*, 152 Ill. 125, 38 N. E. Rep. 670; *Schuster v.*

Sanitary District, 177 Ill. 626, 52 N. E. Rep. 855; *Thompson v. De Weese-Dye Ditch & Res. Co.*, 25 Col. 243, 53 Pac. Rep. 507.

⁴⁰ *Spring Valley Water Works v. Drinkhouse*, 92 Cal. 528, 28 Pac. Rep. 681.

⁴¹ *South Chicago R. R. Co. v. Dix*, 109 Ill. 237; *Tedens v. Sanitary District*, 149 Ill. 87, 36 N. E. Rep. 1033. And see *Pennsylvania R. R. Co. v. Diehm*, 128 Pa. St. 509, 18 Atl. Rep. 522; *Philadelphia v. Ward*, 174 Pa. St. 45, 34 Atl. Rep. 458.

⁴² *Matter of New York, Lackawana & Western Ry. Co.*, 35 Hun 220; S. C. 99 N. Y. 12; *Matter of New York Central & Harlem River R. R. Co.*, 77 N. Y. 248; *Olmsted v. Proprietors of the Morris Aqueduct Co.*, 46 N. J. L. 495; S. C. 47 N. J. L. 311; *Sudd v. Malden R. R. Co.*, 6 Exch. 143; *Cheyney v. Atlantic City Water Works Co.*, 55 N. J. L. 235; *Matter of Union El. R. R. Co.*, 113 N. Y. 275, 21 N. E. Rep. 81; *Coe v. Aiken*, 61 Fed. Rep. 24; *State v. National Docks etc. R. R. Co.*, 57 N. J. L. 183, 30 Atl. Rep. 183.

refused.⁴³ If, upon a hearing, the court determines that the petitioner is seeking to condemn property which is not necessary or more than is necessary, the application should be denied in toto.⁴⁴

§ 394. **Former proceedings for the same purpose.**—It is sometimes provided by statute that a decision refusing to lay out a highway shall be conclusive for a certain length of time.⁴⁵ Former proceedings which have failed by reason of informalities or delay are not within the statute.⁴⁶ The statute cannot be evaded by slight changes in the new application.⁴⁷ In the absence of such a statute, the authorities are conflicting as to the effect of an adverse judgment in former proceedings as a bar to a new application. In Connecticut it is held that the doctrine of *res adjudicata* applies as in other cases.⁴⁸ Other courts hold the contrary.⁴⁹ A former proceeding by different petitioners for the same road which was dismissed after the award of damages, was held not to be a bar.⁵⁰ A former proceeding to have a highway established is no bar to a new proceeding to have an existing highway ascertained and described.⁵¹ A pending proceeding is a bar to a new one for the same purpose.⁵²

⁴³ *Rensselaer etc. R. R. Co. v. Davis*, 43 N. Y. 137.

⁴⁴ *Central R. R. Co. v. Hudson Terminal R. R. Co.*, 46 N. J. L. 289.

⁴⁵ *People v. Springwells*, 13 Mich. 462; *Matter of Highway*, 3 N. J. L. 590.

⁴⁶ *Sholty v. Dale Township*, 63 Ill. 209; *People v. Eggleston*, 13 How. Pr. 123; *Towamencin Road*, 10 Pa. St. 195; *Franconia Township Road*, 78 Pa. St. 316; *Smith v. Commissioners*, 150 Ill. 385, 36 N. E. Rep. 967; *Road in West Manchester*, 10 Pa. Co. Ct. 429. The denial of a petition for a town-way is no bar to a petition for a highway over the same place. *Waterford v. County Comrs.*, 59 Me. 450.

⁴⁷ *Matter of Highway*, 3 N. J. L. 242; but see *Road in Lower Salford*, 25 Pa. St. 524.

⁴⁸ *Terry v. Waterbury*, 35 Conn. 526.

⁴⁹ *Heick v. Voight*, 110 Ind. 279; *Cole v. County Comrs.*, 78 Me. 532; *Pruyn v. Graham*, 1 Wend. 370; *People v. Jones*, 63 N. Y. 306; *Kamer v. Clatsop Co.*, 6 Or. 238; *Thompson v. State*, 20 Ala. 54; *Staple v. Spring*, 10 Mass. 72; *Petition of Strafford*, 14 N. H. 30.

⁵⁰ *Pagels v. Oaks*, 64 Ia. 198.

⁵¹ *Washington Ice Co. v. Lay*, 103 Ind. 48.

⁵² *Parker v. Adams*, 55 N. J. L. 334, 26 Atl. Rep. 814. But where first proceeding has been enjoined its pendency is no bar.

As an improvement which is not necessary at one time may become so by reason of the change of circumstances, it would seem upon principle that, in the absence of any statute controlling the matter, a former application should not be a bar to a new one for the same improvement,⁵³ unless brought so soon after the first that there could not presumably be any change of circumstances.⁵⁴ Whether the condemnor can abandon proceedings after an award of damages has been made and commence new proceedings for the same purpose, presents a different question, which is considered in a subsequent chapter.⁵⁵ Although in many cases the effect of a condemnation proceeding is simply to fix the price of the property, leaving it optional with the condemnor to take the property or not, yet the condemnor cannot abandon the benefit of the proceedings and institute new proceedings for the same purpose. The first proceedings may be shown in bar of the new.⁵⁶

§ 395. **Other objections.**—The courts cannot dictate the order in which the petitioner shall proceed to acquire property or rights. Hence a railroad company may condemn the right to lay its tracks in a street before obtaining the consent of the municipal authorities to occupy the street.⁵⁷ So it may condemn private property on the line selected in a city before it has obtained the consent of the city to cross intervening streets.⁵⁸

Whether it may be shown, by way of defence, that the proceedings are not instituted in good faith for the purpose alleged in the petition, but for some ulterior purpose; for

Allen v. Chicago, 176 Ill. 113, 52 N. E. Rep. 33.

⁵³ Cole v. County Comrs., 78 Me. 532; Warlick v. Lowman, 111 N. C. 532, 16 S. E. Rep. 336.

⁵⁴ Petition of Howard, 28 N. H. 157; Whitcher v. Landaff, 48 N. H. 153.

⁵⁵ Post, chap. xxix.

⁵⁶ Ibid.; Chicago etc. R. R. Co. v. Chicago, 143 Ill. 641, 32 N. E. Rep. 178.

⁵⁷ California Southern R. R. Co. v. Kimball, 61 Cal. 90; Metropolitan City R. R. Co. v. Chicago West Div. R. R. Co., 87 Ill. 317.

⁵⁸ Chicago & Western Indiana R. R. Co. v. Dunbar, 100 Ill. 110. To the same effect, Matter of Gilbert Elevated R. R. Co., 70 N. Y. 361; Matter of Suburban Rapid Transit Co., 38 Hun 553; S. C. 16 Abb. (N. C.) 152;

which the petitioner could not condemn, admits of some doubt. Such defence has been entertained in some cases⁵⁹ and ruled out in others.⁶⁰ It is no defence that the condemnor is already occupying the property sought to be condemned, whether by agreement with the owner or otherwise.⁶¹ Where a statute required a railroad company to allege in its petition to condemn its intent to construct and operate its road, it was held that the allegation of intent could be controverted.⁶² In a proceeding by a city to condemn land for a park, it was held no defence that the city had no funds to pay for the land or that it would by the taking incur an indebtedness in excess of the constitutional limit.⁶³

§ 396. **Defences where proceedings are instituted by the owner.**—Where the initiative is given to the owner, the only object of the proceedings is to secure an assessment of damages. Any defence which goes to the right of the plaintiff to recover damages should be pleaded and determined by the court before a warrant is issued or order made for the tribunal to assess damages.⁶⁴ If the proceedings

Stoughton v. Paul, 173 Mass. 148.

⁵⁹ *Farist Steel Co. v. Bridgeport*, 60 Conn. 278, 22 Atl. Rep. 561; *Pittsburgh etc. R. R. Co. v. Benwood Iron Works*, 31 W. Va. 71, 8 S. E. Rep. 453; *McDaniel v. Columbus*, 91 Ga. 462, 17 S. E. Rep. 1011; *Hodgerson v. St. Louis etc. R. R. Co.*, 160 Ill. 430, 43 N. E. Rep. 614; *Strahan v. Malvern*, 77 Ia. 454, 42 N. W. Rep. 369; *Bridal Veil Lumbering Co. v. Johnson*, 30 Or. 205; *Jenkins v. Central Ontario R. R. Co.*, 4 Ontario 593.

⁶⁰ *Hopkinton v. Winship*, 35 N. H. 209. And see *Dobson v. Penn. S. V. R. R. Co.*, 6 Mont. Co. L. R. 109; *Rudolph v. Penn. S. V. R. R. Co.*, 6 Mont. Co. L. R. 114.

⁶¹ *State v. Jersey City*, 29 N. J. L. 441; *Douglass v. Byrnes*, 59 Fed. Rep. 29; *Somerset Coal Canal Co. v. Harcourt*, 24 Beav. 571.

⁶² *Matter Metropolitan Transit Co.*, 111 N. Y. 588, 19 N. E. Rep. 645; and see *St. Louis etc. R. R. Co. v. Petty*, 63 Ark. 94.

⁶³ *In re Cedar Rapids*, 85 Ia. 39, 51 N. W. Rep. 1142.

⁶⁴ *Vanduser v. Comstock*, 3 Mass. 184; *Howard v. Proprietors of Locks and Canals*, 12 Cush. 259; *Wilmarth v. Knight*, 7 Gray, 294; *Darling, Admr. v. Blackstone Manf. Co.*, 16 Gray, 187; *Hadley v. Citizens' Savings Institution*, 123 Mass. 301; *Jones v. Clark*, 7 Jones Law, 418; *Turner's Appeal*, 2 Walker's Pa. Supm. Ct. 229; *Keokuk etc. R. R. Co. v. Donnell*, 77 Ia. 221, 42 N.

are instituted before the right to damages has accrued, they will be premature and may be quashed on motion.⁶⁵ As to when the right accrues will depend upon the statute.⁶⁶ A grant or release,⁶⁷ a prescriptive right,⁶⁸ or an award upon the same claim,⁶⁹ are respectively good defences to a proceeding by the owner. But an agreement to arbitrate the question of damages is not a defence.⁷⁰ It is held to be no defence to a claim for flowage that it is caused in part by a dam other than the defendant's.⁷¹ In a complaint for flowage the defendant may show a permanent abandonment of the dam complained of.⁷² A plea in bar is waived by a tender of damages.⁷³ Where pleas are filed, the defendant is limited to the defences specified in the pleas.⁷⁴ Where a city has occupied property for a sewer, it cannot, in a proceeding by the owner to have his damages assessed, set up irregularities in its own proceedings to establish the sewer.⁷⁵

§ 397. **Practice in hearing objections.**—There is a great diversity in the practice pursued by different courts in the hearing of objections to the application. It is the usual and better practice to dispose of such objections before entering

W. Rep. 176; *Hamilton v. Adams*, 7 J. J. Marsh. 248.

⁶⁵ *Emerson v. Reading*, 14 Vt. 279; *Tunbridge v. Tarbell*, 19 Vt. 453.

⁶⁶ See *Marion etc. R. R. Co. v. Ward*, 9 Ind. 123.

⁶⁷ *Fuller v. County Comrs. of Plymouth*, 15 Pick. 81; *Seymour v. Carter*, 2 Met. 520; *Crockett v. Boston*, 5 Cush. 182. The grant of a right of way upon condition that the road should be completed within a specified time, was held no bar to proceedings for assessment of damages, where the condition had not been fulfilled. *Bredin v. Pittsburgh etc. R. R. Co.*, 165 Pa. St. 262, 31 Atl. Rep. 39. And see

Updegrave v. Schuylkill Val. R. R. Co., 3 Pa. Co. Ct. 74.

⁶⁸ *Williams v. Nelson*, 23 Pick. 141; *Hadley v. Citizens' Savings Institution*, 123 Mass. 301.

⁶⁹ *Brigham v. Holmes*, 14 Allen, 184; *Tunbridge v. Tarbell, Jr.* 19 Vt. 453.

⁷⁰ *Corbin v. Wisconsin etc. R. R. Co.*, 66 Ia. 269.

⁷¹ *Arimond v. Green Bay & Miss. Canal Co.*, 35 Wis. 41.

⁷² *Blackwell v. Phinney*, 126 Mass. 458.

⁷³ *Hosmer v. Warner*, 7 Gray, 186.

⁷⁴ *Tyler v. Mather*, 9 Gray, 177.

⁷⁵ *Saunders v. Lowell*, 131 Mass. 387.

upon the assessment of damages.⁷⁶ The burden is upon the petitioner to maintain the allegations of the petition which may be denied,⁷⁷ unless otherwise provided by statute.⁷⁸ Such matters are sometimes heard upon affidavits,⁷⁹ but the more satisfactory and regular way would seem to be to try questions of fact by legal evidence at the bar of the court or by reference, where that practice is permissible.⁸⁰ The mode of trial is in the discretion of the court, which may refer questions of fact to a jury, if deemed expedient.⁸¹

§ 398. **Amendments.**—Objections to the petition or notice may in some cases be obviated by amendment.⁸² These matters have already been treated in former chapters, to which reference is made.

⁷⁶ *South Carolina R. R. Co. v. Blake*, 9 Rich. (S. C.) 228; *Baltimore & Ohio R. R. Co. v. Pittsburgh etc. R. R. Co.*, 17 W. Va. 812; *Henry v. Centralia etc. R. R. Co.*, 121 Ill. 264; *O'Hare v. Chicago etc. R. R. Co.*, 139 Ill. 151, 28 N. E. Rep. 923; *Creston Water Works Co. v. McGrath*, 89 Ia. 502, 56 N. W. Rep. 680; *Norfolk etc. R. R. Co. v. Ely*, 101 N. C. 8, 7 S. E. Rep. 476; *Ante*, § 388 note 1.

⁷⁷ *Tracy v. Elizabethtown etc. R. R. Co.*, 80 Ky. 259; *St. Louis v. Frank*, 9 Mo. App. 579; *Wisconsin Central R. R. Co. v. Cornell University*, 52 Wis. 537; *Matter of New York Central R. R. Co.*, 66 N. Y. 407; *Rochester R. R. Co. v. Robinson*, 133 N. Y. 242, 30 N. E. Rep. 1008.

⁷⁸ *Petition of New York Bridge Co.*, 4 Hun 635; *Buffalo etc. R. R. Co. v. Reynolds*, 6 How. Pr. 96. These cases hold that under the New York statute the burden is on the owner to controvert the petition, but are evidently

overruled by the last case cited in the last note.

⁷⁹ *West End Narrow Gauge R. R. Co. v. Almeroth*, 13 Mo. App. 91; *Chicago etc. R. R. Co. v. Chicago*, 143 Ill. 641, 32 N. E. Rep. 178.

⁸⁰ *Matter of Suburban Rapid Transit Co.*, 38 Hun 553; *Petition of New York Bridge Co.*, 4 Hun 635; *Buffalo etc. R. R. Co. v. Reynolds*, 6 How. Pr. 96; *Creston Water Works Co. v. McGrath*, 89 Ia. 502, 56 N. W. Rep. 680; *New Orleans R. R. Co. v. Gay*, 32 La. An. 471; *Wisconsin Central R. R. Co. v. Kneale*, 79 Wis. 89, 48 N. W. Rep. 248.

⁸¹ *Baltimore & Ohio R. R. Co. v. Pittsburgh etc. R. R. Co.*, 17 W. Va. 812.

⁸² See *Hedrick v. Hedrick*, 55 Ind. 78; *Chicago & Great Southern Ry. Co. v. Jones*, 103 Ind. 386; *Southwestern Land Co. v. Hickory Jackson Ditch Co.*, 18 Col. 489, 33 Pac. Rep. 275; *Ante*, § 361.

§ 399. **Waiver of objections by going to a hearing on the question of damages.**—We have already had occasion to consider what objections to the petition and to the notice are waived by an appearance and trial upon the merits.⁸³ Generally, objections which do not go to the jurisdiction are waived by such an appearance.⁸⁴ This, of course, is said of such proceedings as are had before a court which has jurisdiction to hear and determine such objections. The allegations of the petition, if not controverted by the owner in the first instance, should be taken as true.⁸⁵ The owner should not be permitted to take his chance of a favorable result on the question of damages, and, if disappointed, to turn back to objections which should properly have been made before.⁸⁶ In a proceeding to condemn land for a railroad in the gorge of Niagara, the owner resisted the application on the ground that the taking was not for a public use. His objections having been overruled, he consented to the appointment of certain persons as commissioners to assess damages. Afterwards the highest court of the State decided in another case that the taking was not for a public use. Thereupon the owner moved to set aside the order appointing commissioners and to dismiss the

⁸³ Ante, §§ 362, 379.

⁸⁴ *Horton v. Norwalk*, 45 Conn. 237; *Forsythe v. Kreuter*, 100 Ind. 27; *Township Board of Hackman*, 48 Mo. 243; *Harper v. Miller*, 4 Ired. Law 34; *Carpenter v. Sims*, 3 Leigh, 674; *Mitchell v. Thornton*, 21 Gratt. 164; *Jeter v. Board*, 27 Gratt. 910.

⁸⁵ *South Carolina R. R. Co. v. Blake*, 9 Rich. (S. C.) 228; *Matter of Opening Spuyten Duyvil Parkway*, 67 How. Pr. 341. See also *Field v. Vermont & Mass. R. R. Co.*, 4 Cush. 150; *Carpenter's Petition*, 67 N. H. 574, 32 Atl. Rep. 773.

⁸⁶ *Harper v. Miller*, 4 Ired. Law, 34; *Lieberman v. Chicago*

etc. R. R. Co., 141 Ill. 140, 30 N. E. Rep. 544; *Hyde Park v. Wiggin*, 157 Mass. 94, 31 N. E. Rep. 693; *Aikin v. Water Comrs.*, 82 Hun 265, 31 N. Y. Supp. 254; *Matter of Broadway etc. R. R. Co.*, 73 Hun 7, 25 N. Y. Supp. 1080; *Matter of Opening Spuyten Duyvil Parkway*, 67 How. Pr. 341; *Davis v. Boone County*, 28 Neb. 837, 45 N. W. Rep. 249; *Norfolk So. R. R. Co. v. Ely*, 101 N. C. 6, 7 S. E. Rep. 476; *Warlick v. Lowman*, 103 N. C. 122, 9 S. E. Rep. 458; *Minneapolis etc. R. R. Co. v. Nester*, 3 N. D. 480, 57 N. W. Rep. 510; *Siedler v. Seely*, 8 Col. App. 499; *Shoppert v. Martin*, 137 Mo. 455;

petition. It was held that the defendant was not barred by his consent and that the motion should have been granted.⁸⁷

Carpenter's Petition (N. H.) 32
Atl. Rep. 773.

⁸⁷ Matter of Niagara Falls &
Whirlpool R. R. Co., 121 N. Y.

319, 24 N. E. Rep. 452. See also
In re Minneapolis Terminal Co.,
38 Minn. 157.

CHAPTER XVII.

SECURING THE TRIBUNAL TO ASSESS DAMAGES.

§ 400. **The case stated.**—Where the application is to a court and the damages are assessed by an ordinary jury, the jury is usually taken from the regular panel, the same as juries in other cases. In such cases the ordinary rules of practice apply. But, where the damages are assessed by commissioners, or by a special jury, or other special tribunal, various questions arise in regard to the appointment or selection of the tribunal which will now be considered. The statutes are so various that we shall attempt nothing more than to give the substance of the decisions.

§ 401. **The order or warrant.**—An order appointing viewers for the purpose of laying out a highway should give a general description of the road,¹ state the reasons which authorize it,² and require them to report the conveniences and inconveniences.³ Where the statute provides that the county court may order the laying out of a highway provided a majority of the justices are present, it applies to an order appointing a jury of view which will be void if made when less than a majority are present.⁴ In general, the order or warrant to a jury or other tribunal should contain definite instructions as to their duties.⁵ But a substantial compliance with the statute is sufficient.⁶ Where the statute required that the warrant to summon a jury should designate a day for them to meet upon the land, the omis-

¹ Hubbard v. Wickliffe, 2 A. K. Marsh. 503; Same v. Same, 1 Litt. 80; Poston v. Terry, 5 J. J. Marsh. 220; Wood v. Campbell, 14 B. Mon. 339; Smith v. Trenton Delaware Falls Co., 17 N. J. L. 5; see Catharine Tp. Road, 76 Pa. St. 189.

² Fletcher's Heirs v. Fugate, 3 J. J. Marsh. 631.

³ Weirston v. Waggoner, 5 J. J. Marsh. 41.

⁴ Ingram v. Wilson, 4 Humph. 424.

⁵ Heise v. Pennsylvania R. R. Co., 62 Pa. St. 67.

⁶ Queen v. Lancaster & Preston Junction Ry. Co., 6 A. & E. N. S. 759; S. C. 51 E. C. L. R. 757.

sion of the day or the naming of several days is fatal.⁷ A statute provided that the warrant for a jury should be issued by county commissioners, and be made returnable to the supreme court. A warrant was issued returnable to the county commissioners, but was in fact returned to the supreme court. It was held to be void.⁸ In Massachusetts a warrant directing the sheriff to summon a jury according to law was held sufficient.⁹ An order which fixed the time of the first meeting so that the statutory notice could not be given was held bad.¹⁰ An objection to the form of the warrant is waived by appearing before the jury and entering into an agreement as to damages.¹¹

§ 402. The writ of *ad quod damnum*.—This is a common law writ, and has been a favorite mode of procedure in this country, especially in highway and mill cases. The writ should contain definite directions as to what the jury are to consider,¹² and should conform to any statutory provisions which may be applicable.¹³ Either the order or the writ should specify the time and place of the meeting of the jury.¹⁴ Though directed to the sheriff, it may be executed by his deputy.¹⁵ The return may be amended even after the sheriff has gone out of office.¹⁶

§ 403. Some further points as to the appointment and summoning of commissioners, etc.—Where the statute re-

⁷ Chesapeake & Ohio Canal Co. v. Key, 3 Cranch, C. C. 599; Irwin v. Scobee, 3 T. B. Monroe 50; Bray v. Ocean City R. R. Co., 60 N. J. L. 91.

⁸ Cassidy v. Kennebec & Portland R. R. Co., 45 Me. 263.

⁹ Mitchell v. Bridgwater, 10 Cush. 411.

¹⁰ Manhattan R. R. Co. v. Stroub, 68 Hun 90, 22 N. Y. Supp. 602. The order must be made within the time required by law. Trainer v. Lawrence, 36 Ill. App. 90.

¹¹ Wilmarth v. Knight, 7 Gray 294.

¹² Epps v. Cralle, 1 Munford 258; and see Smoot v. Schooler, 87 Ky. 157, 8 S. W. Rep. 202.

¹³ Troutman v. Barnes, 4 Met. (Ky.) 337.

¹⁴ Shackleford's Heirs v. Coffey, 4 J. J. Marsh. 40; Troutman v. Barnes, 4 Met. (Ky.) 337.

¹⁵ Wroe v. Harris, 2 Wash. 126; Gay v. Caldwell, Hardin (Ky.) 68; Stevens v. Duck River Navigation Co., 1 Sneed 237; Tripp v. County Comrs., 2 Allen 556.

¹⁶ Gay v. Caldwell, Hardin (Ky.) 68.

quired that the notice should specify the day when the application should be made to the court for the appointment of commissioners, the court can only act on the day specified.¹⁷ But, where the application is to be made at a certain session of the court, it was held that it might be made at any day of the session as well as on the first day.¹⁸ Where the commissioners of highways were required to summon twelve freeholders to act in the matter of laying out a private road, it was held they could not delegate the power to a constable, but must act in person. But where a constable had summoned twelve men, and the commissioners requested them to act, it was held to be a substantial compliance with the statute.¹⁹ Where the sheriff is to summon twelve freeholders, the court cannot appoint them in advance.²⁰ A town clerk is not disqualified to draw a jury because he is a brother of one of the petitioners.²¹ Where the statute required that, if the sheriff or either of his deputies was interested, the jury should be summoned by the coroner, and a jury was summoned by one deputy while another was interested, the proceedings were quashed.²² A statute provided that, in proceedings to assess damages for lands taken for a railroad, the company might name six persons and the owners six from whom the court should appoint five. It was held that only six could be named by all the owners included in one petition.²³ Where the jury is to consist of twelve persons, it is not irregular to summon thirteen or fourteen, if only twelve are empaneled.²⁴ A statute required that the damages should be assessed by five disinterested householders who should be "elected and compensated as may be prescribed by ordinance." In proceedings to lay

¹⁷ *Adams v. Clarksburg*, 23 W. Va. 203.

¹⁸ *Waterhouse v. County Commissioners etc.*, 44 Me. 368.

¹⁹ *People v. Commissioners of Greenbush*, 24 Wend. 367.

²⁰ *Tipton v. Miller*, 3 Yerg. 423.

²¹ *People v. Dains*, 38 Hun 43.

²² *Barre Turnpike Corporation v. Appleton*, 2 Pick. 430. The

disqualification of the sheriff may be waived. *Ex parte Bradley*, 5 Dow & L. 575.

²³ *Troy etc. R. R. Co. v. Cleveland*, 6 How. Pr. 238.

²⁴ *Hosmer v. Warner*, 15 Gray 46; *Fitchburg R. R. Co. v. Boston & Maine R. R. Co.*, 3 Cush. 58.

out a street the commissioners were named and appointed in the ordinance which directed the laying out of the street, and for this reason the proceedings were held to be void.²⁵ Where no record was made of the order appointing viewers, and two judges in vacation certified that the order had been made and authorizing the clerk to enter it, the proceedings were held bad.²⁶ Where the clerk was required to deposit in a box the names of those selected and returned as jurors, rejecting those of kin or interested in the land, and then draw twelve, and the clerk put all the names in the box without first rejecting those of kin or interested, but none of these were drawn, it was held that the error was immaterial.²⁷ The object of the law was to secure a fair jury. The appointment of commissioners cannot be refused because the damages are slight, or none at all, as this is the question for the commissioners to try.²⁸ Where a statute as to street openings provided that the city should appoint two assessors and the property owners two, and that these, after taking the oath, should appoint a fifth assessor, it was held that the appointment of the fifth before the others had taken the oath was bad.²⁹

§ 404. **Mandamus to compel the appointment of commissioners.**—Where a judge or other tribunal acting ministerially refuses to appoint commissioners or to order a jury, action may be compelled by mandamus if a proper showing is made.³⁰

§ 404a. **Setting aside order appointing viewers, commissioners, etc.**—The order appointing viewers, commissioners, etc., may be set aside for good cause shown and when

²⁵ Union Pacific Ry. Co. v. Burlington & Missouri Riv. R. R. Co., 19 Neb. 386.

²⁶ State Road from Howell's Mills, 6 Wharton 352.

²⁷ People v. Dolge, 45 Hun 310.

²⁸ Matter of Grade Crossing Comrs., 154 N. Y. 561.

²⁹ Austel v. Atlanta, 100 Ga. 182.

³⁰ Illinois Central R. R. Co. v. Rucker, 14 Ill. 353; Chicago, B. & Q. R. R. Co. v. Wilson, 17 Ill. 123; Carpenter v. County Comrs., 21 Pick. 258; Western R. R. Co. v. Dickson, 30 Wis. 389; see also Matter of Thirty-fourth St. R. R. Co., 37 Hun 442; S. C. 102 N. Y. 343; Wright v. Baker, 94 Ky. 343, 22 S. W. Rep. 335.

there has been no waiver of the grounds relied upon.³¹ Fraud practiced upon the court in procuring the appointment of commissioners is sufficient ground for setting aside the appointment.³² So where the petition is defective or the order does not comply with the statute.³³

§ 405. **The qualifications of commissioners, jurors, etc.—***Petitioners.*—The applicants for an improvement are disqualified to act in any matter concerning the same, whether in deciding on its utility or assessing the damages.³⁴ This is especially true where the commissioners are required to be disinterested³⁵ or indifferent men.³⁶

Tax-Payers.—A tax-payer of a town or city which has to pay the expense of opening and maintaining a proposed

³¹ In re Minneapolis Terminal Co., 38 Minn. 157; Matter of Niagara Falls & Whirlpool R. R. Co., 121 N. Y. 319, 24 N. E. Rep. 452; In re appointment of Viewers, 6 Luzerne Leg. Reg. Rep. 13; Lackawana Ave. Viaduct, 14 Pa. Co. Ct. 603; Matter of New York etc. R. R. Co., 40 Hun 130; and see Henline v. People, 81 Ill. 269; Road in Moore Tp., 17 Pa. St. 116.

³² Louisville etc. R. R. Co. v. McVean, (Ky.) 34 S. W. Rep. 525.

³³ Bray v. Ocean City R. R. Co., 60 N. J. L. 91; Glazier v. New Jersey etc. R. R. Co., 60 N. J. L. 353.

³⁴ Public Road, 5 Harr. 242; ex parte Hinckley, 8 Me. 146; State v. Delesdernier, 11 Me. 473; People v. Potter, 36 Hun 181; Radnor Road, 5 Binn. 612; Road from McClaysburg, 4 S. & R. 200; Road at May Town, 4 Yeats 479; Williams v. Mitchell, 49 Wis. 284; Almand v. County of Rock-

dale, 78 Ga. 199; Appeal of McClure, 137 Pa. St. 590, 20 Atl. Rep. 711; Delmar Tp. Road, 13 Pa. Co. Ct. 505. Persons who had signed a petition for a road but had their names erased before the petition was presented were held incompetent. In re Road in Green and K. Tps., 129 Pa. St. 527, 19 Atl. Rep. 855. A petitioner for the establishment of a highway was held not disqualified to act as a commissioner on a petition to discontinue the same road eight years afterwards. Moon v. Sandown, 19 N. H. 93.

³⁵ Epler v. Niman, 5 Ind. 459; Thompson v. Multnomah Co., 2 Or. 34.

³⁶ Anthony v. South Kingstown, 13 R. I. 129. A contrary doctrine appears to have been held in People v. Dains, 38 Hun 43; Buckley v. Drake, 41 Hun 384, and White v. Coleman, 6 Gratt. 138.

road is generally held to be incompetent,³⁷ though some courts hold the contrary.³⁸ In Massachusetts a county commissioner is held not incompetent to act upon the question of common convenience and necessity of a proposed highway because he is a tax-payer in the town through which it passes.³⁹ But this was afterwards changed by statute.⁴⁰

Affinity.—A brother-in-law of a petitioner,⁴¹ or of an owner of land taken,⁴² and the brother of the mother of a petitioner,⁴³ have been held to be disqualified. So also one whose sister-in-law, niece and nephew,⁴⁴ or whose son-in-law⁴⁵ owned land to be affected. But a brother-in-law of a silent partner of a firm having land likely to be affected, was held not disqualified.⁴⁶ But being related to a petitioner in the fourth degree,⁴⁷ or to one who owns land in the vicinity but which is not taken,⁴⁸ or to the trustee of a church which owned land taken,⁴⁹ have been held not to disqualify.

³⁷ Petition of Nashua, 12 N. H. 425; Mitchell v. Holderness, 29 N. H. 523; Petition of New Boston, 49 N. H. 328; State v. Atkinson, 27 N. J. L. 420; Corporation v. Manhattan Co., 1 Caines Rep. 507; Gray v. Middletown, 56 Vt. 53.

³⁸ Johnston v. Rankin, 70 N. C. 550; and see Bridgport v. Giddings, 43 Conn. 304; State v. Wright, 54 N. J. L. 130, 23 Atl. Rep. 116.

³⁹ Wilbraham v. County Comrs., 11 Pick. 322; Danvers v. County Comrs., 2 Met. 185; see also Parsell v. State, 30 N. J. L. 530.

⁴⁰ Hall v. Thayer, 105 Mass. 219, 223.

⁴¹ Phillips v. Tucker, 3 Met. (Ky.) 69; Hilltown Road, 18 Pa. St. 233; Road in Allen Township,

18 Pa. St. 463; Town v. Stoddard, 30 N. H. 23; Locke v. Highway Comr., (Mich.) 65 N. W. Rep. 588; Kiekenapp v. Supervisors, 64 Minn. 547, 67 N. W. Rep. 662.

⁴² Taylor v. County Comrs., 105 Mass. 225.

⁴³ Clifford et al. Appellants, 59 Me. 262.

⁴⁴ High v. Big Creek Ditching Assn., 44 Ind. 356.

⁴⁵ Bradley v. Frankfort, 99 Ind. 417.

⁴⁶ Matter of Ogden St. Opening, 63 Hun 188, 43 N. Y. St. 422, 17 N. Y. Supp. 744. And see Fulton v. Cummins, 132 Ind. 453, 30 N. E. Rep. 949.

⁴⁷ Chase v. Rutland, 47 Vt. 393.

⁴⁸ Road in Lower Windsor, 29 Pa. St. 18.

⁴⁹ People v. Cline, 23 Barb. 197.

Owners of land affected.—An owner of land taken is incompetent to act as commissioner.⁵⁰ So is the owner of land liable to be assessed for benefits.⁵¹ An owner of land benefited but not assessable was held to be not disqualified,⁵² nor is the trustee of a church which was assessed for benefits.⁵³ Likewise one holding the legal title to lands taken, as a mere naked trustee.⁵⁴

Stockholders.—Stockholders in a corporation which is prosecuting the condemnation,⁵⁵ or which owns the land sought to be condemned,⁵⁶ are disqualified to act. One who has subscribed for stock, but has never paid anything and is in default, is not disqualified.⁵⁷ In a railroad condemnation an owner of stock in another railroad company which has already acquired its right of way, is competent.⁵⁸ A railroad cannot object because two of the commissioners are its own stockholders.⁵⁹

Miscellaneous points.—As to those who have already served in a former hearing or proceeding in the same matter, which has failed for some reason, some authorities hold that they are competent,⁶⁰ others that they are incompetent.⁶¹ The latter would seem to be founded

⁵⁰ Daggy v. Green, 12 Ind. 303; State v. Delesdernier, 11 Me. 473; State v. Union, 37 N. J. L. 268; Street in Nanticoke, 4 Luzerne Leg. Reg. Rep. 464. Contra: Matter of Southern Boulevard, 3 Abb. Pr. N. S. 447; People v. Landreth, 1 Hun 544. And see Thompson v. Goldthwait, 132 Ind. 20, 31 N. E. Rep. 451.

⁵¹ State v. Crane, 36 N. J. L. 394. But see Selectmen of Andover v. Board of Comrs., 86 Me. 185, 29 Atl. Rep. 982.

⁵² Webster v. County of Washington, 26 Minn. 220.

⁵³ People v. Syracuse, 63 N. Y. 291.

⁵⁴ Matter of South Seventh St., 48 Barb. 12.

⁵⁵ Rock Island etc. R. R. Co. v. Lynch, 23 Ill. 645; Peninsular R. R. Co. v. Howard, 20 Mich. 18. A former stockholder who has ceased to be such is not disqualified. Matter of Brooklyn El. R. R. Co., 32 App. Div. N. Y. 221.

⁵⁶ Friend Appellant, 53 Me. 387.

⁵⁷ Chesapeake & Ohio Canal Co. v. Binney, 4 Cranch, C. C. 68.

⁵⁸ People v. First Judge of Columbia, 2 Hill, 398.

⁵⁹ Strong v. Beloit & Madison R. R. Co., 16 Wis. 635.

⁶⁰ Cowan v. Glover, 3 A. K. Marsh. 356; Road in Chartier's Township, 34 Pa. St. 276; Road Comrs. v. Morgan, 47 Pa. St. 276.

⁶¹ Folmar v. Folmar, 68 Ala.

on the better reason, since such persons have virtually prejudged the case. Where the jurors were to be summoned from the three nearest towns to the land taken, and the owners of several parcels were joined, it was held sufficient if they were summoned from the three towns nearest any one parcel.⁶² Where commissioners were to be selected from different wards as near as might be, it was held error to appoint five commissioners from three wards when there were six wards in the city.⁶³ Where the jury were all chosen from four towns, out of twenty-two in a county, the inhabitants of which were greatly interested in the improvement, it was held that they were unfairly selected, and that a challenge to the array should have been allowed.⁶⁴ So where they were all taken from one village in a proceeding by the village.⁶⁵ Where commissioners are required to be freeholders, it is sufficient if they become such any time before their appointment.⁶⁶ An heir of one who has directed his land to be sold was held to be a freeholder.⁶⁷ So a vendee in possession under a contract for a deed.⁶⁸ Where the statute makes it the duty of the court to appoint the surveyor of the town through which the proposed road runs, it must be done, though he has given an opinion as to the propriety of laying out the road.⁶⁹ The fact that a commissioner, after his appointment, was elected to the city council does not vitiate the report.⁷⁰ One who is

120; *Hunter v. Matthews*, 12 Leigh 228; *Hester v. Chambers*, 84 Mich. 562, 48 N. W. Rep. 152.

⁶² *Wyman v. Lexington & West Cambridge R. R. Co.*, 13 Met. 316; see also *Road Case*, 1 Brown 210.

⁶³ *State v. Elizabeth*, 32 N. J. L. 357.

⁶⁴ *Haslam v. Galena etc. R. R. Co.*, 64 Ill. 353.

⁶⁵ *Houghton v. Huron Copper Co.*, 57 Mich. 547.

⁶⁶ *New York, West Shore & Buffalo R. R. Co. v. Townsend*, 36 Hun 630. Where the statute

required the commissioners to be freeholders, and the record showed that they were householders only, it was held bad. *Fore v. Hoke*, 48 Mo. App. 254.

⁶⁷ *People v. Scott*, 8 Hun 566.

⁶⁸ *New Orleans etc. R. R. Co. v. Hemphill*, 35 Miss. 17.

⁶⁹ *Matter of Highway*, 3 N. J. L. 504.

⁷⁰ *Matter of Twenty-sixth St.*, 12 Wend. 203. One who was a former city appointee is not incompetent. *Matter of Mayor*, 20 Misc. 520.

exempt may act if he is not disqualified.⁷¹ In a proceeding to assess damages for a change of grade, one who had a similar claim was held to be disqualified to act on the sheriff's jury.⁷² Persons who have been interested or active in promoting the work or improvement for which the condemnation is made are generally held to be disqualified from acting as jurors or commissioners.⁷³

In *State v. Crane*⁷⁴ it was held that the legislature was powerless to remove the disability occasioned by a direct pecuniary interest. The statute construed in that case provided that "whenever heretofore or hereafter a majority of the commissioners of highways, signing any report, were, or shall be competent and disinterested, such report shall not be considered illegal in consequence of any disability on the part of the other commissioners." It was held that this did not validate a report signed by four commissioners, one of whom owned land to be assessed for benefits. In some cases it has been held proper to require a showing by affidavit that the persons whose appointment was desired possessed the qualifications required.⁷⁵

Commissioners should be disinterested in fact and it is not enough that the court believes that they have acted impartially.⁷⁶ As to what constitutes an impartial tribunal is a question elsewhere considered.⁷⁷

⁷¹ *Herman's Heirs v. Municipality No. Two*, 15 La. 597 (8 new ed. 397).

⁷² *Flagg v. Worcester*, 8 Cush. 69.

⁷³ *Michigan Air Line Ry. Co. v. Barnes*, 40 Mich. 383; *Kundinger v. Saginaw*, 59 Mich. 355; *Richmond v. Muire*, 2 Rob. (Va.), 458; but see *Summerville v. Wimbish*, 7 Gratt. 205; *Matter of Mayor*, 20 Misc. 520.

⁷⁴ 36 N. J. L. 394.

⁷⁵ *Matter of Houston St.*, 7 Hill 175. And see generally on the subject of qualifications: *Colorado Central R. R. Co. v.*

Humphreys, 16 Col. 34, 26 Pac. Rep. 165; *Chicago etc. R. R. Co. v. Eaton*, 136 Ill. 9, 26 N. E. Rep. 575; *City of Owosso v. Richfield*, 80 Mich. 324, 45 N. W. Rep. 129; *City of Saginaw v. Campau*, 102 Mich. 594, 61 N. W. Rep. 65; *Knoblauch v. Minneapolis*, 56 Minn. 321, 57 N. W. Rep. 928; *McKusick v. Stillwater*, 44 Minn. 372, 46 N. W. Rep. 769; *Halstead v. Manhattan R. R. Co.*, 58 N. Y. Supr. Ct. 270, 11 N. Y. Supp. 14.

⁷⁶ *Matter of Terminal R. R. Co.*, 16 App. Div. N. Y. 515.

⁷⁷ *Ante*, § 313.

§ 406. Whether the record should show that the commissioners, jurors, etc., possessed the qualifications required by law.—Upon this question the authorities are divided, some holding that the record must affirmatively show the fact,⁷⁸ others that it need not.⁷⁹ Without deciding between these two lines of decisions, it may properly be said that, in conducting proceedings of this character, the better practice is to have all such matters appear upon the face of the record.

§ 407. Waiver of objections to commissioners, jurors, etc.—Objections to the competency of commissioners, etc., should be made at the earliest opportunity, or they will be waived.⁸⁰ A party who is present at the time of the selection of the tribunal, and makes no objection to the com-

⁷⁸ Nichols v. Bridgport, 23 Conn. 189; Pond v. Milford, 35 Conn. 32; Bridgport v. Giddings, 43 Conn. 304; People v. Brighton, 20 Mich. 57; Mansfield etc. R. R. Co. v. Clark, 23 Mich. 519; Levee Commissioners v. Allen, 60 Miss. 93; White v. Memphis etc. R. R. Co., 64 Miss. 566; State v. Jersey City, 25 N. J. L. 309; Baldwin v. Calkins, 10 Wend. 167; United States v. Supervisors of Summit, 1 Pinney, 566; State v. Bayonne, 35 N. J. L. 476; Northern Pacific Terminal Co. v. Portland, 14 Or. 24; Judson v. Bridgport, 25 Conn. 426; Madden v. Louisville etc. R. R. Co., 66 Miss. 258, 6 So. Rep. 181; Louisville etc. R. R. Co. v. Postal Tel. Cable Co., 68 Miss. 806, 10 So. Rep. 74; State v. St. Louis, 1 Mo. App. 503; Fore v. Hoke, 48 Mo. App. 254; Crowley v. Board of Comrs., 14 Mon. 292, 36 Pac. Rep. 313; Vreeland v. Bayonne, 54 N. J. L. 488, 24 Atl. Rep. 486; Jones v. Zink, 65 Mo. App. 409; State v. Perth Amboy, 57 N. J. L. 482,

31 Atl. Rep. 980; State v. Hemsley, 59 N. J. L. 149.

⁷⁹ Chicago, Burlington & Quincy R. R. Co. v. Chamberlain, 84 Ill. 333; Gay v. Caldwell, Hardin (Ky.) 68; Sutherland v. Holmes, 78 Mo. 399; Schuylkill Falls Road, 2 Binn. 250; Road from App's Farm, 17 S. & R. 388; see also Centreville & Abington Turnpike Co. v. Jarrett, 4 Ind. 213; Cage v. Tragar, 60 Miss. 563; Chesapeake & Ohio R. R. Co. v. Patton, 9 W. Va. 648; Leonard v. Sparks, 117 Mo. 103, 22 S. W. Rep. 900; Ohio Riv. R. Co. v. Blake, 38 W. Va. 718, 18 S. E. Rep. 957; Sneed v. Falls County, 91 Tex. 168.

⁸⁰ Bradley v. Frankfort, 99 Ind. 417; Burnham v. Goffstown, 50 N. H. 560; Crowell v. Londonderry, 63 N. H. 42; Hilltown Road, 18 Pa. St. 233; Road in Allen Township, 18 Pa. St. 463; State v. Nelson, 57 Wis. 147; State v. Wilson, 17 Wis. 687; Astor v. Mayor etc. of New York, 62 N. Y. 580; Steele v. Empson,

petency of any person selected or appointed, thereby waives any objection to their competency which was then known to him.⁸¹ So, going into a hearing on the merits is a waiver of all objections then known and not made.⁸² So it has been held that, if a person objects to the report of commissioners, but not on the ground of their incompetency, he cannot afterward object that they were not qualified.⁸³ A party cannot object to commissioners whose names he has suggested,⁸⁴ or to whose appointment he has agreed.⁸⁵

§ 408. **Vacancies, effect of, and how filled.**—This is a matter which must necessarily depend so much upon local statutes that we shall simply state the decisions. In New York it is held that a power conferred upon three or more persons for a public purpose is not extinguished by the death of one, where no provision exists for the vacancy, but vests in the survivors.⁸⁶ It was accordingly held that, where one of three commissioners died after the assessment of damages for opening a street, and before the assessment of benefits, the survivors could go one and assess the benefits.⁸⁷ On the other hand, in New Hampshire, it was held that two of a board of three road commissioners, the third being dead, could not act in the laying out of a highway, although a statute provided that “all words purporting to

142 Ind. 397, 41 N. E. Rep. 822; *Morris v. New York*, 55 Hun 476, 29 N. Y. St. 376, 8 N. Y. Supp. 763; *Pennsburg Alley*, 12 Pa. Co. Ct. 213; *Road in Limerick Tp.*, 16 Pa. Co. Ct. 567; *Street in Nanticoke*, 4 Luzerne Leg. Reg. Rep. 513; *Forsythe v. Wilcox*, 143 Ind. 144, 41 N. E. Rep. 371.

⁸¹ *Ipswich v. County Commissioners of Essex*, 10 Pick. 519; *Hallock v. County of Franklin*, 2 Met. 558; *Smith v. School District No. 2*, 40 Mich. 143; *Supervisors of Doddridge Co. v. Stout*, 9 W. Va. 703.

⁸² *Walker v. Boston & Maine R. R. Co.*, 3 Cush. 1; *Fitchburg*

R. R. Co. v. Same, 3 Cush. 58; *Steele's Petition*, 44 N. H. 220; *Baldwin v. Calkins*, 10 Wend. 167.

⁸³ *Commissioners' Court v. Bowie*, 34 Ala. 461.

⁸⁴ *Matter of New York, West Shore & Buffalo R. R. Co.*, 35 Hun 575; *Roanoke City v. Berkowitz*, 80 Va. 616.

⁸⁵ *People v. Taylor*, 34 Barb. 481.

⁸⁶ *People v. Palmer*, 52 N. Y. 83; *People v. Syracuse*, 63 N. Y. 291.

⁸⁷ *People v. Syracuse*, 63 N. Y. 291.

give a joint authority to three or more public officers shall be construed as giving such authority to a majority of them.”⁸⁸ It was said that the statute conferred the authority upon a majority of a full board. A statute of Wisconsin provided for summoning a jury of eighteen freeholders, and gave each party the right to strike off three, the remaining twelve to be sworn and to act. After six had been thus stricken off, one of the twelve said he was not a freeholder, and was excused, and thereupon one of the six was put in his place. Their assessment was held to be invalid for this reason.⁸⁹ A statute of New Jersey provided that roads should be laid out by six of the surveyors of the county joined with six surveyors of the next county chosen for the townships nearest to the line of the road. One of the latter being sick, his place was filled from another township. If eight of the twelve agreed, it was sufficient. The report was signed by ten, including the one who was substituted. The proceedings were quashed on certiorari, the court holding that a proviso could not be put into a statute, the terms of which were plain and positive.⁹⁰ Where the proceedings are under the supervision of a court which appoints or supervises the tribunal, it would seem proper that, if vacancies occur before the tribunal proceeds to act, it should proceed to fill such vacancies.⁹¹ If a vacancy occurs pending the proceedings before the tribunal, it cannot be filled and the case go on as though the new appointee had been in from the beginning.⁹² But the legislature may so provide by statute, even as to pending proceedings.⁹³ Where the commissioners appointed were disqualified and the statute made no provision for filling

⁸⁸ *Palmer v. Conway*, 22 N. H. 144; *Wentworth v. Farmington*, 49 N. H. 119.

⁸⁹ *In re Detroit & Pontiac R. Co.*, 2 Doug. (Mich.) 367.

⁹⁰ *State v. Willingborough Road*, 1 N. J. L. 128.

⁹¹ *McMullen v. State*, 105 Ind. 334; *Road in Little Britain*, 27 Pa. St. 69. See *Friend v. Ab-*

bott, 56 Me. 262. The vacancy should be filled by an order of court, not by a mere indorsement on the petition. *Cherry St.*, 1 Pa. Dist. Ct. 41.

⁹² *Gilkerson v. Scott*, 76 Ill. 509.

⁹³ *State v. National Docks etc. R. R. Co.*, 54 N. J. L. 180; 23 Atl. Rep. 686.

vacancies, it was held that the order should be set aside and that there should be a new notice and new order of appointment.⁹⁴

§ 409. **Effect of the disagreement of spécial juries.**—Where the court ordered the sheriff to summon a jury to assess the damages caused by opening a highway and the first jury summoned disagreed, it was held proper for the sheriff, without making any report or obtaining any new order, to summon another jury. The order was held to stand as authority to the sheriff until he had summoned a jury who assessed the damages.⁹⁵ In another case it was held that the sheriff could not summon a new jury without a new warrant, that the proper course was to make return of the disagreement and obtain a new order.⁹⁶ Under a petition for a review of a highway, the court appointed viewers who made an incomplete report. It was held proper to treat their action as a nullity, and to appoint new viewers under the same petition.⁹⁷

§ 410. **The presiding officer of special juries: his qualifications, duties, etc.**—The presiding officer should be disinterested,⁹⁸ and should in all things conform to the statute.⁹⁹ Where a statute provided that the damages should be assessed by a jury, and that the county commissioners should appoint some one to preside over the jury whose duty it should be to keep order and administer oaths to the jury and the witnesses, it was held that he could not give instructions.¹ Where the statute provided that the probate judge should accompany the jury of inquest, swear witnesses and decide questions of law, or should appoint a circuit court

⁹⁴ *Kinnie v. Base*, 68 Mich. 625, 36 N. W. Rep. 672.

⁹⁵ *Hicks v. Foster*, 32 Ga. 414; see also *Road in Charlestown Township*, 2 Phila. 126.

⁹⁶ *Mendon v. County of Worcester*, 10 Pick. 235.

⁹⁷ *Charleston Road*, 2 Grant's Cas. 467.

⁹⁸ *Merrill v. Berkshire*, 11 Pick. 269. A mayor of a city who

owns land affected is not disqualified to act as presiding judge of the mayor's court for the assessment of damages, his duties being merely ministerial in the matter. *Mayor of Lexington v. Long*, 31 Mo. 369.

⁹⁹ *Bibb v. Mountjoy*, 2 Bibb 1.

¹ *McKenney v. County Comrs.*, 40 Me. 136.

commissioner to go in his place, it was held that the rulings of the probate judge were advisory only and that the decision was with the jury and not the judge.² A party who requests instructions cannot complain if they are against him. Where the proceedings are conducted partly by the sheriff and partly by the coroner, each should certify to the part which took place before him.³ Where it is the duty of the sheriff to certify the substance of any decision or instruction given by him when requested by any party, if no request is made no certificate need be given, and such decision or instruction cannot afterward be proved by parol.⁴

² Grand Rapids etc. R. R. Co. v. Chesebro, 74 Mich. 466, 42 N. W. Rep. 66.

³ Pittsfield & North Adams R. Co. v. Foster, 1 Cush. 480.

⁴ Allen v. Androscoggin R. R. Co., 60 Me. 494.

CHAPTER XVIII.

PROCEEDINGS BY AND BEFORE THE CONSTITUTED TRIBUNAL.

§ 411. **The oath to be taken.**—The first duty of commissioners and the like is to qualify themselves in the manner required by law. This usually consists in taking an oath prescribed by statute, the substance of which is that they will faithfully discharge their duties. All the authorities agree that the failure to take this oath in substantially the form prescribed by law renders all the proceedings invalid.¹ In *Lumsden v. Milwaukee*² it was held to be absolutely essential that the tribunal should act under the sanction of an oath, and that no valid proceedings could be had under a charter which did not require the jury of view to be sworn. A contrary conclusion is reached in *Bradstreet v. Erskine*,³ and this would seem to be the more correct view

¹ *Keenan v. Commissioners'* Court, 26 Ala. 568; *Frith v. Justices of the Inferior Court*, 30 Ga. 723; *Crossett v. Owens*, 110 Ill. 378; *Walters v. Houck*, 7 Ia. 72; *Grimes v. Doyle, Sneed* (Ky.), 58; *Daviess v. County Court*, 1 Bibb, 453; *Elliot v. Lewis*, 1 A. K. Marsh. 514; *Thompson v. Crabb*, 6 J. J. Marsh. 222; *Breckenridge v. Ward*, 1 T. B. Mon. 57; *Harper v. Lexington & Ohio R. R. Co.*, 2 Dana, 227; *Spring v. Lowell*, 1 Mass. 422; *Bowler v. Drain Comr.*, 47 Mich. 154; *Matter of Public Road*, 4 N. J. L. 396; *State v. Lawrence*, 5 N. J. L. 850; *Fisher v. Allen*, 8 N. J. L. 301; *State v. Hutchinson*, 10 N. J. L. 242; *State v. Davis*, 13 N. J. L. 10; *State v. Barnes*, 13 N. J. L. 268; *State v. Ayres*, 15 N. J. L. 479; *State v. Hart*, 17 N. J. L.

185; *State v. Bayonne*, 35 N. J. L. 476; *People v. Conner*, 46 Barb. 333; *Bryson's Road*, 2 P. & W. 207; *Neff's Road*, 3 S. & R. 210; *Case of Broad Street Road*, 7 S. & R. 444; *Cambria Street*, 75 Pa. St. 357; *Douglass v. Rawlins*, 4 Hayward, Tenn. 111; *Lyman v. Burlington*, 22 Vt. 131; *Fisher v. Smith*, 5 Leigh, 611; *Bohlman v. Green Bay & Minn. Ry. Co.*, 40 Wis. 157; *Clinton Tp. Road*, 3 Pa. Co. Ct. 170; *Road in Kidder Tp.*, 1 Luzerne Leg. Reg. Rep. 10; *Road in Foster Tp.* 1 Ibid. 100, 249; *Ryan Tp. Road*, 3 Ibid. 76; *Road in Butler Tp.*, 6 Ibid. 443.

² 8 Wis. 485. But the contrary was held in *State v. Hogue*, 71 Wis. 384, 36 N. W. Rep. 860.

³ 50 Me. 407. And see *Corey v.*

of the matter. All must be sworn, and the failure of one or two to take the oath required has the same effect as though it was omitted by all.⁴

§ 412. **The form and sufficiency of the oath.**—If the form of the oath is prescribed, it should conform exactly to the statute, for then all doubt as to its sufficiency is removed. But slight variations which do not change the substance will be immaterial.⁵ Where the oath to assess damages followed the statute, except the words “if any” were added after the word damages, it was held to be erroneous, but not to vitiate the proceedings collaterally.⁶ Commissioners were required by statute to take an oath “fairly and impartially to execute the duties imposed upon them by this act.” The oath taken was “that they would fairly and impartially execute the duties imposed upon them by the above appointment, and make a just and true report according to the best of their skill and judgment.” This was held to be a substantial compliance with the statute.⁷ An oath to ascertain the compensation from the evidence, the argument of counsel and the instructions of the court, instead of from the evidence, as provided by statute, was held not to vitiate.⁸ The omission of the word “faithfully” from the form required by statute was held to invalidate the proceedings.⁹ In another case viewers, before entering upon their duties, were required to be sworn “to perform the same impartially and according to the best of their judgment.” An oath “faithfully to discharge their duties,” was held to be insufficient,

Chicago etc. R. R. Co., 100 Mo. 282, 13 S. W. Rep. 346.

⁴ Matter of Public Road, 4 N. J. L. 396; State v. Davis, 13 N. J. L. 10; State v. Ayres, 15 N. J. L. 479; State v. Hart, 17 N. J. L. 185; Case of Broad St. Road, 7 S. & R. 444.

⁵ As where the person sworn was made to “declare” instead of “promise.” Bassett v. Denn, 17 N. J. L. 432; and see Tide Water Canal Co. v. Archer, 9 G. & J.

479; Fort St. Union Depot Co. v. Morton, 83 Mich. 265, 47 N. W. Rep. 228, 3 Am. R. R. & Corp. Rep. 438.

⁶ Hawkins v. Calloway, 88 Ill. 155.

⁷ State v. Trenton, 35 N. J. L. 485.

⁸ Cahill v. Norwood Park, 149 Ill. 156, 36 N. E. Rep. 606.

⁹ In re Gilroy, 85 Hun 424, 32 N. Y. Supp. 891.

because less comprehensive than the oath required by law.¹⁰ But under the same statute it was held sufficient if they were sworn to perform their duties according to law.¹¹ Again, an oath by commissioners in a railroad condemnation, to discharge their duties under the charter of the company to the best of their ability, was held insufficient, where the act required an oath to support the constitution of the United States and of the State and to faithfully discharge their duties to the best of their ability.¹² In another case in the same State the statute required an oath that the commissioners should justly and impartially discharge their duties. The oath taken was to fairly and impartially hear the evidence, review the premises and to fairly and impartially decide. It was held to be insufficient, and the proceedings were quashed.¹³ These cases illustrate the necessity of a strict observance of the statute.¹⁴ If the form of the oath is not prescribed, but an oath is required, it may be in general language that the commissioners, etc., will faithfully and impartially perform the duties devolved upon them.¹⁵

An oath must be administered by one having authority, or it is no oath at all. Thus an oath administered by a city clerk *pro tem.*, no such officer being known to the law, is a nullity.¹⁶ A viewer, though having authority to administer oaths, cannot swear himself.¹⁷

An oath administered by an attorney, by request and in the presence of one having authority, was held good.¹⁸ An oath in blank is a nullity.¹⁹ Where the name was written

¹⁰ Cambria Street, 75 Pa. St. 357.

¹¹ Paschall St., 81 Pa. St. 118.

¹² Bohlman v. Green Bay & Minn. Ry. Co., 40 Wis. 157.

¹³ State v. Hoetz, 67 Wis. 84.

¹⁴ See also Chapman v. Clark, 49 Mich. 305.

¹⁵ Commonwealth v. Westborough, 3 Mass. 406; Shoemaker

v. United States, 147 U. S. 282, 13 S. C. Rep. 361.

¹⁶ State v. Bayonne, 35 N. J. L. 476; but see Woolsey v. Board of Supervisors etc. 32 Iowa, 130

¹⁷ East Penn. Tp. Road, 2. Pa. Co. Ct. 453.

¹⁸ Road in Macungie Township, 26 Pa. St. 221.

¹⁹ Matter of Highway, 16 N. J. L. 391.

Byles in the body of the oath, but was correctly subscribed Boyles, it was held sufficient.²⁰

Where the commissioners acted and made a report without being sworn, it was held that they might be sworn and make a new report.²¹ Where commissioners, proceeding under an ordinance, were sworn two days before the ordinance was approved by the mayor and so before it became a law, it was held not to vitiate.²² Where the first report is set aside and the matter referred to the same commissioners, they do not need to be sworn again.²³

The oath need not be in writing unless required by statute.²⁴

§ 413. What the record should show as to the oath taken.—The record should show that the commissioners have been sworn as required by law.²⁵ Thus far there is no difference in the authorities. But, as to how this should be made to appear in the record, the decisions are at variance. Some cases hold that the mere recital that the commissioners were sworn according to law is sufficient.²⁶ Other cases hold that the facts should be stated which

²⁰ Hoagland v. Culvert, 20 N. J. L. 387.

²¹ Lyman v. Burlington, 22 Vt. 131.

²² Gurnee v. Chicago, 40 Ill. 165; Skinner v. Chicago, 42 Ill. 52.

²³ Low v. Galena etc. R. R. Co., 18 Ill. 324.

²⁴ Hays v. Parish, 52 Ind. 132; Dallas etc. R. R. Co. v. Day, 3 Tex. Civ. App. 353, 22 S. W. Rep. 538.

²⁵ Elliot v. Lewis, 1 A. K. Marsh. 453; Breckenridge v. Ward, 1 T. B. Mon. 57; Harper v. Lexington & Ohio R. R. Co., 2 Dana, 227; Spring v. Lowell, 1 Mass. 422; Neff's Road, 3 S. & R. 210; Douglass v. Rawlins, 4 Haywood, Tenn. 111; Fisher v. Smith, 5 Leigh, 611; Ryan Tp.

Road, 3 Luzerne Leg. Reg. Rep. 76.

²⁶ Long v. Commissioners' Court, 18 Ala. 482; Thompson v. Crabb, 6 J. J. Marsh. 222; Dollarhide v. Muscatine County, 1 G. Green, 158; Word v. Campbell, 14 B. Mon. 339; New Orleans etc. R. R. Co. v. Hemphill, 35 Miss. 17; Hannibal & St. Joseph R. R. Co. v. Morton, 27 Mo. 317; In re Road in East Donegal Township, 90 Pa. St. 190; Lyon v. Green Bay & Minn. Ry. Co., 42 Wis. 538; Bronnenburg v. O'Bryant, 139 Ind. 17, 38 N. E. Rep. 416; Road in Hilltown, 2 Walker's Pa. Supm. Ct. 78; Road in Pottsgrove, 2 Walker's Pa. Supm. Ct. 503; East Penn. Tp. Road, 2 Pa. Co. Ct., 453; Road in Nescopeck, 1 Luzerne Leg. Reg. Rep. 316.

show a compliance with the law.²⁷ The correct doctrine would seem to be that, where the proceedings are under the supervision of a court of record, and the tribunal is sworn at the bar of the court and a record of the fact made as part of the proceedings in the case, a simple recital that the oath was taken as required by law would be sufficient. But, where the only record of the oath is in the report of the commissioners themselves, or in the certificate of a sheriff, clerk or other ministerial officer, it ought to show what the oath was which was taken, and how it was administered, in order that it may appear from the facts detailed that the law has been complied with.²⁸

§ 414. **Waiver of defective oath.**—A failure to take the oath required, or any irregularity in taking it, may be waived. If the parties proceed to a hearing with knowledge of the omission or irregularity, it amounts to a waiver thereof.²⁹ If the oath is required to be filed, and is filed in the case, there is a presumption of notice of its contents which amounts to knowledge in fact.³⁰ Where there is an

²⁷ *Keenan v. Commissioners' Court*, 26 Ala. 568; *Crossett v. Owens*, 110 Ill. 378; *Walters v. Houck*, 7 Ia. 72; *Bowler v. Drain Comr.*, 47 Mich. 154; *In the Matter of Nicetown Lane*, 11 Phila. 377; *Case of Greenleaf Court*, 4 Wharton, 514; *Rushton v. Martin*, 43 Ala. 555; *Road in Plains Tp.*, 7 Luzerne Leg. Reg. Rep. 233.

²⁸ "A statutory proceeding affecting the rights of individuals must be strictly pursued, and where what has been done is to be certified by the persons executing such special authority or a record is to be made thereof and such certificate or record is to conclude the rights of parties, it must appear upon the certificate or record that everything was done which the statute re-

quired." *State v. Van Geison*, 15 N. J. L. 339. Relief will not be granted in equity on the ground that the record does not show that the viewers were sworn. It should be averred that they were not sworn. *Parham v. Decatur County*, 9 Ga. 341.

²⁹ *Raymond v. County Comrs.*, 63 Me. 110; *Petition of Gilford*, 25 N. H. 124; *Wentworth v. Farmington*, 51 N. H. 128; *Rockford etc. R. R. Co. v. McKinley*, 64 Ill. 338; *Town v. Stoddard*, 30 N. H. 23; *People v. Gilon*, 76 Hun 346, 27 N. Y. Supp. 704.

³⁰ *Wentworth v. Farmington*, 51 N. H. 128. In *Raymond v. County Comrs.*, 63 Me. 110, it is said that, where parties go to a hearing, knowledge of the facts in regard to taking the oath will be presumed.

appeal from the award of viewers to a court and trial de novo, it is too late to object on appeal that the viewers were not sworn.³¹

§ 415. **The time and place of meeting and of acting.**—The commissioners must meet at the time and place appointed in the order or notice, or their proceedings will be invalid.³² A statute which required commissioners to meet within ten days after the lapse of twenty days from the giving of certain notice, was held to be imperative.³³ A board of county commissioners which has power to fix the time within which viewers in a road case shall meet may extend the time.³⁴ If they are required to complete their work and make report at a certain time, as by the next term of the court, their authority will cease at the expiration of the time, and a report made subsequently is void.³⁵

§ 416. **Mode of procedure before commissioners: Evidence, etc.**—If the statute prescribes the mode of procedure, its provisions will, of course, govern.³⁶ But, if the statute is silent on the subject, commissioners and similar bodies necessarily have power to regulate their own proceedings and decide upon the order of business before them.³⁷ They may obtain information in any manner they see fit and may take the opinions of parties or others.³⁸ They may deter-

³¹ Patton v. Clark, 9 Yerg. 268.

³² Roberts v. Williams, 13 Ark. 355; Hobbs v. Board of Comrs., 103 Ind. 575; State v. Horn, 34 Kan. 556; Barlow v. Highway Commissioners, 59 Mich. 443; State v. Scott, 9 N. J. L. 17; In re Johnson, 49 N. J. L. 381; New York & Long Branch R. R. Co. v. Copner, 49 N. J. L. 555. But see West Fallowfield Road, 7 Pa. Co. Ct. 645. The statute may provide for fixing a new time and place, when there is a failure to meet at the time first appointed. Vogle v. Bridges, (Ky.) 22 S. W. Rep. 82.

³³ Commissioners v. Harper, 38

Ill. 103; Wood v. Commissioners, 62 Ill. 391; Commissioners v. Barry, 66 Ill. 496. The first case distinguishes Wells v. Hicks, 27 Ill. 343.

³⁴ Black v. Thompson, 107 Ind. 162.

³⁵ Inhabitants of Windham Petitioners, 32 Me. 452; Metzler & Hugus's Road, 62 Pa. St. 151; Rutland v. Supervisors, 55 Wis. 664; Anderson v. Pemberton, 89 Mo. 61.

³⁶ Kimball v. Yates, 14 Ill. 464.

³⁷ Jones v. Goffstown, 39 N. H. 254.

³⁸ Bristol v. Town of Bradford, 42 Conn. 321; Matter of Staten

termine the order of introducing testimony and who shall have the open and close.³⁹ They should proceed only at regular meetings at which all are present, or of which all have notice, which should be regularly adjourned if necessary.

The principal difficulty is in the matter of informing themselves concerning the matters to be decided. It has been held that, in the absence of a statutory provision to that effect, they have no right to hear witnesses.⁴⁰ Other courts have held that it is optional with such bodies to hear evidence or not as they may choose,⁴¹ and that they may inform themselves of the facts by any accessible means of information.⁴² Again, other courts hold that it is their duty to hear testimony though the statute is silent on the subject.⁴³

Island Rapid Transit Co., 47 Hun 396, 14 N. Y. St. Rep. 494; Note 42 below. In the case last cited it is said: "Such commissioners are selected with special reference to their fitness for the position and the duties they are expected to discharge, and such information and experience as they have themselves may be brought to their aid and used to assist them in the performance of their office, and upon viewing the premises to be affected their senses are made to testify to them in a most beneficial manner. They may also seek information from all available sources by inquiries prosecuted by them alone in the absence of the parties in as full and ample a manner as a private individual may do where his own interests are involved. They are untrammelled by technical rules of evidence, and unrestricted in respect to their sources of information, and at the last they must be govern-

ed by their own judgment, which is not to be controlled or outweighed by the opinions of witnesses, however numerous they may be."

³⁹ Albany Northern R. R. Co. v. Lansing, 16 Barb. 68.

⁴⁰ Vanwickle v. Camden & Amboy R. R. Co., 14 N. J. L. 162; Coster v. New Jersey R. R. etc. Co., 24 N. J. L. 730; Clarksville etc. Turnpike Co. v. Atkinson, 1 Sneed, 426.

⁴¹ Matter of Rondout etc. R. R. Co. v. Dego, 5 Lans. 298; Pennsylvania R. R. Co. v. Keiffer, 22 Pa. St. 356; Lyman v. Burlington, 22 Vt. 131; St. Paul & Sioux City R. R. Co. v. Covell, 2 Dak. 483.

⁴² Inhabitants of Readington v. Dilley, 24 N. J. L. 209; Columbia Delaware Bridge Co. v. Geisse, 35 N. J. L. 474; affd. 36 N. J. L. 537; Case of Spring Garden Street, 4 Rawle, 192.

⁴³ Washington etc. R. R. Co. v. Switzer, 26 Gratt. 661.

The parties are undoubtedly entitled to be heard,⁴⁴ and to point out how the commissioners may obtain information as to the facts which they rely upon. If the statutes make no provision for sworn testimony, it is difficult to see how any can be heard, since an oath not authorized by law is an empty form. The commissioners should view the premises,⁴⁵ and they may do this without notice and at any time during the proceedings.⁴⁶ Where the statute provides for hearing evidence, the rulings of the commissioners in regard thereto are not to be scrutinized too closely or expected to conform to the rules which obtain in courts of law.⁴⁷ Their award will not be disturbed on that ground, unless substantial injustice has been done.⁴⁸

§ 417. **What questions may be considered.**—This will depend upon the statute. The tribunal can only pass upon such questions as are authorized by law.⁴⁹ Usually it is only the question of damages which is submitted to the commissioners or other tribunal.⁵⁰ But sometimes there is also submitted to them the question of necessity or public utility,⁵¹ and, it may be, the question of whether the improvement shall be made. They have no right to pass upon

⁴⁴ *Inhabitants of Readington v. Dilley*, 24 N. J. L. 209; ante, §§ 363-368.

⁴⁵ *Western Pacific R. R. Co. v. Reed*, 35 Cal. 621; *Remy v. Municipality No. 2*, 12 La. An. 500; *Matter of Curtiss St.*, 1 Sheldon (N. Y.) 425; *Matter of New York, Lackawanna & Western R. R. Co.*, 33 Hun 148; *Inhabitants of Readington v. Dilley*, 24 N. J. L. 209.

⁴⁶ *Matter of New York, Lackawanna & Western R. R. Co.*, 33 Hun 148.

⁴⁷ *Michigan Air Line Ry. Co. v. Barnes*, 44 Mich. 222; *Port Huron etc. Ry. Co. v. Voorhies*, 50 Mich. 506; *Matter of Pugh*, 22 Misc. N. Y. 43.

⁴⁸ *Ibid*, and *Petition of Landraff*, 34 N. H. 163. The following cases hold that only legal evidence should be heard, and that the consequence of receiving incompetent evidence will be the same as in other legal proceedings: *Central Pacific R. R. Co. v. Pearson*, 35 Cal. 247; *Rochester etc. R. R. Co. v. Budlong*, 6 How. Pr. 467.

⁴⁹ *In re Magnolia Ave.*, 117 Pa. St. 56, 11 Atl. Rep. 405.

⁵⁰ *De Buol v. Freeport etc. Ry. Co.*, 111 Ill. 499; *In re Byles*, 25 L. J. Ex. 53.

⁵¹ *Toledo etc. R. R. Co. v. Campau*, 83 Mich. 33, 46 N. W. Rep. 1026.

the regularity of their own appointment,⁵² the corporate existence of the petitioner,⁵³ or the right to make the improvement in question.⁵⁴ They are not in general authorized to pass upon questions of title,⁵⁵ though they may award damages to particular persons where the title is not in issue.⁵⁶

§ 418. **Adjournments.**—Usually either the statute or the order of appointment or warrant for summoning the special tribunal fixes the time and place of meeting. Sometimes it is left for the commissioners to fix the time and place and notify the parties interested thereof. When once regularly convened, such bodies possess an inherent power to adjourn from time to time until the business before them is completed,⁵⁷ provided such adjournments do not extend beyond the time within which they are required to complete their inquest,⁵⁸ or beyond the time allowed by law.⁵⁹ Where the

⁵² *State v. Bailey*, 6 Wis. 291.

⁵³ *Schroeder v. Detroit etc. Ry. Co.*, 44 Mich. 387.

⁵⁴ *Forbes v. Delashmutt*, 68 Ia. 164; *Matter of Girard Ave.*, 11 Phila. 449.

⁵⁵ *San Francisco & San Jose R. Co. v. Mahoney*, 29 Cal. 112; *Wilcox v. Oakland*, 49 Cal. 29; *Conshohocken Ave.*, 1 Walker's Pa. Supm. Ct. 424; *Western Ave.*, 7 Pa. Co. Ct. 233; *Ohio Riv. R. R. Co. v. Ward*, 35 W. Va. 481, 14 S. E. Rep. 142; *Anthony v. Lawhorne*, 1 Leigh, 1; *Queen v. The Inns of Court Hotel Co.*, 32 L. J. Q. B. 367; *Read v. Victoria Station etc. R. R. Co.*, 32 L. J. Ex. 167; *In re Brandon's Estate*, 34 L. J. Eq. 333; but see *Chicago etc. R. R. Co. v. Broquet*, 47 Kan. 571, 28 Pac. Rep. 717; *Matter of Ethel St.*, 3 Misc. 403, 24 N. Y. Supp. 689.

⁵⁶ *Winebiddle v. Pennsylvania R. R. Co.*, 2 Grant's Cases, 32.

⁵⁷ *Goodwin v. Weatherfield*, 43 Conn. 437; *Polly v. Saratoga etc. R. R. Co.*, 9 Barb. 449; *Butman v. Fowler*, 17 Ohio, 101; *Leavenworth etc. R. R. Co. v. Meyer*, 50 Kan. 25, 31 Pac. Rep. 700; *Orono v. County Comrs.*, 30 Me. 302; *Weymouth v. Commissioners*, 86 Me. 391, 29 Atl. Rep. 1100; *In re Board of Street Opening*, 12 Misc. 535, 33 N. Y. Supp. 599; *Rose v. Kansas City etc. R. R. Co.* 128 Mo. 135, 30 S. W. Rep. 518; *Issenhuth v. Baum*, 11 S. D. 222. Where the statute authorized "any number of the six surveyors" to adjourn, all may adjourn. *State v. Vanbuskirk*, 21 N. J. L. 86; *State v. Bergen*, 21 N. J. L. 342.

⁵⁸ *Ruhland v. Supervisors*, 55 Wis. 664; *Wood v. Commissioners of Highways*, 62 Ill. 391.

⁵⁹ *Wilson v. Atkin*, 80 Mich. 247, 45 N. W. Rep. 94. In this case the statute permitted ad-

statute permitted highway commissioners to adjourn the hearing by public announcement, "and by the posting of a notice at the time and place named for the first meeting," it was held that the posting of a notice of adjournment at a different but more public place did not vitiate the proceedings.⁶⁰ The continuity of the original meeting should be kept up by regular adjournments,⁶¹ or else new notice should be given to the parties interested.⁶² Where there was an adjournment but to no fixed time or place, it was held that the tribunal lost jurisdiction.⁶³ Where six surveyors met and decided against an application for a road and reported without adjournment, and afterwards four met and signed a report laying it out, it was held invalid.⁶⁴ Where a hearing is regularly adjourned to a future time, a hearing and decision before that time will be void.⁶⁵ Parties are bound to take notice of regular adjournments, and no notice or proclamation is necessary unless required by statute.⁶⁶

§ 419. **Whether a majority may act or decide.**—It is a general rule of law that, where several persons are authorized to do any act of a public nature, they must all deliberate,

journments from time to time, not to exceed twenty days. This was held to mean that the adjournments altogether must not exceed twenty days.

⁶⁰ Wright v. Commissioners of Highways, 145 Ill. 48, 33 N. E. Rep. 876. And see Public Road, 4 N. J. L. 290.

⁶¹ McPherson v. Holdridge, 24 Ill. 38; Allison v. Commissioners of Highways, 54 Ill. 170; New York & Long Branch R. R. Co. v. Capner, 49 N. J. L. 555.

⁶² McPherson v. Holdridge, 24 Ill. 38; Goodwin v. Weatherfield, 43 Conn. 437. Thus, where a time and place was fixed for the first meeting of supervisors to lay out a highway, when one appeared and adjourned to another day,

when another appeared and adjourned to still another day, when no one appeared, and afterwards all met without any new notice and made the lay-out, it was held void. McPherson v. Holdridge, 24 Ill. 38.

⁶³ Dixon v. Highway Commissioners, 75 Mich. 225, 42 N. W. Rep. 814.

⁶⁴ Matter of Highway, 16 N. J. L. 391.

⁶⁵ Price v. Stagrays, 68 Mich. 17, 35 N. W. Rep. 815. And see North Lebanon Tp. Road, 3 Pa. Co. Ct. 401.

⁶⁶ Board of Supervisors v. Ma-goon, 109 Ill. 142; Leavenworth etc. R. R. Co. v. Meyer, 50 Kan. 25, 31 Pac. Rep. 700; Weymouth v. Commissioners, 86 Me. 391, 29

though a majority may decide.⁶⁷ In the absence of any statutory provisions controlling the matter, it follows that commissioners and similar bodies must meet and deliberate together concerning the matters submitted to their decision,⁶⁸ and that, having done so, a decision of the majority will be valid and binding.⁶⁹ It also follows that the decision of a majority, when the minority do not participate

Atl. Rep. 1100; *In re Road in Peach Bottom Tp.*, 3 Penny. 541; ante, § 384.

⁶⁷ *Paradise Road*, 29 Pa. St. 20; *McLellan v. County Comrs.*, 21 Me. 390. "Where a number of persons are entrusted with powers not of mere private confidence, but in some respects of a general nature, and all of them are regularly assembled, the majority will conclude the minority and their act will be the act of the whole." *Grindley v. Barker*, 1 Bos. & Pul. 229.

⁶⁸ *Curry v. Jones*, 4 Del. Ch. 559; *Louk v. Woods*, 15 Ill. 256; *Galbraith v. Littlech*, 73 Ill. 209; *Commonwealth v. Ipswich*, 2 Pick. 70; *Smith v. Trenton Delaware Falls Co.*, 17 N. J. L. 5; *Marble v. Whitney*, 28 N. Y. 297; *People v. Hinds*, 30 N. Y. 470; *People v. Williams*, 36 N. Y. 441; *Board of Water Comrs. v. Lansing*, 45 N. Y. 19; *Matter of Application of Mayor etc. of New York*, 34 Hun 441; *affd.* 99 N. Y. 569; *Christy v. Newton*, 60 Barb. 332; *Chapman v. Swan*, 65 Barb. 210; *Young v. Buckingham*, 5 Ohio, 485; *Matter of Wells County Road*, 7 Ohio St. 16; *Road Leading etc.*, 1 Brown, 210; *Turnpike Road by Chad's Ford*, 5 Binney, 481; *Paradise Road*, 29 Pa. St. 20; *State v. Findley*, 67

Wis. 86; *Commissioners v. Baumgarten*, 41 Ill. 254; *Ohio & M. R. Co. v. Barker*, 134 Ill. 470, 25 N. E. Rep. 785; *Leavenworth etc. R. R. Co. v. Meyer*, 58 Kan. 305; *State v. Weare*, 38 N. H. 314; *Doughty v. Hope*, 3 Denio, 249, 594; *People v. Commissioners*, 27 Barb. 94; *Fourth Ave.*, 11 Abb. Pr. 189; *Beekman v. Jackson County*, 18 Or. 283, 22 Pac. Rep. 1074, 1 Am. R. R. & Corp. Rep. 665; *Road in Ross Tp.* 36 Pa. St. 87; *Clinton Tp. Road*, 3 Pa. Co. Ct. 170; *Ryan Tp. Road*, 3 Luzerne Leg. Reg. Rep. 76, 158; *Road in Plains Tp.* 7 Luzerne Leg. Reg. Rep. 233; *Prichard v. Bixby*, 71 Wis. 422, 37 N. W. Rep. 228. But see *Smith v. New Haven*, 59 Conn. 203, 22 Atl. Rep. 146. The statute may authorize a majority to act. *Serrell v. Probate Judge*, 107 Mich. 234, 65 N. W. Rep. 107; *Turlow v. Ross*, 144 Mo. 234.

⁶⁹ *Louk v. Woods*, 15 Ill. 256; *Galbraith v. Littlech*, 73 Ill. 209; *Piper v. Connersville & Liberty Turnpike Road Co.*, 12 Ind. 400; *Beynon v. Brandywine etc. Turnpike Co.*, 30 Ind. 129; *Inhabitants of Vassalborough*, 19 Me. 333; *Plymouth v. County Comrs.*, 16 Gray, 341; *Ex parte Rogers*, 7 Cow. 526; *Woolsey v. Tompkins*, 23 Wend. 324; *Cruger v. Hudson*

in the proceedings, will be invalid.⁷⁰ It has been held that the absence of one of the commissioners, from some, but not all, of the meetings, will not vitiate the proceedings.⁷¹ The authorities differ as to the effect of a record which shows a decision by a majority, without showing that all acted.⁷² If power is conferred upon a board or corporate body, it may be exercised by a quorum which consists of a majority of the members.⁷³ Such are the rules in the absence of statutory provisions upon the subject; but in most of the States statutory provisions exist, either of a general nature or in the particular acts which relate to eminent domain. Many States have a general enactment that, where an au-

River R. R. Co., 12 N. Y. 190; Marble v. Whitney, 28 N. Y. 297; Astor v. Mayor etc. of New York, 62 N. Y. 580, 591; 37 N. Y. Superior Ct. 539; Matter of Application of Mayor etc. of New York, 34 Hun 441; affd. 99 N. Y. 569; Rochester etc. R. R. Co. v. Beckwith, 10 How. Pr. 168; Young v. Buckingham, 5 Ohio, 485; Road Leading etc., 1 Brown, 210; Turnpike Road by Chad's Ford, 5 Binney, 481; Road from App's Tavern, 17 S. & R. 388; Moore v. Street Passenger R. R. Co., 3 Phila. 417; Paradise Road, 29 Pa. St. 20; State Road in Lehigh County, 60 Pa. St. 330; Commissioners v. Baumgarten, 41 Ill. 254; American Cannel Co. v. Huntingburg etc. R. R. Co., 130 Ind. 98, 29 N. E. Rep. 566; Hall v. Manchester, 40 N. H. 410, 414; Field v. Field, 38 N. J. L. 290; Fourth Ave., 11 Abb. Pr. 189; Beekman v. Jackson County, 18 Or. 283, 22 Pac. Rep. 1074, 1 Am. R. R. & Corp. Rep. 665.

⁷⁰ Ohio & M. R. R. Co. v. Barker, 134 Ill. 470, 25 N. E. Rep. 785; People v. Commissioners, 27

Barb. 94; Ryan Tp. Road, 3 Luzerne Leg. Reg. Rep. 76, 158; Road in Plains Tp., 7 Luzerne Leg. Reg. Rep. 233; Prichard v. Bixby, 71 Wis. 422, 37 Wis. 228; and cases cited in last two notes. It is held in Connecticut that a majority may act in the absence of the minority. Smith v. New Haven, 59 Conn. 203, 22 Atl. Rep. 146.

⁷¹ In re Riverside Drive, 83 Hun 50, 31 N. Y. Supp. 735. And see In re Brooklyn El. R. R. Co., 80 Hun 355, 30 N. Y. Supp. 131.

⁷² Commissioners v. Baumgarten, 41 Ill. 254; Ohio & M. R. R. Co. v. Barker, 134 Ill. 470, 25 N. E. Rep. 785; White Water Valley Canal Co. v. Henderson, 3 Ind. 3; State v. Weare, 38 N. H. 314; Griscom v. Gilmore, 16 N. J. L. 105; Doughty v. Hope, 3 Denio, 249, 594; People v. Commissioners, 27 Barb. 94; Clinton Tp. Road, 3 Pa. Co. Ct. 170.

⁷³ Cupp v. Commissioners of Seneca County, 19 Ohio St. 173; State Road in Lehigh County, 60 Pa. St. 330; Commett v. Pearson, 18 Me. 344.

thority is conferred upon three or more, a majority may act. Such a statute is held to apply to commissioners in eminent domain proceedings.⁷⁴

In New Jersey, in laying out highways, the tribunal consists of six surveyors appointed by the court, all of whom must have notice, and a majority of whom may act.⁷⁵ Where the report is signed by less than the whole number, the record should show that all were notified and had the opportunity to act.⁷⁶ If less than a majority attempt to act,⁷⁷ or if five prevent the sixth from acting,⁷⁸ their proceedings will be void.

A statute of New York provides that "any two commissioners of any town may make an order in execution of the powers conferred in this title, provided it shall appear in the order filed by them that all of the commissioners of highways of the town met and deliberated on the subject embraced in such order, or were notified to attend a meeting of the commissioners for the purpose of deliberating thereon."⁷⁹ Under this statute it is imperative that the report should conform to the statute, and if made by two only it must show that the third met with them or had due notice.⁸⁰ The constitutional provision that the damages shall be ascertained by a jury, or by not less than three commis-

⁷⁴ *Hays v. Parish*, 52 Ind. 132; *Acton v. York County*, 77 Me. 128; *Quayle v. M. K. & T. Ry. Co.*, 63 Mo. 465; *Austin v. Helms*, 65 N. C. 560; *Union Pacific Ry. Co. v. Burlington etc. R. R. Co.*, 1 McCrary, 452.

⁷⁵ R. S., 1821, p. 616.

⁷⁶ *State v. Burnet*, 14 N. J. L. 385; *State v. Van Geison*, 15 N. J. L. 339; *Griscom v. Gilmore*, 15 N. J. L. 475; *Shough ex parte*, 16 N. J. L. 264; *Smith v. Trenton Delaware Falls Co.*, 17 N. J. L. 5. In *Bassett v. Clement*, 17 N. J. L. 166, it is said that it must appear, either from the record or

by proof made to the court, that the absent surveyor had notice.

⁷⁷ *State v. Hall*, 17 N. J. L. 374.

⁷⁸ *State v. Shreve*, 4 N. J. L. 297.

⁷⁹ R. S., 1829, vol. I, p. 525, § 125.

⁸⁰ *People v. Hynds*, 30 N. Y. 470; *People v. Williams*, 36 N. Y. 441; *Stewart v. Wallis*, 30 Barb. 344; *Christy v. Newton*, 60 Barb. 332; *Chapman v. Swan*, 65 Barb. 210; *Matter of Summit St.*, 3 How. Pr. 26; these cases overrule *Tucker v. Rankin*, 15 Barb. 471.

sioners, does not prevent the legislature from enacting that two of the three may decide.⁸¹

In Pennsylvania the statutes in road cases provide for the appointment of six viewers, five of whom must act, and that four of those acting must join in the report.⁸² Under this statute it has been held that if five act it is immaterial whether the sixth was present or absent, and the record may be silent on that point;⁸³ that if the report is signed by four it need not appear of record that five were present at the view, but this fact may be shown by evidence;⁸⁴ and that it is immaterial that one of the six is disqualified from acting.⁸⁵ But, if one acts who is not qualified by reason of his not taking the oath required, the proceedings are invalid, although the other five joined in the view and report.⁸⁶

In Illinois it is held that a report signed by two viewers is good though it does not appear that the third was present and acted.⁸⁷ In the first case cited it was held that it would be presumed the third viewer was present until the contrary was shown, and in the other that in a collateral proceeding this presumption could not be overcome by parol evidence.

Where a statute provided that the appraisers or any two of them might perform the duties, it was held that it could not be construed otherwise than as permitting two to act as the whole might act.⁸⁸ Where a statute provided that, by agreement of parties, the damages might be assessed by a committee of three, it was held that all must act and concur in a decision.⁸⁹ Where damages were to be assessed by a jury of six and one was unable to attend, and the parties

⁸¹ *Astor v. New York*, 62 N. Y. 580; see *Conger v. Hudson Riv. R. R. Co.*, 12 N. Y. 190.

⁸² 2 *Brightley's Purdon*, 1272, 1283.

⁸³ *Turnpike Road by Chad's Ford*, 5 *Binney*, 481; *New Hannover Road*, 18 Pa. St. 220; *Road in Little Britain*, 27 Pa. St. 69.

⁸⁴ *Road from Mrs. Cully's*, 13 S. & R. 25; see also *Road to Ewing's Mill*, 32 Pa. St. 282.

⁸⁵ *Paschall St.*, 81 Pa. St. 118.

⁸⁶ *Cambria St.*, 75 Pa. St. 357.

⁸⁷ *Louk v. Woods*, 15 Ill. 256; *Galbraith v. Littleich*, 73 Ill. 209; see also *Astor v. New York*, 62 N. Y. 580.

⁸⁸ *Van Steenburgh v. Bigelow*, 3 *Wend.* 43.

⁸⁹ *McLellan v. County Comrs.*, 21 *Me.* 390.

stipulated to go on with five, it was held the parties were estopped by their agreement to object on the ground of a defective organization of the jury.⁹⁰

§ 420. **Receiving ex parte communications.**—Commissioners should in all respects act openly and fairly. If they permit one of the parties to discuss with them privately and in the absence of the other the questions to be decided, such action will vitiate a decision adverse to the absentee.⁹¹ Ex parte communications touching the merits of the controversy will have the same effect.⁹² But, where the counsel for one of the parties sent to the commissioners certain computations in writing which he had given orally at the hearing, it was held not sufficient cause for setting aside their report.⁹³ Where a city charter provided that the city attorney should advise the jury in proceedings by the city to establish streets, alleys, etc., it was held to provide for improper relations and to render the proceedings void collaterally.⁹⁴

But while all ex parte communications are improper and, prima facie, vitiate the proceedings, yet, if it appears that there was no improper motive, and they did not relate to the questions to be decided and that the tribunal could not have been influenced by them, the courts will not interfere with the proceedings on that ground. Thus, where one of the parties went to the commissioners privately after the hearing, in good faith and merely for the purpose of urging a speedy decision, it was held not to vitiate the proceedings.⁹⁵

⁹⁰ *Avery v. Groton*, 36 Conn. 304.

⁹¹ *Peavy v. Wolfborough*, 37 N. H. 286; *Patten's Petition*, 16 N. H. 277.

⁹² *Harris v. Woodstock*, 27 Conn. 567; *Lenox v. Knox & Lincoln R. R. Co.*, 62 Me. 322.

⁹³ *New York etc. R. R. Co. v. Church*, 31 Hun 440.

⁹⁴ *Paul v. Detroit*, 32 Mich. 108.

⁹⁵ *Blake v. County Comrs.*, 114

Mass. 583, 585. The court say: "The interviews of Mr. Aspinwall with one or more of the commissioners, which are alleged as one of the grounds for this petition, and which took place subsequently to the hearing in reference to the proposed widening of Washington street, were of questionable propriety. It is important that contested matters upon which any tribunal

§ 421. **Receiving entertainment.**—The mere fact that the commissioners were served with refreshments by one of the parties or dined or lodged at his house, will not of itself be sufficient cause for setting aside the report.¹ While such bodies should not receive entertainment from interested parties, yet, if there is no improper motive and no abuse of the privilege, it will be disregarded.² Where it is agreed that the committee to lay out a road may lodge with one

is to pass should not in any way be made the subject of conversation, except in the presence of all parties to the controversy. If we were left in doubt as to whether the judgment of the commissioners was in any way affected by them, we might feel it our duty to grant the petition. The existence of a cause which might improperly affect their judgment, although it is not known that it did so, is a sufficient ground for such action. If it was found that the members of such a tribunal had been addressed with any improper motive, or with intent to sway or bias their judgment, even if such attempt had not been shown to be effectual, it would also be a sufficient ground for such action. In the present case, however, the facts are distinctly found that Mr. Aspinwall addressed the commissioner or commissioners at their office in Boston, with no improper purpose to influence their action, his object being only to hasten it. It is also found that their action was not changed by reason of anything done by him. We do not think therefore that the proceedings should be quashed on account of these conversations or that im-

portant public rights should be lost because of an irregularity found to have been unintentional, and attended with no evil result."

¹ State v. Justice, 24 N. J. L. 413; State v. Reckless, 38 N. J. L. 393; Lehigh Valley R. R. Co. v. Dover & Rockaway R. R. Co., 43 N. J. L. 528; Wichita etc. R. R. Co. v. Fechheimer, 49 Kan. 643, 31 Pac. Rep. 127; Gurney v. Minneapolis etc. R. R. Co., 41 Minn. 223, 43 N. W. Rep. 2. The contrary has been held in a number of Pennsylvania cases; Magnolia St., 8 Phil. 468; Road in Heidelberg Tp., 1 Pa. Co. Ct. 7; Londonderry Tp. Road, 6 Pa. Co. Ct. 391; Blakely Road, 8 Pa. Co. Ct. 592; Road in Upper Hanover, 2 Luzerne Leg. Reg. Rep. 179; Road in Ross Tp., 4 Luzerne Leg. Reg. Rep. 67; Road in Sugarloaf Tp., 6 Luzerne Leg. Reg. Rep. 469.

² Green v. East Haddam, 51 Conn. 547; Road in Plymouth, 5 Rawle, 150; Coleman v. Moody, 4 Hen. & Munf. 1; Tripp v. County Comrs., 2 Allen, 556; Blake v. County Comrs., 114 Mass. 583. In the last case the town furnished lunch to the commissioners, witnesses and all the parties in interest,

of the parties,³ or the fact that one of them has done so is known and not objected to at the time,⁴ there is a waiver of the irregularity.

Where one of the parties treated the commissioners freely to intoxicating liquors, the report was set aside without looking into the merits.⁵ Where the owner furnished entertainment to one commissioner and gave another for his expenses more than the law allowed, and there was a manifest disposition to secure an unfair advantage, the report was set aside.⁶

§ 422. **Other improprieties.**—Where the son of one of the commissioners in a railroad condemnation was taken into the company's employ immediately after the father's appointment, the award was set aside.⁷ So where one of the commissioners was retained as attorney by one of the parties in another case.⁸ Where in a proceeding to condemn a lot for a school-house, the owner of the land, by violent and abusive language and threats of violence, deterred the representative of the school district from attending, the award was held to be void.⁹ The fact that commissioners met at the house of the petitioner,¹⁰ or that they are paid more than their legal fees by the applicant,¹¹ or that, in a railroad case where the law does not fix their fees, they agree upon the amount of their fees with the company after their report is made¹² have been held not to vitiate the award in the absence of any proof of improper motives or

³ *Beardsley v. Washington*, 39 Conn. 265.

⁴ *Williams v. Stonington*, 49 Conn. 229.

⁵ *Petition for a Highway in Newport*, 48 N. H. 433.

⁶ *Matter of Buffalo, New York & Philadelphia R. R. Co.*, 32 Hun 289.

⁷ *New York, West Shore & Buffalo R. R. Co. v. Townsend*, 36 Hun 630.

⁸ *Douglass v. Byrnes*, 63 Fed. Rep. 16. To same effect: *Road*

in *Whitemarsh*, 3 Luzerne Leg. Reg. Rep. 474.

⁹ *Peckham v. School District*, 7 R. I. 545.

¹⁰ *Oxford v. Brands*, 45 N. J. L. 332.

¹¹ *State v. Miller*, 23 N. J. L. 383; *Matter of Staten Island Rapid Transit Co.*, 41 Hun 392; *Matter of Buffalo, New York & Phila. R. R. Co.*, 32 Hun 289.

¹² *Lehigh Valley R. R. Co. v. Dover & Rockaway R. R. Co.*, 43 N. J. L. 528.

influence.¹³ Charges of improper conduct must always be substantiated by proof.¹⁴

§ 423. **Power of commissioners to reconsider or amend their report.**—Commissioners, as a general rule, have complete authority over their report until it has been filed or otherwise placed beyond their control.¹⁵ Although they have once resolved to report adversely to an improvement, they may afterwards report in favor of it.¹⁶ But, after having once filed their report, their power over it is gone and they are *functus officio*.¹⁷ If they afterwards file an amended report, it is a nullity.¹⁸ They may perhaps be permitted by the court to amend it in formal matters only, if done within the time for filing the original report.¹⁹ Where by statute commissioners were authorized to review and correct their report after having given notice of its completion, it was held to be in the nature of an appellate power, and that no changes could be made in the absence of objections by those interested.²⁰ Where on appeal the case was to be heard before referees, it was held that after the case had once been heard and submitted for decision they had no power to grant a rehearing on the merits.²¹ Where the report of commissioners is set aside or quashed, they cannot proceed and make a new assessment without being again appointed and qualified as in the first instance.²²

§ 423a. **Where the proceedings are before a court.—**

¹³ And see generally *Sanitary District v. Cullerton*, 147 Ill. 385, 35 N. E. Rep. 723.

¹⁴ *Hayward v. Bath*, 40 N. H. 100.

¹⁵ *Leavenworth etc. R. R. Co. v. Meyer*, 58 Kan. 305.

¹⁶ *Butman v. Fowler*, 17 Ohio 101.

¹⁷ *People v. Mott*, 60 N. Y. 649; *People v. Brooklyn*, 49 Barb. 136; *Pollard v. Ferguson*, 1 Litt. 196; *Keech v. People*, 22 Ill. 478; *Badger v. Merry*, 139 Ind. 631, 39 N. E. Rep. 309; *Union Ter-*

minal R. R. Co. v. Board of R. R. Comrs., 54 Kan. 352, 38 Pac. Rep. 290.

¹⁸ *Jefferson v. Delachaise*, 22 La. An. 26; *People v. Mott*, 2 Hun 672; *People v. Mott*, 60 N. Y. 649.

¹⁹ *Springbrook Road*, 64 Pa. St. 451. See *In re Washington St.*, (R. I.) 33 Atl. Rep. 516.

²⁰ *Matter of Hamilton Avenue*, 14 Barb. 405.

²¹ *People v. Ferris*, 41 Barb. 121.

²² *People v. Brooklyn*, 49 Barb.

Where the proceedings are before a court it has power to determine all incidental questions and to make all necessary and proper orders as to procedure, etc.²³

§ 424. **View of the premises by the jury.**—In case of trials before common law juries, statutes usually provide for a view of the premises, either as matter of right or in the discretion of the court. If the statute is silent as to the stage of the trial at which the view shall be made, it rests in the discretion of the court, and they may be sent at any time before the instructions are given.²⁴ The jury are entitled to view the entire premises, and cannot be confined to the part taken.²⁵ Where the statute is that whenever, in the opinion of the court, it is proper for the jury to view the premises, it may so order, it is left to the discretion of the court, and its action will not be interfered with unless a very clear case of abuse is made out.²⁶ Jurors have no right to visit the premises except by order of court, and in charge of an officer,²⁷ and where it appeared that two jurors visited the premises during the trial, the verdict was set aside.²⁸ Where a jury was sent to view premises but one did not go, a party going on with knowledge of the fact cannot object therefor after verdict.²⁹ In common law suits to recover compensation for property taken or damages to property not taken, the court may order a view in its discretion.³⁰

136; *Pollard v. Ferguson*, 1 Litt. 196.

²³ *Los Angeles v. Pomeroy*, 124 Cal. 597, 57 Pac. Rep. 585.

²⁴ *Galena etc. R. R. Co. v. Haslam*, 73 Ill. 494; *Kankakee & Seneca R. R. Co. v. Straut*, 102 Ill. 666; *New York etc. R. R. Co. v. Price*, 4 Penny. 200.

²⁵ *Wakefield v. Boston & Maine R. R. Co.*, 63 Me. 385. Here the presiding officer compelled them to keep within the right of way location, and it was held to be error. But see *Tedens v. San-*

itary District, 149 Ill. 87, 36 N. E. Rep. 1033.

²⁶ *Clayton v. Chicago etc. R. R. Co.*, 67 Ia. 238; see also, under a similar statute, *Coyner v. Bouyd*, 55 Ind. 166; *Snow v. Boston & Maine R. R. Co.*, 65 Me. 230.

²⁷ *Patchin v. Brooklyn*, 2 Wend. 377; *S. C. affd.*, 8 Wend. 47.

²⁸ *Ortman v. Union Pacific Ry. Co.*, 32 Kan. 419.

²⁹ *Gurney v. Minneapolis etc. R. R. Co.*, 41 Minn. 223, 43 N. W. Rep. 2.

³⁰ *Springer v. Chicago*, 135 Ill.

§ 425. **Effect to be given the view.**—In view of the fact that the practice of submitting the question of damages in condemnation suits to a court and jury is becoming more and more general, and that in nearly all cases a view of the premises may be had by the jury, the effect which such view should have upon the result becomes a question of very considerable importance. Is the object of the view simply to enable the jury the better to understand and apply the evidence, or may they take into consideration all the facts which they learn upon such view, as so much additional evidence on which to found their verdict? Some courts take the latter view. In Illinois an instruction was held correct which told the jury that they had the right, in finding their verdict, "to take into account such facts as they learned by viewing the property, as to whether the construction of the viaduct permanently depreciated or increased the market value of the property in question."³¹ There are other courts which take a similar view.³² In an early case in Indiana it was held that, as the facts learned and impressions made upon the jury by the view were not contained in the bill of exceptions, it failed to contain all the evidence and the

552, 26 N. E. Rep. 514, 4 Am. R. R. & Corp. Rep. 52.

³¹ Culbertson & Blair Provision Co. v. Chicago, 111 Ill. 651, 655; other cases declare or support the same rule. Chicago & Evanston R. R. Co. v. Jacobs, 110 Ill. 414; Peoria etc. Ry. Co. v. Barnum, 107 Ill. 160; Green v. Chicago, 97 Ill. 370; Chicago & Iowa R. R. Co. v. Hopkins, 90 Ill. 316; Mitchell v. Illinois & St. Louis R. R. & Coal Co., 85 Ill. 566; Peoria etc. R. R. Co. v. Sawyer, 71 Ill. 361; Chicago etc. R. R. Co. v. Bowman, 122 Ill. 595; Kiernan v. Chicago etc. R. R. Co., 123 Ill. 188. But the jury may not disregard the evidence. Atchison etc. R. R. Co. v. Schneider, 127 Ill. 144, 20 N. E.

Rep. 41; Peoria Gaslight etc. Co. v. Peoria Terminal R. R. Co., 146 Ill. 372, 34 N. E. Rep. 550. And see Davis v. N. W. El. R. R. Co., 170 Ill. 595.

³² Evansville etc. R. R. Co. v. Cochran, 10 Ind. 560; Parker v. Boston, 15 Pick. 198; City of Kansas v. Butterfield, 89 Mo. 646; Omaha & Republican Valley R. R. Co. v. Walker, 17 Neb. 432; In re Barbadoes St., 8 Phila. 498; Lehigh Valley Coal Co. v. Chicago, 26 Fed. Rep. 415; Topeka v. Martineau, 42 Kan. 387, 22 Pac. Rep. 417; City of Kansas v. Street, 36 Mo. App. 666; Williams v. Lockoman, 46 Ohio St. 416, 21 N. E. Rep. 358; Chicago etc. R. R. Co. v. Parsons, 51 Kan. 408, 32 Pac. Rep. 1083.

court could not determine whether the verdict was against the evidence or not.³³ This would seem to be a logical conclusion from the position that what the jury learn is evidence in the case.³⁴

Other courts hold that the object of the view is to enable the jury the better to understand and apply the evidence, and so to more intelligently and fairly perform their duties.³⁵ The reasons in support of this view are very fully and ably given in the case cited from Wisconsin, from which we quote as follows: "We understand that the object of a view is to acquaint the jury with the physical situation, condition, and surroundings of the thing viewed. What they see they know absolutely. If a witness testify to anything which they know by the evidence of their senses on the view is false, they are not bound to believe, indeed cannot believe, the witness, and they may disregard his testimony, although no other witness has testified on the stand to the fact as the jury know it to be. For example, if a witness testify that a certain farm is hilly and rugged when the view has disclosed to the jury and to every juror alike that it is level and smooth, or if a witness testifying that a given building was burned before the view, and the view discloses that it had not been burned, no contrary testimony of witnesses on the stand is required to authorize the jury to find the fact as it is, in regard of testimony given in court.

³³ *Evansville etc. R. R. Co. v. Cochran*, 10 Ind. 560; see cases cited below, which overrule this case.

³⁴ But other courts hold that the verdict of a jury, though properly founded upon knowledge obtained by the view, may be reviewed and set aside upon the evidence. *Atchison etc. R. R. Co. v. Schneider*, 127 Ill. 144, 20 N. E. Rep. 41; *City of Kansas v. Street*, 36 Mo. App. 666; *In re Metropolitan El. R. R. Co.*, 76 Hun 375, 27 N. Y. Supp. 756.

³⁵ *Jeffersonville etc. R. R. Co.*

v. Bowen, 40 Ind. 545; *Heady v. Turnpike Co.*, 52 Ind. 117; overruling *Evansville etc. R. R. Co. v. Cochran*, 10 Ind. 560; *Close v. Samm*, 27 Ia. 503; *Harrison v. Iowa Midland R. R. Co.*, 36 Ia. 323; *Washburn v. Milwaukee etc. R. R. Co.*, 59 Wis. 364; *Grand Rapids v. Perkins*, 78 Mich. 93, 43 N. W. Rep. 1037; *Baltimore & O. R. R. Co. v. Flower*, 132 Pa. St. 524, 19 Atl. Rep. 274; *Columbus v. Bidlingmeier*, 7 Ohio C. C. 136; *Besuden v. Comrs.*, 7 Ohio C. C. 237; *Laffin v. Chicago etc. R. R. Co.*, 33 Fed. Rep. 415.

“But, if the fact to which the jury may thus take cognizance is only one of many elements which must be considered to determine some other fact which can only be satisfactorily determined by a resort to professional or expert testimony, the case is very different. Such are these cases. The jury were to assess the value of the land taken for the use of the railway company, and the damages to the other adjacent lands of the respective owners resulting from such taking. To do this intelligently it became necessary to determine the location, quality and condition of the land, the uses to which it was or might be applied, its market value, the manner in which the taking of a part of the tract would affect the residue, and perhaps other conditions affecting such value and damages. Some of these conditions, and more especially the value of the land, could not be definitely determined by the view alone, and cannot properly be said to be within the common knowledge of the jury. The opinions of witnesses acquainted with the values of such property are essential to an intelligent judgment.

“At the common law a view might have been had in a real action, and by statute in any action, to the end that the jury might see the land or thing claimed to enable the jurors better to understand the evidence on the trial. Jacob’s Law Dict., tit. ‘View.’ We think such is still the office of a view. Hence, whatever the jury in each of these cases learned of the lands in question by the view, was available to enable them to determine the weight of conflicting testimony respecting value and damage, but no further. For reasons hereinafter more fully stated, we think such value and damages could only be assessed upon the evidence given by the witnesses, and that an assessment outside of the evidence could not be upheld. For instance, if no witness had estimated the compensation to which a plaintiff was entitled at less than \$500, or more than \$1,000, a verdict for less than \$500 or more than \$1,000 should be set aside, because unsupported by the evidence. * * * To allow jurors to make up their verdict on their individual knowledge of disputed facts material to the case not testified to by them in court, or upon their private opinions, would be most danger-

ous and unjust. It would deprive the losing party of the right of cross-examination, and the benefit of all the tests of credibility which the law affords. Besides, the evidence of such knowledge, or of the grounds of such opinions, could not be preserved in a bill of exceptions or questioned on appeal. It would make each juror the absolute judge of the accuracy and value of his own knowledge or opinions, and compel the appellate court to affirm judgments on the facts, when all of the evidence is before it and there is none whatever to support the judgment. The court would be obliged to presume that the jury or some juror had, or at least thought he had, some personal knowledge of facts outside the testimony, or contrary to it, which would sustain the judgment. Such a ruling in a case, the procedure in which was governed by common law rules of evidence, we presume was never heard of.

"We think the correct rule in these cases is that above stated, to-wit, if the testimony of value and damages is conflicting, the jury may resort to their own general knowledge of the elements which affect the assessment, in order to determine the relative weight of conflicting testimony, but their assessment must be supported by the testimony, or it cannot stand."³⁶

³⁶ Washburn v. Milwaukee etc. R. R. Co., 59 Wis. 364, 368; this case was approved and followed in Munkovitz v. Chicago, Milwaukee & St. Paul R. R. Co., 64 Wis. 403, and Seefeld v. Chicago, Milwaukee & St. Paul Ry. Co., 67 Wis. 96. Similar language is used by the Iowa court, which, in speaking of the statute in question, says: "The question then arises as to the purpose and intent of this statute. It seems to us that it was to enable the jury, by the view of the premises or place, to better understand and comprehend the testimony of the witnesses respecting the

same, and thereby the more intelligently to apply the testimony to the issues on trial before them, and not to make them silent witnesses in the case, burdened with testimony unknown to both parties, and in respect to which no opportunity for cross-examination or correction of error, if any, could be afforded either party. If they are thus permitted to include their personal examination, how could a court ever properly set aside their verdict as being against the evidence, or even refuse to set it aside without knowing the facts ascertained by such per-

Where the jury viewed the premises and the case was submitted to them without evidence, it was held, on appeal, that the court could not interfere with the verdict, as there was no evidence in the record and the court could have no knowledge of what the jury saw.³⁷

§ 426. **The right to open and close.**—On the trial of the question of damages, the right to open and close the case is in the owner of the land taken or damaged.³⁸ While the weight of authority supports this proposition, the opposite doctrine is strenuously maintained in several of the States.³⁹

sonal examination by the jury?"
Close v. Samm, 27 Ia. 503, 508.

³⁷ Peoria etc. Ry. Co. v. Barnum, 107 Ill. 160.

³⁸ Springfield & Memphis Ry. Co. v. Rhea, 44 Ark. 258; Evansville & Crawfordsville R. R. Co. v. Miller, 30 Ind. 209; Grand Rapids & Indiana R. R. Co. v. Horn, 41 Ind. 479; Connecticut River R. R. Co. v. Clapp, 1 Cush. 559; Winnisimmet Co. v. Grueby, 111 Mass. 543; Burt v. Wigglesworth, 117 Mass. 302; Minnesota Valley R. R. Co. v. Doran, 17 Minn. 188; St. Paul & Sioux City R. R. Co. v. Murphy, 19 Minn. 500; Omaha & Republican Valley R. R. Co. v. Walker, 17 Neb. 432; Omaha, Niobrara & Black Hills R. R. Co. v. Umstead, 17 Neb. 459; Matter of New York, Lackawanna & Western R. R. Co., 33 Hun 148; Oregon & Cal. R. R. Co. v. Barlow, 3 Or. 311; Charleston etc. R. R. Co. v. Blake, 12 Rich. (S. C.) 634; Indianapolis etc. R. R. Co. v. Cook, 102 Ind. 133; St. Louis etc. R. R. Co. v. North, 31 Mo. App. 345; Dallas etc. R. R. Co. v. Day, 3 Tex. Civ. App. 353, 22 S. W. Rep. 538; Gainesville etc. R. R. Co. v.

Waples, 3 Tex. Ct. of App. p. 482, § 409; Dallas etc. R. R. Co. v. Chenault, 4 Tex. Ct. of App. p. 171, § 111; Warner v. Gunnison, 2 Col. App. 430, 31 Pac. Rep. 238; Consumer's Gas Trust Co. v. Huntsinger, 12 Ind. App. 285, 40 N. E. Rep. 34.

³⁹ Montgomery etc. Ry. Co. v. Sayre, 72 Ala. 443; Harrison v. Young, 9 Ga. 359; McReynolds v. Baltimore & Ohio Ry. Co., 106 Ill. 152; South Park Commissioners v. Trustees of Schools, 107 Ill. 489; Streyer v. Georgia etc. R. R. Co., 90 Ga. 56, 15 S. E. Rep. 637; Wolff v. Georgia Southern etc. R. R. Co., 94 Ga. 555, 20 S. E. Rep. 484; Williams v. Macon & B. R. R. Co., 94 Ga. 709, 21 S. E. Rep. 997; Bellingham Bay etc. R. R. Co. v. Strand, 4 Wash. 311, 30 Pac. Rep. 144; Seattle & M. R. R. Co. v. Murphine, 4 Wash. 448, 30 Pac. Rep. 720; Seattle & M. R. R. Co. v. Gilchrist, 4 Wash. 509, 30 Pac. Rep. 738. In an early case in Illinois the landowner was held to have the burden of proof. County of Sangamon v. Brown, 13 Ill. 207. So, where the owner filed a cross petition for damages to lots not

It will be proper, therefore, to consider the question on its merits. It may be conceded that the question is to be determined by the application of the general rules and principles of evidence to the particular case. Greenleaf says "that the obligation of proving any fact lies upon the party who substantially asserts the affirmative of the issue."⁴⁰ Wharton, in his work on Evidence, states the rule as follows: "It makes no difference, therefore, whether the actor is plaintiff or defendant, so far as concerns the burden of proof. If he undertake to make out a case, whether affirmative or negative, this case must be made out by him, or judgment must go against him. Hence it may be stated, as a test admitting of universal application, that whether the proposition be affirmative or negative, the party against whom judgment would be given, as to a particular issue, supposing no proof to be offered on either side, has on him, whether he be plaintiff or defendant, the burden of proof, which he must satisfactorily sustain."⁴¹ These rules are laid down with reference to formal issues of fact in common law proceedings. In condemnation proceedings there are usually no formal pleadings and never any formal issues on the question of damages. The general rules which have been referred to cannot be applied without ascertaining what the substantial issue is in such inquiries and how the parties would be arranged with respect to it, if it was put into the form of a proposition affirmed on the one side and denied on the other. The question to be determined is, What is the amount which the land-owner is entitled to receive as just compensation? It is always a conceded fact that he is entitled to something. The proceeding is always one to take property or some interest therein, or to obtain compensation for property which has already been taken. The fact of the taking implies the right to receive compensation. The party seeking the condemnation concedes the right to compensation, and is always willing as matter of fact to pay a cer-

taken, the burden is held to be on the owner as to the issue thus presented. *Neff v. Cincinnati*, 32 Ohio St. 215.

⁴⁰ 1 Greenleaf Evi. §74.

⁴¹ 1 Wharton Evi. § 357.

tain sum. The amount may or may not be understood between the parties. In nearly all cases there must be an attempt to agree before the compulsory powers can be resorted to, and in such negotiations it is usually disclosed what the one party is willing to give and what the other party is willing to take. As to the amount which the party condemning is willing to give or which he concedes to be the amount of the just compensation to be paid, there is no controversy and no issue in form or substance between the parties. The real issue is as to whether the compensation is more than the amount conceded.⁴² If this issue was put in form it would consist of an affirmation on the part of the land-owner that the amount of compensation was more than a certain sum and of a denial of this affirmation by the other party. This is always the practical issue between the parties, and the land-owner always in effect maintains the affirmative of this issue. Consequently, upon the principle that he who maintains the affirmative of an issue must assume the burden of proof, the land-owner is entitled to open and close the case, and this is true no matter whether his position is plaintiff or defendant.⁴³

The same conclusion is reached in some of the cases on the principle that he who claims damages the amount of which is unliquidated is entitled to open and close, notwithstanding the fact that on the issue as to the right to damages the burden is on the other party.⁴⁴

In the trial of other issues than the amount of damages, such as the necessity of taking particular property or the public utility of a particular improvement, the burden of

⁴² This is analogous to the mode of determining the jurisdiction of the U. S. Court in respect to the amount involved. It depends not upon the amount involved in the suit, but upon the amount actually in dispute between the parties. *Tintsman v. National Bank*, 100 U. S. 6; *Dows v. Johnson*, 110 U. S. 223.

⁴³ *Burt v. Wigglesworth*, 117

Mass. 302, and other cases cited above; also *St. Louis etc. R. R. Co. v. Donovan*, 149 Mo. 93, 50 S. W. Rep. 286.

⁴⁴ *Connecticut River R. R. Co. v. Clapp*, 1 Cush. 559; *Minnesota Valley R. R. Co. v. Doran*, 17 Minn. 188; *Matter of New York, Lackawanna & Western R. R. Co.*, 33 Hun 148; 1 Greenl. Evi. § 76,

proof is upon those who are seeking to have the appropriation made, and they are entitled to open and close the case.⁴⁵

§ 427. **Practice as to consolidation of cases and separate trials.**—These matters are usually provided for by statute, and cases construing such statutes are given below.⁴⁶ In the absence of any express statutory provision it would seem to rest in the discretion of the trial court whether distinct claims for damages by the same work or improvement should be tried together or separately.⁴⁷

§ 428. **Instructions.**—The same principles apply in regard to instructions as in other cases. The court should not attempt to interfere with the province of the jury by instructing them as to the comparative weight of different kinds of evidence.⁴⁸ It is error to call attention to the evidence of one side only,⁴⁹ or one particular fact or item of evidence.⁵⁰ It is not error that the instructions imply that the land-owner is entitled to something, when the evidence of both sides concedes it.⁵¹ Instructions should not deal too much in general principles and abstract propositions, but

⁴⁵ *Neff v. Reed*, 98 Ind. 341.

⁴⁶ *Grayville & Mattoon R. R. Co. v. Christy*, 92 Ill. 337; *Bowman v. Carondelet Ry. Co.*, 102 Ill. 459; *Brown v. Ellis*, 26 Ia. 85; *Richardson v. Curtis*, 2 Cush. 341; *Pusey's Appeal*, 83 Pa. St. 67; *Williams' Executors v. Pittsburgh*, 83 Pa. St. 71; *Heyl v. Philadelphia*, 12 Phila. 291; *Abrahams v. Mayor etc. of London*, 37 L. J. Ch. 732; *Starr v. Same*, 7 L. R. Eq. Cas. 236; *Chicago etc. R. R. Co. v. Cicero*, 154 Ill. 656, 39 N. E. Rep. 574; *Friedenwald v. Baltimore*, 74 Md. 116, 21 Atl. Rep. 555; *Union Depot Co. v. Frederick*, 117 Mo. 138, 21 S. W. Rep. 1118, 1130; *Charleston etc. Bridge Co. v. Comstock*, 36 W. Va. 263, 15 S.

E. Rep. 69; *Convers v. Atchison etc. R. R. Co.*, 142 U. S. 671.

⁴⁷ *Springfield v. Sleeper*, 115 Mass. 587; *Burt v. Wigglesworth*, 117 Mass. 302. In *Giesy v. Cincinnati, W. & Z. R. R. Co.*, 4 Ohio St. 308, it was held that each owner was entitled to a separate trial, though the statute was silent on the subject.

⁴⁸ *Cook v. South Park Commissioners*, 61 Ill. 115; *Smith v. Chicago etc. R. R. Co.*, 105 Ill. 511; *Watson v. Milwaukee & Madison Ry. Co.*, 57 Wis. 332.

⁴⁹ *Dupuis v. Chicago & North Wisconsin Ry. Co.*, 115 Ill. 97.

⁵⁰ *Cross v. Plymouth*, 125 Mass. 557.

⁵¹ *Commissioners of Lyon Co. v. Kiser*, 26 Kan. 279.

should be applicable to the facts of the particular case.⁵² In regard to the law applicable to such cases, the reader is referred to the other chapters where the various questions are discussed.

§ 429. **Arbitration.**—Where the condemnation is by individuals or corporations, the question of damages may be settled by arbitration in the same manner as any other private dispute, and in such an arbitration the statutory forms need not be followed.⁵³ But in the case of condemnation on behalf of the public, where the mode of ascertaining the compensation is pointed out by statute, that mode must be pursued, and an arbitration is unauthorized.⁵⁴ A statute which provides for submitting to arbitration any “controversy which might be the subject of a personal action at law or of a suit in equity,” does not include a claim for damages under the flowage acts,⁵⁵ and a judgment rendered upon such an arbitration is not binding upon a subsequent grantee of the mill.⁵⁶ Where the matters in controversy in a condemnation proceeding are submitted to arbitration, it is held to work a discontinuance of the proceeding.⁵⁷

⁵² *Whitman v. Boston & Maine R. R. Co.*, 3 Allen, 133; *Otoe Co. v. Heys*, 19 Neb. 289.

⁵³ *Viele v. Troy & Boston R. R. Co.*, 20 N. Y. 184; *La Crosse & Milwaukee R. R. Co. v. Seeger*, 4 Wis. 268; *Collins v. South Staffordshire Ry. Co.*, 21 L. J. Ex. N. S. 247; *Odum v. Rutledge & J. R. Co.*, 94 Ala. 488, 10 S. E. Rep. 222; *Fitch v. Taft*, 126 Mass. 503; *Dalrymple v. Whitingham*, 26 Vt. 345; *Herring etc. R. R. Co.*, 5 Ont. 349; *Whitmore v. Smith*, 29 L. J. Ex. 402.

⁵⁴ *Eastman v. Stowe*, 37 Me. 86; *Parst v. Bayonne*, 39 N. J. L. 559; *McCann v. Otoe Co.*, 9 Neb.

324. The contrary is held in Connecticut. *Mallory v. Huntington*, 64 Conn. 88, 29 Atl. Rep. 245; *Bridgeport v. Eisenman*, 47 Conn. 34. Arbitration by municipalities is sometimes permitted by statute. *Anderson v. Ft. Worth*, 83 Tex. 107, 18 S. W. Rep. 483.

⁵⁵ *Henderson v. Adams*, 5 Cush. 610. But see *Gerdon v. Tucker*, 6 Me. 247.

⁵⁶ *Carpenter v. Spencer*, 2 Gray, 407.

⁵⁷ *Niagara Falls etc. R. R. Co. v. Brundage*, 7 App. Div. 445, 39 N. Y. Supp. 1048.

CHAPTER XIX.

EVIDENCE.

§ 430. **The general rules of evidence apply.**—In the trial of condemnation cases by a court or jury, the general rules of evidence apply, except as modified by the statute under which the proceedings are had.¹ It would be out of place, therefore, in this connection to do more than notice the questions which are peculiar to condemnation proceedings, referring the reader to the ordinary treatises on evidence for a discussion of those questions which are common to these and other proceedings alike.

§ 431. **Competency of evidence generally.**—It may be stated as a general rule that any evidence is competent which tends to prove or disprove the matters at issue. In nearly all condemnation proceedings the only matter at issue is the amount of just compensation or damages. The rules which apply in estimating the damages and the elements which should be included or excluded are discussed in the succeeding chapter. The evidence should conform to the rules there laid down. Whatever is a legitimate element of consideration in estimating the damages may be proved by proper evidence, and whatever is not legitimate cannot be proved. It is principally the mode of proof, and not the things to be proved, which forms the subject of consideration in this chapter.

§ 432. **The burden of proof.**—This subject has been fully discussed in the previous chapter, in considering the right to open and close the case.² In the section referred to it is shown that the authorities differ as to where the burden of proof lies, or as to who has the right to open and close the case. Where the burden of proof is on the owner, if no evidence is offered, the judgment should be for the peti-

¹ Farwell v. Chicago etc. R. Co., 52 Neb. 614. ² Ante, § 426.

tioner with nominal damages.³ In Illinois, where it is held that the burden is on the petitioner for condemnation, it is held that the burden of showing damages to the part not taken is on the owner, and that, if he offers evidence tending to show such damage, the petitioner may rebut it.⁴

§ 433. **Competency of witnesses generally.**—In regard to the competency of witnesses, the general rules apply. The disqualification of interest being now generally removed by statute, the question of competency seldom arises. Under the common law rule it has been held that petitioners for the improvement⁵ and stockholders in a railroad corporation seeking to condemn land⁶ were disqualified by interest. The fact that one has acted as a viewer does not render him incompetent.⁷ An objection to the competency of a witness must be made when he is offered, or it is waived.⁸

§ 434. **Limiting the number of witnesses.**—It is competent for the court to limit the number of witnesses which may be called to testify as to any particular fact or matter. This is frequently done in condemnation suits in respect of the question of value or damages.⁹ The matter is in the discretion of the trial court, whose action in the matter will not be interfered with except in cases of abuse.¹⁰ Limiting the number to five on each side was held proper in the cases cited.

§ 435. **Opinion of witnesses as to value.**—All the authorities, so far as they have come to our notice, agree that wit-

³ Matter of New York Bridge Co., 67 Barb. 295.

⁴ Chicago etc. R. R. Co. v. Phelps, 125 Ill. 482, 17 N. E. Rep. 769.

⁵ Watts v. Derry, 22 N. H. 498; Kennet's Petition, 24 N. H. 139.

⁶ Dearborn v. Boston etc. R. R. Co., 24 N. H. 179; Contra: Newcastle & Richmond R. R. Co. v. Brumback, 5 Ind. 543.

⁷ Plank Road Co. v. Thomas, 20 Pa. St. 91; Dorlan v. East

Brandywine etc. R. R. Co., 46 Pa. St. 520.

⁸ Watts v. Derry, 22 N. H. 498.

⁹ Union Railroad, Transfer and Stock Yard Co. v. Moore, 80 Ind. 458; Everett v. Union Pacific Ry. Co., 59 Ia. 243; Sheldon v. Minneapolis & St. Louis Ry. Co., 29 Minn. 318; Sixth Ave. R. R. Co. v. Metropolitan El. R. R. Co., 138 N. Y. 548, 34 N. E. Rep. 400; Preston v. Cedar Rapids, 95 Ia. 71, 63 N. W. Rep. 577.

¹⁰ Ibid.

nesses, having the necessary qualifications, may give their opinion as to the value of property.¹¹ Opinions should be confined to the property in question, unless on cross-examination for the purpose of testing the knowledge and com-

- ¹¹ St. Louis etc. R. R. Co. v. Anderson, 39 Ark. 167; Texas & St. Louis Ry. Co. v. Kirby, 44 Ark. 103; Little Rock Junction Ry. Co. v. Woodruff, 49 Ark. 381; Central Pacific R. R. Co. v. Pearson, 35 Cal. 247; Cincinnati & Georgia R. R. Co. v. Mims, 71 Ga. 240; Illinois & Wis. R. R. Co. v. Van Horn, 18 Ill. 257; Johnson v. Freeport & Miss. River Ry. Co., 111 Ill. 413; Chicago & Evanston R. R. Co. v. Blake, 116 Ill. 163; Evansville etc. R. R. Co. v. Cochran, 10 Ind. 560; Indianapolis etc. R. R. Co. v. Pugh, 85 Ind. 279; Yost v. Conroy, 92 Ind. 464; Watson v. Crowsore, 93 Ind. 220; Winkelman v. Des Moines North Western Ry. Co., 62 Ia. 11; McClean v. Chicago etc. Ry. Co., 67 Ia. 568; Kansas Central Ry. Co. v. Allen, 24 Kan. 33; Central Branch U. P. R. R. Co. v. Andrews, 37 Kan. 162; Snow v. Boston & Maine R. R. Co., 65 Me. 230; Shaw v. Charleston, 2 Gray, 107; West Newbury v. Chase, 5 Gray, 421; Hosmer v. Warner, 15 Gray, 46; Bennet v. Clemence, 6 Allen, 10; Shattuck v. Stoneham Branch R. R. Co., 6 Allen, 115; Pinkham v. Chelmsford, 109 Mass. 225; Sexton v. North Bridgewater, 116 Mass. 200; Hawkins v. Fall River, 119 Mass. 94; Winona & St. Peter R. R. Co. v. Waldron, 11 Minn. 515; Colvill v. St. Paul & Chicago Ry. Co., 19 Minn. 283; Lehmick v. St. Paul, Stillwater etc. R. R. Co., 19 Minn. 464; Curtis v. St. Paul etc. R. R. Co., 20 Minn. 28; Sherwood v. St. Paul & Chicago Ry. Co., 21 Minn. 127; County of Blue Earth v. St. Paul & Sioux City R. R. Co., 28 Minn. 503; Sherman v. St. Paul etc. Ry. Co., 30 Minn. 227; Hoshier v. Kansas City etc. R. R. Co., 60 Mo. 303; Randall v. Pacific R. R. Co., 65 Mo. 325; Springfield & Southern Ry. Co. v. Calkin, 90 Mo. 538; Republican Valley R. R. Co. v. Arnold, 13 Neb. 485; Same v. Linn, 15 Neb. 234; Troy & Boston R. R. Co. v. Northern Turnpike Co., 16 Barb. 100; Matter of Utica etc. R. R. Co., 56 Barb. 456; Matter of City of Rochester, 40 Hun 588; Cleveland etc. R. R. Co. v. Ball, 5 Ohio St. 568; Pennsylvania & New York R. R. Co. v. Bunnell, 81 Pa. St. 414; Pittsburg & Lake Erie R. R. Co. v. Robinson, 95 Pa. St. 426; Tingley v. Providence, 8 R. I. 493; Washburn v. Milwaukee & Lake Winnebago R. R. Co., 59 Wis. 364; Lehigh Valley Coal Co. v. Chicago, 26 Fed. Rep. 415; Denver etc. R. R. Co. v. Griffith, 17 Col. 598, 31 Pac. Rep. 171; Young v. Harrison, 21 Ga. 584; Logansport, 49 Ind. 493; Lafayette v. Nagle, 113 Ind. 425; Hire v. Knisley, 130 Ind. 295, 29 N. E. Rep. 1132; Florence etc. R. R. Co. v. Pember, 45 Kan. 625, 26 Pac. Rep. 1; Baltimore v. Brick Co., 80 Md. 458, 31 Atl. Rep. 423; Barnett v. St. An-

petency of the witness;¹² also to the question of market value, and not the value to the owner or for particular uses.¹³ Where a part only is taken, witnesses may state the value before and after the taking,¹⁴ or with and without the improvement,¹⁵ and may in all cases give the reasons upon which they base their opinions.¹⁶ But in giving their reasons they should not be allowed to go into the details of particular sales or transactions,¹⁷ though such details may be called out on cross-examination.¹⁸ Such opinions should, in general, be limited to the value of the property

thony etc. Co., 33 Minn. 265; Tate v. M. K. & T. R. R. Co., 64 Mo. 149; Nevada etc. R. R. Co. v. De Lissa, 103 Mo. 125, 15 S. W. Rep. 366; Kansas City etc. R. R. Co. v. Dawley, 50 Mo. App. 480; Chicago etc. R. R. Co. v. Mitchell, 159 Ill. 406, 42 N. E. Rep. 973; Mobile etc. R. R. Co. v. Riley, 119 Ala. 260, 24 So. Rep. 858.

¹² Wyman v. Lexington & West Cambridge R. R. Co., 13 Met. 316; Bennett v. Clemence, 6 Allen, 10; Kansas City etc. R. R. Co. v. Vickroy, 46 Kan. 248, 26 Pac. Rep. 698; Rand v. Newton, 6 Allen, 38; Colton v. New York El. R. R. Co., 7 Misc. 626, 28 N. Y. Supp. 149.

¹³ Young v. Harrison, 21 Ga. 584; St. Louis etc. R. R. Co. v. St. Louis Union Stock Yard Co., 120 Mo. 541, 25 S. W. Rep. 399.

¹⁴ Indianapolis etc. R. R. Co. v. Pugh, 85 Ind. 279; McClean v. Chicago etc. Ry. Co., 67 Ia. 568; Missouri River etc. R. R. Co. v. Owen, 8 Kan. 409; Kansas Central Ry. Co. v. Allen, 24 Kan. 33; West Newbury v. Chase, 5 Gray, 421; Curtis v. St. Paul etc. R. R. Co., 20 Minn. 28; Sherwood v. St. Paul & Chicago Ry. Co., 21 Minn.

127; Hosher v. Kansas City etc. R. R. Co., 60 Mo. 303; Randle v. Pacific R. R. Co., 65 Mo. 325; Pennsylvania & New York R. R. Co. v. Bunnell, 81 Pa. St. 414; Tingley v. Providence, 8 R. I. 493.

¹⁵ Yost v. Conroy, 92 Ind. 464; County of Blue Earth v. St. Paul & Sioux City R. R. Co., 28 Minn. 503.

¹⁶ Illinois & Wisconsin R. R. Co. v. Van Horn, 18 Ill. 257; McClean v. Chicago etc. Ry. Co., 67 Ia. 568; Sexton v. North Bridge-water, 116 Mass. 200; Burt v. Wigglesworth, 117 Mass. 302; Hawkins v. Fall River, 119 Mass. 94; Sawyer v. Boston, 144 Mass. 470; Chicago etc. R. R. Co. v. Cicero, 154 Ill. 656, 39 N. E. Rep. 574; Missouri Pac. R. R. Co. v. Dulany, 38 Kan. 246, 16 Pac. Rep. 343; St. Louis etc. R. R. Co. v. Lyman, 57 Ark. 512, 22 S. W. Rep. 170.

¹⁷ Central Pacific R. R. Co. v. Pearson, 35 Cal. 247; Hunt v. Boston, 152 Mass. 168, 25 N. E. Rep. 82.

¹⁸ Same and Dickenson v. Fitchburg, 13 Gray, 546; Chicago etc. R. R. Co. v. Stewart, 47 Kan. 704, 28 Pac. Rep. 1017.

at the time with reference to which its value is required to be estimated,¹⁹ but in one case an expert in values was allowed to give in evidence a set of values he had fixed on the property in question six months before and to read the same from a memorandum which he made at the time.²⁰ The jury are not bound by the opinions of the witnesses, but may consider them in connection with all other facts in evidence.²¹ In New York it is held that witnesses may not give opinions as to what property on a street would have been worth if an elevated railroad had not been built thereon, or in other words that witnesses must confine their opinions to the value of property in its actual condition and relations in the present or past.²²

§ 436. **Opinions as to the amount of damages or benefits.**—There is quite a conflict of authority as to whether witnesses may be allowed to state their opinions as to the amount of damage or benefit to property by reason of works constructed under the power of eminent domain. It is now held that such opinions are competent, by the courts of Arkansas,²³ California,²⁴ Illinois,²⁵ Maine,²⁶ Massachusetts,²⁷

¹⁹ Post, § 477; *Tedens v. Sanitary District*, 149 Ill. 87, 36 N. E. Rep. 1033; *Barnett v. St. Anthony etc. Co.*, 33 Minn. 265.

²⁰ *Cobb v. Boston*, 109 Mass. 438. And see *Colton v. New York El. R. R. Co.*, 7 Misc. 626, 28 N. Y. Supp. 149.

²¹ *Watson v. Crowsore*, 93 Ind. 220; *Green v. Chicago*, 97 Ill. 370; *Chicago etc. R. R. Co. v. Drake*, 46 Kan. 568, 26 Pac. Rep. 1039; *Pierce v. Boston*, 164 Mass. 92, 41 N. E. Rep. 227.

²² *McGean v. Manhattan R. R. Co.*, 117 N. Y. 219, 22 N. E. Rep. 957; *Roberts v. New York El. R. R. Co.*, 128 N. Y. 455, 28 N. E. Rep. 486; *Doyle v. Manhattan R. R. Co.*, 128 N. Y. 488, 28 N. E. Rep. 495; *Gray v. Manhattan R.*

R. Co., 128 N. Y. 499, 28 N. E. Rep. 498; *Kernochan v. New York El. R. R. Co.*, 130 N. Y. 651, 29 N. E. Rep. 245; *Crawford v. Metropolitan El. R. R. Co.*, 120 N. Y. 624, 24 N. E. Rep. 305; *Jefferson v. New York El. R. R. Co.*, 132 N. Y. 483, 30 N. E. Rep. 981; *Roosevelt v. New York El. R. R. Co.*, 57 N. Y. Supr. Ct. 438, 8 N. Y. Supp. 547; *Hamilton v. Manhattan R. R. Co.*, 58 N. Y. Supr. Ct. 17, 9 N. Y. Supp. 313; *Bohlen v. Metropolitan El. R. R. Co.*, 59 N. Y. Supr. Ct. 565, 14 N. Y. Supp. 378; *S. C. reversed* 133 N. Y. 677.

²³ *Texas & St. Louis Ry. Co. v. Kirby*, 44 Ark. 103; *Fayetteville etc. R. R. Co. v. Combs*, 51 Ark. 324, 11 S. W. Rep. 418.

Minnesota,²⁸ Missouri,²⁹ Oregon,³⁰ Pennsylvania,³¹ Texas,³² West Virginia,³³ and Wisconsin.³⁴ On the other hand such opinions are held to be incompetent in the States of Ala-

²⁴ *Eachus v. Los Angeles Consolidated El. R. R. Co.*, 103 Cal. 614, 37 Pac. Rep. 750.

²⁵ *Hays v. Ottawa etc. R. R. Co.*, 54 Ill. 373; *Galena & S. W. R. R. Co. v. Haslam*, 73 Ill. 494; *Keithsburg & East R. R. Co. v. Henry*, 79 Ill. 290; *Chicago v. McDonough*, 112 Ill. 85; *Spear v. Drainage Comrs.*, 113 Ill. 632; *East St. Louis v. O'Flynn*, 19 Ill. App. 64; *Chicago etc. R. R. Co. v. Nix*, 137 Ill. 141, 27 N. E. Rep. 81; *Illinois Cent. R. R. Co. v. Chicago*, 169 Ill. 329.

²⁶ *Snow v. Boston & Maine R. R. Co.*, 65 Me. 230.

²⁷ *Dwight v. County Comrs.*, 11 Cush. 201; *Shaw v. Charlestown*, 2 Gray, 107; *Shattuck v. Stoneham Branch R. R. Co.*, 6 Allen, 115; *Swan v. County of Middlesex*, 101 Mass. 173.

²⁸ *Simmons v. St. Paul & Chicago R. R. Co.*, 18 Minn. 184; *Colvill v. St. Paul & Chicago Ry. Co.*, 19 Minn. 283; *Lehmicke v. St. Paul, Stillwater etc. R. R. Co.*, 19 Minn. 464; *Curtis v. St. Paul etc. R. R. Co.*, 20 Minn. 28; *Sherwood v. St. Paul & Chicago Ry. Co.*, 21 Minn. 127; *Sherman v. St. Paul, M. & M. Ry. Co.*, 30 Minn. 227; *Emmons v. Minneapolis etc. R. R. Co.*, 40 Minn. 133, 42 N. W. Rep. 789; *Minnesota Belt Line R. R. Co. v. Gluck*, 45 Minn. 463, 48 N. W. Rep. 194.

²⁹ *Nevada & M. R. R. Co. v. De Lissa*, 103 Mo. 125, 15 S. W. Rep.

366; *Spencer v. Metropolitan St. R. R. Co.*, 120 Mo. 154, 23 S. W. Rep. 126; *St. Louis etc. R. R. Co. v. St. Louis Union Stock Yards Co.*, 120 Mo. 541, 25 S. W. Rep. 399; *Union Elevator Co. v. Kan. City Sub. Belt R. R. Co.*, 135 Mo. 353, 36 S. W. Rep. 1071.

³⁰ *Portland v. Kamm*, 10 Or. 383.

³¹ *White Deer Creek Improvement Co. v. Sassaman*, 67 Pa. St. 415; *Pittsburgh etc. R. R. Co. v. Robinson*, 95 Pa. St. 426; *Beck v. Pennsylvania etc. R. R. Co.*, 148 Pa. St. 271, 23 Atl. Rep. 900; *Dawson v. Pittsburgh*, 159 Pa. St. 317, 28 Atl. Rep. 171; *Lee v. Springfield Water Co.*, 176 Pa. St. 223, 35 Atl. Rep. 184.

³² *Telephone Telegraph Co. v. Forke*, 2 Tex. App. Civil Cas. p. 318; *Dallas etc. R. R. Co. v. Chennault*, 4 Tex. Ct. of App. 171, § 111.

³³ *Railroad Co. v. Foreman*, 24 W. Va. 662.

³⁴ *Snyder v. Western Union R. R. Co.*, 25 Wis. 60; *Parks v. Wisconsin Central R. R. Co.*, 33 Wis. 413; *Wooster v. Sugar River Valley R. R. Co.*, 57 Wis. 311; *Neilson v. Chicago, Mil. & N. W. Ry. Co.*, 58 Wis. 516; *Washburn v. Milwaukee & Lake Winnebago R. R. Co.*, 59 Wis. 364. Contra: *Ferrand v. Chicago & North Western Ry. Co.*, 21 Wis. 435; *Stowell v. Milwaukee*, 31 Wis. 523.

bama,³⁵ Georgia,³⁶ Indiana,³⁷ Iowa,³⁸ Kansas,³⁹ Nebraska,⁴⁰ New Jersey,⁴¹ New York,⁴² Ohio,⁴³ and Rhode Island,⁴⁴ and

³⁵ *Montgomery & West Point R. R. Co. v. Varner*, 19 Ala. 185; *Alabama & Florida R. R. Co. v. Burkett*, 42 Ala. 83.

³⁶ *Brunswick & Albany R. R. Co. v. McLaren*, 47 Ga. 546.

³⁷ *Evansville etc. R. R. Co. v. Fitzpatrick*, 10 Ind. 120; *Same v. Stringer*, 10 Ind. 551; *New Albany & Salem R. R. Co. v. Huff*, 19 Ind. 315; *Hagaman v. Moore*, 84 Ind. 496; *Yost v. Conroy*, 92 Ind. 464.

³⁸ *Dalzell v. Davenport*, 12 Ia. 437; *Prosser v. Wapello*, 18 Ia. 262; *Harrison v. Iowa Midland R. R. Co.*, 36 Ia. 323; *Noe v. Chicago etc. R. R. Co.*, 76 Ia. 360, 41 N. W. Rep. 42. But in *Ball v. Keokuk etc. R. R. Co.*, 74 Ia. 132, 37 N. W. Rep. 110, where a witness had stated the value of a farm before and after the construction of a railroad through it, it was held not to be error to permit him to state how much less it was worth per acre by reason of the railroad.

³⁹ *Parsons Water Co v. Knapp*, 33 Kan. 752; *Wichita R. R. Co. v. Kuhn*, 38 Kan. 675, 17 Pac. Rep. 322; *Leroy etc. R. R. Co. v. Ross*, 40 Kan. 398, 20 Pac. Rep. 197; *Ottawa etc. R. R. Co. v. Adolph*, 41 Kan. 600, 21 Pac. Rep. 643; *Chicago etc. R. R. Co. v. Dill*, 41 Kan. 736, 21 Pac. Rep. 778; *Chicago etc. R. R. Co. v. Muller*, 45 Kan. 85, 25 Pac. Rep. 210; *Chicago etc. R. R. Co. v. Neiman*, 45 Kan. 533, 26 Pac. Rep. 22; *Leavenworth etc. R. R. Co. v. Herley*, 45 Kan. 535, 26 Pac. Rep. 23; *contra: Leavenworth etc. Ry. Co. v.*

Paul, 28 Kan. 816. But it has been held that a witness, who has stated the value of property before a work or improvement is made, may state how much less it is worth afterwards. *Wichita etc. R. R. Co. v. Kuhn*, 38 Kan. 104, 16 Pac. Rep. 75; *Topeka v. Martineau*, 42 Kan. 387, 22 Pac. Rep. 417.

⁴⁰ *Fremont etc. R. R. Co. v. Whalen*, 11 Neb. 585; *Burlington & M. R. R. Co. v. Schluntz*, 14 Neb. 421; *Same v. Beebe*, 14 Neb. 463; *Fremont etc. R. R. Co. v. Marley*, 25 Neb. 138, 40 N. W. Rep. 948. But see *Republican Valley R. R. Co. v. Arnold*, 13 Neb. 485; *Same v. Hays*, *Ibid.* 489; *Omaha v. Kramer*, 25 Neb. 492, 41 N. W. Rep. 295; *Burlington etc. R. R. Co. v. White*, 28 Neb. 166, 44 N. W. Rep. 95.

⁴¹ *Thompson v. Pennsylvania R. R. Co.*, 51 N. J. L. 42, 15 Atl. Rep. 833.

⁴² *Roberts v. New York El. R. R. Co.*, 128 N. Y. 455, 28 N. E. Rep. 486; *McGean v. Manhattan R. R. Co.*, 117 N. Y. 219, 22 N. E. Rep. 957; *Matter of New York etc. R. R. Co.*, 29 Hun 609; *Pratt v. New York R. R. Co.*, 77 Hun 139; *Blumenthal v. New York El. R. R. Co.*, 60 N. Y. Supr. Ct. 95; *Blum v. Manhattan R. R. Co.*, 1 Misc. 119, 2 N. Y. Supp. 722; *Carter v. New York El. R. R. Co.*, 134 N. Y. 168, 31 N. E. Rep. 514. *Contra: Rochester etc. R. R. Co. v. Budlong*, 6 How. Pr. 467; *Same v. Same*, 10 How. Pr. 289; *Matter of Utica etc. R. R. Co.*, 56 Barb. 456; *Hine v. New*

in the territory of New Mexico.⁴⁵ In some of the latter States it has been held, and very likely is the practice in all of them, that witnesses may state the value before and after the taking or injury, or with or without the improvement.⁴⁶ This in effect permits the very thing to be done which is condemned, since the amount of damages or benefits, as the case may be, is then arrived at by the mere arithmetical process of subtraction. The law is supposed to discourage all indirect and circuitous methods. Why a witness should not be allowed to state at once and directly his opinion of the amount of damages or benefits in answer to a single question, instead of stating it indirectly in answer to two questions, we are unable to perceive.⁴⁷ The distinction attempted to be maintained between the two

York El. R. R. Co., 36 Hun 293; Schmidt v. N. Y. El. R. R. Co., 2 App. Div. 481, 37 N. Y. Supp. 1100.

⁴³ Atlantic etc. R. R. Co. v. Campbell, 4 Ohio St. 583; Cleveland etc. R. R. Co. v. Ball, 5 Ohio St. 568; Railway Co. v. Gardner, 45 Ohio St. 309, 13 N. E. Rep. 69. But see Miller v. Weber, 1 Ohio Circ. Ct. Rep. 130.

⁴⁴ Tingley v. Providence, 8 R. I. 493; Brown v. Providence & Springfield R. R. Co., 12 R. I. 238.

⁴⁵ New Mexican R. R. Co. v. Hendricks, 30 Pac. Rep. 901.

⁴⁶ Hagaman v. Moore, 84 Ind. 496; Yost v. Conroy, 92 Ind. 464; Dalzell v. Davenport, 12 Ia. 437; Harrison v. Iowa Midland Ry. Co., 36 Ia. 323; Missouri River etc. R. R. Co. v. Owen, 8 Kan. 409; Kansas Central Ry. Co. v. Allen, 24 Kan. 33; Atlantic etc. R. R. Co. v. Campbell, 4 Ohio St. 583; Tingley v. Providence, 8 R. I. 493; Ball v. Keokuk etc. R. R. Co., 74 Ia. 132, 37 N. W. Rep. 110; Leroy etc. R. R. Co. v. Ross,

40 Kan. 598, 20 Pac. Rep. 197; New Mexican R. R. Co. v. Hendricks (N. M.), 30 Pac. Rep. 901; Railway Co. v. Gardner, 45 Ohio St. 309.

⁴⁷ In Fayetteville etc. R. R. Co. v. Combs, 51 Ark. 324, 11 S. W. Rep. 418, the court says: "Opinions are confessedly admissible to prove the value of the land in question before and after the construction of the railway, but the extent of the injury is the difference between these values, and that difference is the result reached by the answer to the single question, what damage has the land sustained? It is only a question whether the witness or the jury shall perform the mental process of subtraction, and that can be of no judicial importance so long as the witness is required to show in advance such knowledge of the facts as to satisfy the judge that his opinion may be of value, and may be made to disclose the facts upon which it is based."

methods is without any substantial difference and must eventually be abandoned. This is clearly pointed out in an opinion of Selden, J., which we subjoin.⁴⁸ The true rule

⁴⁸ We quote from the opinion in *Rochester & Syracuse R. R. Co. v. Budlong*, 10 How. Pr. 289, 293: "But all this is merely preliminary to my main object, which is, to examine the foundation of the rule, so often repeated, and so frequently misunderstood, that while opinions are uniformly received upon a question of value, they can never be received upon a question of damages. It is clear, that in many cases the two questions are identical; that is, the amount of damages depends entirely upon a question of value. For instance, in an action upon the warranty of a horse, proved to have a certain defect warranted against, a witness competent to testify, may be asked, first, the value of the horse as he is; then, what would be his value in case he was as warranted—leaving to the jury the important intellectual process of subtracting the one from the other; or this process may be performed by the witness, who may then give the result. The difference constitutes the damages in the case. Why, then, may not the question be, what damages has the plaintiff sustained by reason of the breach of the defendant's warranty? It is certain that the answer, if correct, must be precisely the same as to the previous question; and yet the question in this form would be improper, for the reason that it involves a

question of law. Damages is a legal term; and the rule of damages is, in all cases, a question for the court; an answer to a question, as to the amount of damages in a suit, must necessarily assume what is the rule or measure of damages, and is therefore inadmissible. But, in the case supposed, if the question be so framed as to call for the difference in value of the horse, and nothing else, it is no objection to it that the word damages is used. As for instance, what is the amount of damage or injury to the horse, arising from the defect? It would be absurd to exclude this question, as calling for an opinion as to damages, and not as to value. The difference is merely verbal. There is clearly no such inherent distinction between questions of value and questions of damages, if you exclude from the latter all idea of any legal rule or measure of damages, as will bring one within and the other without the province of opinions from witnesses. Every one who has had much experience in judicial trials, knows, that in most cases brought for the recovery of unliquidated damages, the opinion of witnesses enters, of necessity, as a large ingredient into the evidence which enables the jury to estimate the damages. If the rule, that whenever opinions are resorted to, the fact upon which the witness bases his

would seem to be that a witness may give his opinion as to the amount of damages or benefits when the question relates simply to a difference in values, and opinions are admissible to prove the values. Witnesses have also been allowed to state what per cent. property was damaged or benefited by a public work or improvement.⁴⁹ Where property is affected in a variety of ways by the same improvement, as by constructing a railroad through it, it has been held improper to ask witnesses the effect of each particular element of damage or benefit, but that they should give their opinion in view of all combined.⁵⁰

§ 437. **Who are competent to give such opinions.**—This is a question the determination of which is left mostly to the discretion of the trial judge.⁵¹ There is no presumption that a witness is competent to give an opinion, and his competency must be shown.⁵² It must appear that he has some peculiar means of forming an intelligent and correct judgment as to the value of the property in question, or the effect upon it of a particular improvement, beyond what is pre-

opinion shall in all cases be given, were strictly observed, there would, I think, be far less hostility, both at the bar and on the bench, to their admission. Where this is done, the jury have all the means of forming an independent judgment, which the case affords, together with all the aid they can derive from the opinions of those conversant with the subject." See also Rogers on Expert Testimony, § 152.

⁴⁹ *Leavenworth etc. Ry. Co. v. Paul*, 28 Kan. 816; *Dawson v. Pittsburgh*, 159 Pa. St. 317, 28 Atl. Rep. 171.

⁵⁰ *Matter of New York, West Shore & Buffalo Ry. Co.*, 29 Hun 609; *Matter of Utica etc. R. R. Co.*, 56 Barb. 456.

⁵¹ *St. Louis etc. R. R. Co. v. Anderson*, 39 Ark. 167; *Texas & St. Louis Ry. Co. v. Kirby*, 44 Ark. 103; *Howard v. Providence*, 6 R. I. 514; *Warren v. Spencer Water Co.*, 143 Mass. 155; *Phillips v. Marblehead*, 148 Mass. 326, 19 N. E. Rep. 547; *Roberts v. Boston*, 149 Mass. 346, 21 N. E. Rep. 668; *Barnett v. St. Anthony etc. Co.*, 33 Minn. 265; *Papoosehek v. Winona etc. R. R. Co.*, 44 Minn. 195, 46 N. W. Rep. 329; *St. Louis etc. R. R. Co. v. Bradley*, 54 Fed. Rep. 630, 4 C. C. A. 528; *Montana R. R. Co. v. Warren*, 137 U. S. 348, 11 S. C. Rep. 96; *Manning v. Lowell*, 173 Mass. 100.

⁵² *Missouri Pacific Ry. Co. v. Coon*, 15 Neb. 232.

sumed to be possessed by men generally.⁵³ These peculiar means may consist in a general knowledge of values derived from buying and selling, valuing and managing real estate in the town or county where the particular property is situated;⁵⁴ or in a long acquaintance with the particular property and the neighborhood where it is situated, accompanied with the occupation or ownership of similar property,⁵⁵ and especially if accompanied with a knowledge of sales of similar property;⁵⁶ or in any other matter which the court can see gives the witness some peculiar advantage in forming a correct opinion. It is not necessary that the witnesses should have been engaged in the real estate business.⁵⁷ Intelligent men who have resided a long time in the place, and who are acquainted with the land in question and say they know its value, are competent, although they are merchants or farmers and have never bought or sold land in the place.⁵⁸ It is

⁵³ *Boston & Maine R. R. Co. v. Old Colony & Fall River R. R. Co.*, 3 Allen 142.

⁵⁴ *Central Branch U. P. R. R. Co. v. Andrews*, 37 Kan. 162; *Swan v. County of Middlesex*, 101 Mass. 173; *Amory v. Melrose*, 162 Mass. 556, 39 N. E. Rep. 276; *Ragan v. Kansas City etc. R. R. Co.*, 111 Mo. 456, 20 S. W. Rep. 234; *North Chester v. Eckfeldt*, 1 Monaghan (Pa. Supm.) 732; *Darlington v. Allegheney City*, 189 Pa. St. 202, 42 Atl. Rep. 112.

⁵⁵ *St. Louis etc. R. R. Co. v. Anderson*, 39 Ark. 167; *Keithsburg & East R. R. Co. v. Henry*, 79 Ill. 290; *Kansas Central Ry. Co. v. Allen*, 24 Kan. 33; *Johnson v. Freeport etc. Ry. Co.*, 111 Ill. 413; *Republican Valley R. R. Co. v. Arnold*, 13 Neb. 485; *Meyers v. Schuylkill Riv. E. S. R. R. Co.*, 5 Pa. Co. Ct. 634; *Chicago etc. R. R. Co. v. Buel*, 56 Neb. 205.

⁵⁶ *Walker v. Boston*, 8 Cush.

279; *West Newbury v. Chase*, 5 Gray 421; *Whitman v. Boston & Maine R. R. Co.*, 7 Allen 313; *Pinkham v. Chelmsford*, 109 Mass. 225; *McElheny v. McKeesport etc. Bridge Co.*, 153 Pa. St. 108, 25 Atl. Rep. 1021; *Mewes v. Crescent Pipe Line Co.*, 170 Pa. St. 364, 32 Atl. Rep. 1082.

⁵⁷ *Snodgrass v. Chicago*, 152 Ill. 600, 38 N. E. Rep. 790; *Stolze v. Manitowoc Terminal Co.*, 100 Wis. 208.

⁵⁸ *Cherokee v. S. C. & I. F. etc. Co.*, 52 Ia. 279; *Lehmicke v. St. Paul, Stillwater etc. R. R. Co.*, 19 Minn. 464; *Curtis v. St. Paul etc. R. R. Co.*, 20 Minn. 28; *Springfield & Southern Ry. Co. v. Calkins*, 90 Mo. 538; *Burlington etc. R. R. Co. v. Schluntz*, 14 Neb. 421; *San Diego Land & Town Co. v. Neale*, 78 Cal. 63, 20 Pac. Rep. 372; *City of Santa Ana v. Harlin*, 99 Cal. 538, 34 Pac. Rep. 224; *Orange Belt R. R. Co. v. Craver*, 32 Fla. 28, 13 So. Rep.

not necessary that one's opinion should be founded upon actual sales.⁵⁹ One who leased a building on the same street and sub-rented it, and who knew nothing more than one in his position naturally would, was held competent to testify as to the value of the lease, though he had not seen the building in question.⁶⁰ But a tenant of a building in Boston, a shoemaker by trade, who had merely rented five different buildings in different parts of the city, but had no other experience in real estate, was held incompetent to give an opinion of the value of the building he occupied.⁶¹ Later cases in the same State have held that the owner of prop-

444; Chicago etc. R. R. Co. v. Nix, 137 Ill. 141, 27 N. E. Rep. 81; Lafayette v. Nagle, 113 Ind. 425; Evansville etc. R. R. Co. v. Fetting, 130 Ind. 61, 29 N. E. Rep. 407; Ball v. Keokuk etc. R. R. Co., 74 Ia. 132, 37 N. W. Rep. 110; Pingrey v. Cherokee & D. R. R. Co., 78 Ia. 438, 43 N. W. Rep. 285; St. Louis etc. R. R. Co. v. Chapman, 38 Kan. 307, 16 Pac. Rep. 695; Leroy & W. R. R. Co. v. Hawk, 39 Kan. 638, 18 Pac. Rep. 943; Kansas City etc. R. R. Co. v. Baird, 41 Kan. 69, 21 Pac. Rep. 227; Chicago etc. R. R. Co. v. Casper, 42 Kan. 561, 22 Pac. Rep. 634; Chicago etc. R. R. Co. v. Mouriquand, 45 Kan. 170, 25 Pac. Rep. 567; Papooshek v. Winona etc. R. R. Co., 44 Minn. 195, 46 N. W. Rep. 329; Sioux City etc. R. R. Co. v. Weimer, 16 Neb. 272; Northeastern Neb. R. R. Co. v. Frazier, 25 Neb. 53, 40 N. W. Rep. 609; Blakeley v. Chicago etc. R. R. Co., 25 Neb. 207, 40 N. W. Rep. 956; Montana R. R. Co. v. Warren, 137 U. S. 348, 11 S. C. Rep. 96; St. Louis etc. R. R. Co. v. Bradley, 4 C. C. A. 528, 54 Fed. Rep. 630; Chicago etc. R. R. Co. v. Shafer, 49 Neb. 25, 68 N. W.

Rep. 342; Lewis v. Springfield Water Co., 176 Pa. St. 230, 35 Atl. Rep. 186; Galbraith v. Phila. Co., 2 Pa. Supr. 359; Sewell v. Chicago Terminal Trans. R. R. Co., 177 Ill. 93, 52 N. E. Rep. 302. Contra: Buffum v. New York & Boston R. R. Co., 4 R. I. 221; and see last two notes. In Jacksonville etc. R. R. Co. v. Caldwell, 21 Ill. 75, it is said that, in estimating the damages for taking a right of way through a farm, more weight should be given to the evidence of farmers than to the evidence of persons in other pursuits. In Brown v. Providence & Springfield R. R. Co., 12 R. I. 238, it was held that farmers were only competent to say how much land was worth for farming purposes, and not to say what it was worth generally.

⁵⁹ Chicago & Evanston R. R. Co. v. Blake, 116 Ill. 163; Montana Ry. Co. v. Warren, 6 Mon. 275; Montana R. R. Co. v. Warren, 137 U. S. 348, 11 S. C. Rep. 96.
⁶⁰ Lawrence v. Boston, 119 Mass. 126.

⁶¹ Whitney v. Boston, 98 Mass. 312.

erty was competent to testify as to its value, without showing any expert knowledge.⁶² One who has been assessor, and whose duties require him to assess the property in question and other property in the neighborhood, is competent to give an opinion.⁶³ His position and duties qualify him to form a correct opinion in such matters. A witness who had only seen part of the land in question on two occasions, and who stated that he was not much acquainted with it, was held incompetent.⁶⁴ Witnesses who have not seen the land in question,⁶⁵ or who confess that they do not know its market value,⁶⁶ are incompetent. A farmer is competent to testify as to the value of crops,⁶⁷ but not as to the effect upon land by reason of exposure to fire from passing locomotives.⁶⁸ A witness who has had experience in renting and fitting buildings, for lodge purposes, may testify as to the value of a leasehold to be used exclusively for such purposes.⁶⁹ A witness, who owned land and had re-

⁶² *Lincoln v. Commonwealth*, 164 Mass. 368, 41 N. E. Rep. 489; *Blaney v. City of Salem*, 160 Mass. 303, 35 N. E. Rep. 858.

⁶³ *North Chester v. Eckfeldt*, 1 Monaghan (Pa. Supm.) 732; *Dickenson v. Fitchburg*, 13 Gray, 546; *Whitman v. Boston & Maine R. R. Co.*, 7 Allen, 313; *Sexton v. North Bridgewater*, 116 Mass. 200; *Chandler v. Jamaica Pond Aqueduct Co.*, 125 Mass. 544. In the last case it was held that it might be shown, by way of establishing competency, that the witness had testified frequently in such cases.

⁶⁴ *Pittsburgh etc. R. R. Co. v. Vance*, 115 Pa. St. 325.

⁶⁵ *San Diego Land & Town Co. v. Neale*, 88 Cal. 50, 25 Pac. Rep. 977; *Kansas City etc. R. R. Co. v. Dawley*, 50 Mo. App. 480; *Mewes v. Crescent Pipe-Line Co.*, 170 Pa. St. 364, 32 Atl. Rep.

1082; *Mewes' Admr. v. Crescent Pipe-Line Co.*, 170 Pa. St. 369, 32 Atl. Rep. 1083; *Pennock v. Crescent Pipe-Line Co.*, 170 Pa. St. 372, 32 Atl. Rep. 1085; *Metropolitan W. S. El. R. R. Co. v. Dickinson*, 161 Ill. 22, 43 N. E. Rep. 706.

⁶⁶ *Chicago etc. R. R. Co. v. Easley*, 46 Kan. 337, 26 Pac. Rep. 731; *Chicago etc. R. R. Co. v. Stewart*, 50 Kan. 33, 31 Pac. Rep. 668; *Gorgas v. Philadelphia etc. R. R. Co.*, 144 Pa. St. 1, 22 Atl. Rep. 715; *Seattle & M. R. R. Co. v. Gilchrist*, 4 Wash. 509, 30 Pac. Rep. 738.

⁶⁷ *St. Louis etc. R. R. Co. v. Lyman*, 57 Ark. 512, 22 S. W. Rep. 170.

⁶⁸ *Pennsylvania etc. R. R. Co. v. Root*, 53 N. J. L. 253, 21 Atl. Rep. 285.

⁶⁹ *Boteler v. Philadelphia etc.*

sided many years in the vicinity of a mill, who was familiar with the values of real estate, and who had examined the mill with a view to ascertaining its value, but who had never bought, sold, owned or operated a mill, was held incompetent to give an opinion as to the value of the mill.⁷⁰ A real estate dealer in Boston, who dealt in lands on streets leading to Brookline and had a general knowledge of lands and prices therein, but who had never bought or sold lands in Brookline or lived there and who had never been on the land in question situated in that suburb, was held incompetent to testify as to the value of such land.⁷¹ A witness with but little experience was allowed to give his opinion as to the value of sufficient water to supply the plaintiff's meadow for raising cranberries.⁷²

The value of such opinions depends upon the intelligence of the witness and the knowledge and experience which he possesses in such matters,⁷³ and is in all cases a question for the jury.⁷⁴

§ 438. **Opinions of witnesses as to other matters.**—Opinions of witnesses as to the necessity or public utility of the proposed taking or improvement are not admissible.⁷⁵ But one who is familiar with all the facts and has shown himself competent to judge may give his opinion as to the probable effect upon the public health of a proposed work, such as a

R. R. Co., 164 Pa. St. 397, 30 Atl. Rep. 303.

⁷⁰ Clark v. Rockland Water Co., 52 Me. 68. See Illinois Cent. R. R. Co. v. Chicago, 169 Ill. 329; Bergen Neck R. R. Co. v. Point Breeze F. & I. Co., 57 N. J. L. 163, 30 Atl. Rep. 584.

⁷¹ Benton v. Brookline, 151 Mass. 250, 23 N. E. Rep. 846. Compare Lyman v. Boston, 164 Mass. 99, 41 N. E. Rep. 127.

⁷² Warren v. Spencer Water Co., 143 Mass. 155.

⁷³ Lehigh Valley Coal Co. v. Chicago, 26 Fed. Rep. 415; San

Diego Land & Town Co. v. Neale, 88 Cal. 50, 25 Pac. Rep. 977; Ohio Valley R. & T. Co. v. Kerth, 130 Ind. 314, 30 N. E. Rep. 298.

⁷⁴ Johnson v. Freeport etc. Ry. Co., 111 Ill. 413; Pittsburgh etc. R. R. Co. v. Robinson, 95 Pa. St. 426; Papooshek v. Winona etc. R. R. Co., 44 Minn. 195, 46 N. W. Rep. 329; Mewes v. Crescent Pipe Line Co., 170 Pa. St. 364, 32 Atl. Rep. 1083.

⁷⁵ Loshbaugh v. Birdsell, 90 Ind. 466; Dillman v. Crooks, 91 Ind. 158; Yost v. Conroy, 92 Ind. 464; Thompson v. Deprez, 96 Ind.

drain or dam.⁷⁶ A grazier may give his opinion as to the effects upon cattle of their being disturbed by the operation of a railroad through the pasture where they are kept.⁷⁷ An engineer who has made a study of such things may testify as to the probable effect of enlarging and raising a reservoir upon adjoining land, as respects rendering it damp and unfit for building.⁷⁸ One need not necessarily be a civil engineer to be competent to testify as to the effect of a railroad bridge to obstruct the flow of water.⁷⁹ Opinions are not admissible as to the amount of damage to a farm by a railroad along the bank of a river, which prevented access for purpose of fishing.⁸⁰ Opinions as to whether certain land would be available for town lots were held incompetent.⁸¹ But it has also been held that an owner may show to what use his land is adapted, and in proper cases may resort to expert evidence for that purpose.⁸² It has been held that a witness may give his experience, observation and knowledge as to how an elevated railroad affects adjacent property generally.⁸³ A witness may give his opinion as to the

67; *People v. Burton*, 65 N. Y. 452; *Grand Rapids v. Bennett*, 106 Mich. 528, 64 N. W. Rep. 585.

⁷⁶ *Burnett v. Meehan*, 83 Ind. 566; *Taft v. Commonwealth*, 158 Mass. 526, 33 N. E. Rep. 1046.

⁷⁷ *Baltimore & Ohio R. R. Co. v. Thompson*, 10 Md. 76.

⁷⁸ *Chandler v. Jamaica Pond Aqueduct Co.*, 125 Mass. 544.

⁷⁹ *Noe v. Chicago etc. R. R. Co.*, 76 Ia. 360, 41 N. W. Rep. 42; *St. Louis etc. R. R. Co. v. Bradley*, 54 Fed. Rep. 630, 4 C. C. A. 528. But one who is not an expert cannot testify as to the capacity of ditches to take off water or as to the amount of land that will be flooded by reason of the construction of a railroad in a particular manner through a tract. *Chicago etc. R. R. Co. v.*

Donelson, 45 Kan. 189, 28 Pac. Rep. 584. To same effect: *St. Louis etc. R. R. Co. v. Yarbrough*, 56 Ark. 612, 20 S. W. Rep. 515.

⁸⁰ *Boston etc. R. R. Co. v. Montgomery*, 119 Mass. 114.

⁸¹ *Cedar Rapids etc. R. R. Co. v. Ryan*, 37 Minn. 38, 34 N. W. Rep. 222. And see *Currie v. Waverly etc. R. R. Co.*, 52 N. J. L. 381, 20 Atl. Rep. 56.

⁸² *Packard v. Bergen Neck R. R. Co.*, 54 N. J. L. 553, 25 Atl. Rep. 506. And see *Blaney v. Salem*, 160 Mass. 303, 35 N. E. Rep. 858.

⁸³ *Metropolitan W. S. El. R. R. Co. v. White*, 166 Ill. 375, 46 N. E. Rep. 978. See *Flynn v. Kings Co. El. R. R. Co.*, 3 App. Div. 254, 38 N. Y. Supp. 204.

cause of the depreciation of property on a street where there is an elevated railroad.⁸⁴

In a recent case it is said: "In this class of cases it is quite improper to permit expert witnesses to speculate as to the facts and then base a speculative opinion upon the facts. Such witnesses may give opinions as to the present or past value of property based upon facts which they have observed, and they may give opinions on other matters which are the proper subject of expert evidence based upon facts known to them or proved by competent evidence; and thus there will be a sufficient range for expert evidence. So far as possible facts should be placed before the triers of fact and their unbiased, disinterested inferences from the facts, and opinions upon the facts, will serve the ends of justice much better than the prejudiced opinions of hired experts."⁸⁵

§ 439. **Admissions.**—In regard to the proof of admissions of the parties, the same general rules apply as in other cases. It is competent to prove the declarations of the owner of the property in question as to its value⁸⁶ and the price at which he has offered to sell it,⁸⁷ and other admissions which are pertinent to the issue.⁸⁸ But such declarations, to be competent, should be so recent in point of time as to be presumptively applicable at the time of the taking.⁸⁹ A witness cannot state his impressions as to what the owner has said concerning the value of his property.⁹⁰ In a suit by a lessee

⁸⁴ *Gordon v. Kings County El. R. R. Co.*, 23 N. Y. App. Div. 51.

⁸⁵ *Doyle v. Manhattan R. R. Co.*, 128 N. Y. 488, 28 N. E. Rep. 495.

⁸⁶ *Central Branch U. P. R. R. Co. v. Andrews*, 37 Kan. 162. But such admissions must be duly proven. Memoranda made by a bank on the plaintiff's application for a loan, are not admissible against him. *Skelly v. New York El. R. R. Co.*, 7 Misc. 88, 27 N. Y. Supp. 304.

⁸⁷ *East Brandywine etc. R. R. Co. v. Ranck*, 78 Pa. St. 454.

⁸⁸ *Hobart v. County of Plymouth*, 100 Mass. 159; *Paine v. Woods*, 108 Mass. 160; *Patch v. Boston*, 146 Mass. 52; *Taylor v. Bay City St. R. R. Co.*, 101 Mich. 140, 59 N. W. Rep. 447.

⁸⁹ *Central Branch U. P. R. R. Co. v. Andrews*, 37 Kan. 162.

⁹⁰ *Matter of New York, West Shore & Buffalo R. R. Co.* 33 Hun 231.

for damages by reason of widening a street, statements of the landlord, who had settled with the city and agreed to save it harmless from all claims by the tenants, cannot be proved as admissions, since he is not a party to the proceeding.⁹¹ An owner agreed to release damages to his property by reason of widening a street, in consideration of certain alterations being made in the street. Alterations were made, but not according to the agreement. In a suit by the owner it was held that the release was admissible, not as a release of damages, but as tending to show that alterations similar to those actually made were regarded by the owner as beneficial.⁹² In a railroad case it was held incompetent to show that the owner had once offered to donate his land if the company would locate its road where he wanted it.⁹³ In a similar case it was held incompetent to prove that, after the proceedings were commenced, the company offered and an agent of the owner agreed to accept a certain price for the property.⁹⁴ Admissions made by the officers and agents of corporations are competent evidence against such corporations, provided such officers and agents had authority in that behalf.⁹⁵

§ 440. **Whether the owner must prove his title.**—Where the owner takes the initiative and institutes proceedings under the statute for an assessment of damages, or brings a suit at common law for the same purpose, he must prove his title, unless it is admitted by the proceedings,¹ as that lies at the foundation of the suit or proceedings.² Possession alone is sufficient to enable one to maintain a suit or

⁹¹ *Lawrence v. Boston*, 119 Mass. 126.

⁹² *Chase v. Worcester*, 108 Mass. 60.

⁹³ *East Pennsylvania R. R. Co. v. Hiester*, 40 Pa. St. 53.

⁹⁴ *Chicago, Evanston & Lake Superior R. R. Co. v. Catholic Bishop of Chicago*, 119 Ill. 525.

⁹⁵ *Lake Shore etc. R. R. Co. v. Baltimore etc. R. R. Co.*, 149 Ill. 272, 37 N. E. Rep. 91; *Wellington*

v. Boston & M. R. R. Co., 158 Mass. 185, 33 N. E. Rep. 393.

¹ *Benson v. Soule*, 32 Me. 39.

² *La Fayette v. Wortman*, 107 Ind. 404; *Costello v. Burke*, 63 Ia. 361; *Waltmeyer v. Wisconsin etc. Ry. Co.*, 71 Ia. 626; *Jones' Heirs v. Barclay*, 2 J. J. Marsh. Ky. 73; *Nelson v. Butterfield*, 21 Me. 220; *Minot v. Cumberland County Comrs.*, 28 Me. 121; *Thurston v. Portland*, 63 Me. 149;

proceeding for an injury which affects the possession, but not for the value of the property or injury to the fee.³

When proceedings are instituted by the party condemning, the question of title is not usually submitted to the tribunal which assesses the damages or passes on the questions of necessity or public utility.⁴ The condition of the title is either ascertained beforehand and persons made parties and notified as the owners of particular interests, or, if this cannot be done, all persons interested are brought in by a general notice to all whom it may concern. In the former case title is admitted,⁵ in the latter, either the owners appear and show their various interests and titles and claim damages accordingly, or the damages are assessed and deposited and the owner obtains them by making proof of his title, as may be required by law.⁶ An issue of title may be made and decided if necessary.⁷

§ 441. **Estoppel to deny title.**—Where proceedings are instituted by the party seeking to condemn the property, and it is alleged in the petition that certain persons are owners of the property desired, proof of title is dispensed with and the petitioner is estopped to dispute the title as alleged in the petition.⁸ If a mistake is made, the petition

Brainard v. Boston & New York Central R. R. Co., 12 Gray 407; *Tufts v. Charlestown*, 117 Mass. 401; *Directors of the Poor v. Railroad Co.*, 7 W. & S. 236; *Philadelphia & Reading R. R. Co. v. Obert*, 109 Pa. St. 193; *Robbins v. Milwaukee & Horicon R. R. Co.*, 6 Wis. 636; *Winchester v. Stevens Point*, 58 Wis. 350.

³ *King v. Tarlton*, 2 Harris & McH. (Md.) 473; *Trustees of State Lunatic Asylum v. County of Worcester*, 1 Met. 437; *Pace v. Freeman*, 10 Ired. L. 103.

⁴ *Norristown etc. Turnpike Co. v. Burkett*, 26 Ind. 53; *Spring Valley Water Works v. San*

Francisco, 22 Cal. 434; *Galveston H. & S. A. etc. R. R. Co. v. Mud Creek etc. Co.*, 1 Tex. App. Civil Cas. p. 169; *Ft. Worth & Denver City Ry. Co. v. Hogsett*, *Ibid.* p. 200; *Appeal of Lefevre*, 32 Cal. 565; *Queen v. London & Northwestern Ry. Co.*, 23 L. J. Q. B. N. S. 185; *Rippe v. Chicago etc. R. R. Co.*, 23 Minn. 18.

⁵ See post, § 441.

⁶ *Bentonville R. R. Co. v. Stroud*, 45 Ark. 278.

⁷ *G. B. & L. Ry. Co. v. Haggart*, 9 Col. 346; *Lawrence R. R. Co. v. O'Hara*, 48 Ohio St. 343, 28 N. E. Rep. 175.

⁸ *Mount Sterling v. Givens*, 17 Ill. 255; *Peoria etc. Ry. Co. v.*

should be amended or the proceedings abandoned.⁹ If there is any doubt about the title, the allegation should not be made in positive terms. It may be stated that certain persons claim to be owners, or that the owners are unknown. The city of San Jose filed a petition to condemn certain property for a street, alleging that the defendant was the only owner. It was held to be estopped by its petition from showing that the land in question had been dedicated as a street for the purpose of affecting the damages. If it claims a dedication, it should proceed for obstructing the street.¹⁰ In general a party cannot proceed to condemn land or the property of another and then in that same proceeding set up a paramount right or title in itself, either by prescription, dedication or otherwise.¹¹ On a petition for the reassessment of damages by a dam, the owner of the dam is estopped by the prior judgment, from setting up a right by prescription prior to such judgment.¹²

§ 442. **What is sufficient proof of title.**—Whenever it is necessary for the owner to prove title, a prima facie case is made out by proving possession under a deed purporting to

Bryant, 57 Ill. 473; Peoria etc. R. R. Co. v. Lansie, 63 Ill. 264; Metropolitan City Ry. Co. v. Chicago West Div. Ry. Co., 87 Ill. 317; Bensley v. Mountain Lake Water Co., 13 Cal. 306; San Jose v. Reed, 65 Cal. 241; Republican Valley R. R. Co. v. Hayes, 13 Neb. 489; Omaha etc. R. R. Co. v. Gerrard, 17 Neb. 587; Bentonville R. R. Co. v. Stroud, 45 Ark. 278; G. B. & L. Ry. Co. v. Haggart, 9 Col. 346; Wilcox v. St. Paul & Northern Pacific Ry. Co., 35 Minn. 439; Wright v. Town of Butler, 64 Mo. 165; Dietrichs v. Lincoln etc. R. R. Co., 14 Neb. 355. Where a railroad company was required by its charter to name the owners of land, so far as they could be ascertained, in

the report of its location, it was held that it was not estopped to dispute the title of one so named as owner. Allyn v. Providence etc. R. R. Co., 4 R. I. 457.

⁹ Wilcox v. St. Paul & Northern Pacific Ry. Co., 35 Minn. 439.

¹⁰ San Jose v. Reed, 65 Cal. 241; also Board of Commissioners v. Bisby, 37 Kan. 253.

¹¹ Colorado M. R. R. Co. v. Croman, 16 Col. 381, 27 Pac. Rep. 256; Chicago v. Hill, 124 Ill. 646; In re City of New Orleans, 20 La. An. 394; Olean v. Streynier, 135 N. Y. 341, 32 N. E. Rep. 9; In re City of Yonkers, 117 N. Y. 564, 23 N. E. Rep. 661.

¹² Hersey v. Packard, 56 Me. 395; Adams v. Pearson, 7 Pick. 341.

convey a fee,¹³ or even by proving possession claiming title.¹⁴ Where the title is not put in issue it is held that the owner may testify orally as to his ownership.¹⁵ Where deeds have been introduced for the purpose of showing title, it is held in Illinois that the jury was to take into account the consideration named therein, in fixing the value or damages.¹⁶

§ 443. **Proving sales of similar property.**—The propriety of allowing proof of the sales of similar property to that in question, made at or about the time of the taking, is almost universally approved by the authorities.¹⁷ But such

¹³ *Kansas City Sub. Belt R. R. Co. v. Norcross*, 137 Mo. 415; *Atlanta v. Wood*, 78 Ga. 276; *Hughes v. Metropolitan El. R. R. Co.*, 130 N. Y. 14, 28 N. E. Rep. 765. *Williamson v. Carlton*, 51 Me. 449; *Whitman v. Boston & Maine R. R. Co.*, 3 Allen 133; *Swenson v. Lexington*, 69 Mo. 157; *Carl v. Sheboygan & Fond du Lac R. R. Co.*, 46 Wis. 625; *Benton v. Milwaukee*, 50 Wis. 368. See Wisconsin cases cited in next note. A deed alone, without showing possession in the grantor, or possession under it, is insufficient. *La Fayette v. Wortman*, 107 Ind. 404. Where title is shown to be in B, a deed purporting to be from the heirs of B is not sufficient without proof of heirship. *Costello v. Burke*, 63 Ia. 361.

¹⁴ *Morrison v. Hinkson*, 87 Ill. 587; *St. Paul & Sioux City R. R. Co. v. Matthews*, 16 Minn. 341; *Sherwood v. St. Paul & Chicago Ry. Co.*, 21 Minn. 127; *Burlington & Mo. Riv. R. R. Co. v. Beebe*, 14 Neb. 463; *Lawrence Railroad Co. v. Cobb*, 35 Ohio St. 94; *Commissioners of Kensington v. Wood*, 10 Pa. St. 93; *Shoenber-*

ger v. Mulhollan, 8 Pa. St. 134. Contra: *Robbins v. Milwaukee & Horicon R. R. Co.*, 6 Wis. 636; *Winchester v. Stevens Point*, 58 Wis. 350. In the latter case both sides of the question are elaborately discussed in an opinion of the court and in a dissenting opinion. *Ham v. Wisconsin etc. Ry. Co.*, 61 Ia. 716, also favors the text.

¹⁵ *Chicago etc. R. R. Co. v. Grovier*, 41 Kan. 685, 21 Pac. Rep. 779; *Bexar County v. Terrell (Tex.)*, 14 S. W. Rep. 62.

¹⁶ *Jones v. Chicago etc. R. R. Co.*, 68 Ill. 380; but see *Seefeld v. Chicago, Milwaukee & St. Paul Ry. Co.*, 67 Wis. 96.

¹⁷ Illinois.—*St. Louis etc. R. R. Co. v. Haller*, 82 Ill. 208; *Culbertson & Blair Packing and Provision Co. v. Chicago*, 111 Ill. 651; *Concordia Cem. Assn. v. Minnesota etc. R. R. Co.*, 121 Ill. 199.

Iowa.—*Cherokee v. S. C. & I. F. etc. Co.*, 52 Ia. 279. The right to make such proof is indirectly approved in the following Iowa cases, by rulings approving its rejection in particular cases upon other grounds than its en-

evidence is held to be wholly incompetent in Pennsylvania.¹⁸ A late case in Minnesota adopts the Pennsylvania doc-

ture incompetency. *King v. Iowa Midland R. R. Co.*, 34 Ia. 458; *Everett v. Union Pacific Ry. Co.*, 59 Ia. 243; *Winklemans v. Des Moines Northwestern Ry. Co.*, 62 Ia. 11; *Cummings v. Des Moines & St. Louis Ry. Co.*, 63 Ia. 397; *Hollingsworth v. Same*, 63 Ia. 443.

Kansas.—*Chicago etc. R. R. Co. v. Emery*, 51 Kan. 16, 32 Pac. Rep. 631.

Maryland.—*Mayor etc. of Baltimore v. Smith & S Brick Co.*, 80 Md. 458, 31 Atl. Rep. 423.

Massachusetts.—*Paine v. Boston*, 4 Allen 168; *Shattuck v. Stoneham Branch R. R. Co.*, 6 Allen 115; *Benham v. Dunbar*, 103 Mass. 365; *Chandler v. Jamaica Pond Aqueduct Co.*, 122 Mass. 305; *Gardner v. Brookline*, 127 Mass. 358; *Sawyer v. Boston*, 144 Mass. 470; *Patch v. Boston*, 146 Mass. 52; *Roberts v. Boston*, 149 Mass. 346, 21 N. E. Rep. 668; *Hunt v. Boston*, 152 Mass. 168, 25 N. E. Rep. 82.

Missouri.—*St. Louis etc. R. R. Co. v. Clark*, 121 Mo. 169, 25 S. W. Rep. 192; *Markowitz v. Kansas City*, 125 Mo. 485, 28 S. W. Rep. 642; *Forsyth Boulevard v. Forsyth*, 127 Mo. 417, 30 S. W. Rep. 188.

New Hampshire.—*March v. Portsmouth & Concord R. R. Co.*, 19 N. H. 372; *Concord R. R. Co. v. Greely*, 23 N. H. 237.

New York.—*Matter of New York, Lackawanna & Western Ry. Co. v. Arnot*, 27 Hun 151; *Hadden v. Metropolitan El. R. R.*

Co., 75 Hun 63, 26 N. Y. Supp. 995.

Washington.—*Seattle & M. R. R. Co. v. Gilchrist*, 4 Wash. 509, 30 Pac. Rep. 738.

Wisconsin.—*West v. Milwaukee etc. Ry. Co.*, 56 Wis. 318; *Watson v. Milwaukee & Madison Ry. Co.*, 57 Wis. 332; *Washburn v. Milwaukee & Lake Winnebago R. R. Co.*, 59 Wis. 364; *Stolze v. Manitowoc Terminal R. R. Co.*, 100 Wis. 208.

Federal.—*Lafin v. Chicago etc. R. R. Co.*, 33 Fed. Rep. 415.

¹⁸ *Becker v. Phila. etc. R. R. Co.*, 177 Pa. St. 252, 35 Atl. Rep. 617; *East Pennsylvania R. R. Co. v. Hiester*, 40 Pa. St. 53; *Hays v. Briggs*, 74 Pa. St. 373; *Pennsylvania & New York R. R. Co. v. Bunnell*, 81 Pa. St. 414; *Pittsburgh, Va. & C. Ry. Co. v. Vance*, 115 Pa. St. 325; *Pittsburgh & Western R. R. Co. v. Patterson*, 107 Pa. St. 461, 464. In the last case the court say: "It is well settled by numerous decisions of this court, that the proper measure of damages for lands taken for railroad purposes is the difference between the market value of the land before and after the appropriation of the right of way; and it seems to be equally well settled under the law of this State, that evidence of particular sales of alleged similar properties, under special circumstances, is inadmissible to establish market value; *Searle v. Lackawanna R. R. Co.*, 9 Casey, 57; *Railroad Co. v. Hiester*, 4

trine,¹⁹ although in an earlier case the admission of such testimony was referred to and the practice not commented upon.²⁰

In regard to the degree of similarity which must exist, between the property concerning which such proof is offered and the property taken, and the nearness in respect of time and distance, no general rules can be laid down. These are matters with which the trial judge is usually conversant, and they must rest largely in his discretion.²¹ A reference to some of the decided cases will perhaps best illustrate

Wright, 53; Railroad Co. v. Rose, 24 P. F. S. 362; Hays v. Briggs, 24 P. F. S. 373; Vanderslice v. City of Philadelphia, 7 Out. 102. The cases cited determine the question here raised, so directly, that any extended discussion of it here would be a mere repetition of what is there fully stated. The selling price of lands in the neighborhood at the time, is undoubtedly a test value, but it is the general selling price, not the price paid for particular property. The location of the land, its uses and products, and the general selling price in the vicinity, are the data from which a jury may determine the market value. The price which, upon a consideration of the matters stated, the judgment of well-informed and reasonable men will approve is the market value. A particular sale may be a sacrifice compelled by necessity, or it may be the result of mere caprice or folly; if it be given in evidence, it raises an issue collateral to the subject of inquiry, and these collateral issues are as numerous as the sales. The offer was to show particular sales, made about the time of the location

of the railroad and since, of properties alleged to possess similar qualities, and equal facilities as landings; the consideration of each of such sales, therefore, involved necessarily not only the collateral issues already stated, but also a comparison of these various properties, with that in question, as well as with each other. Such a course of examination must inevitably lead rather to the confusion than to the enlightenment of the jury, on the single matter for consideration. The introduction of evidence of particular sales is therefore not allowable under our decisions to establish market value."

¹⁹ Stinson v. Chicago etc. Ry. Co., 27 Minn. 284. See also Chicago etc. R. R. Co. v. Griffith, 44 Neb. 690, 62 N. W. Rep. 868.

²⁰ Lehmicke v. St. Paul, Stillwater etc. R. R. Co., 19 Minn. 464.

²¹ Chandler v. Jamaica Pond Aqueduct Co., 122 Mass. 305; Amory v. Melrose, 162 Pa. St. 556, 39 N. E. Rep. 276; and see cases already cited in this section.

the law upon the subject.²² In a proceeding to assess damages for a portion of Long Island, in Boston Harbor, taken by the United States, evidence was received of the sales of similar lands upon islands and headlands in and about Boston Harbor, from half a mile to six miles distant, and ranging from one to eight years back. The case was affirmed by the Supreme Court, which said: "The rule must vary with the circumstances of each case. If the value of a town lot was in question, it is plain that the evidence should be confined to sales of comparatively recent date and of land in the near vicinity. If it was wild land, in a thinly settled part of the country, a more liberal rule would be applicable. Without some further evidence, we cannot suppose that the changes in the title to real estate in the islands and headlands of the harbor are so frequent, or the difference in situation and value so great, as to render the evidence here objected to inadmissible."²³ In a proceeding to condemn land which was shown to be suitable for raising cranberries and situated on the Charles River, a witness was permitted to testify for what he sold similar land situated across the river and in another town, some three or four years before. In approving this ruling, the court says: "If the question was as to the value of building lots, the exact situation of the two parcels with respect to each other might be of more importance; but when it is as to the value of land of rare quality, which is adapted to the cultivation of cranberries, a different standard applies, and if the land sold is in the same general locality and of the same peculiar quality, the price obtained may afford a just measure of the value of the land taken."²⁴

Rejecting evidence of a sale of land on the same street, and only 176 feet distant from the property in question, as

²² *May v. Boston*, 158 Mass. 21, 32 N. E. Rep. 902; *Pierce v. Boston*, 164 Mass. 92, 41 N. E. Rep. 227; *Lyman v. Boston*, 164 Mass. 99, 41 N. E. Rep. 127; *Bowditch*

v. Boston, 164 Mass. 107, 41 N. E. Rep. 132.

²³ *Benham v. Dunbar*, 103 Mass. 365, 368.

²⁴ *Gardner v. Brookline*, 127 Mass. 358, 363.

too remote in distance, was held error.²⁵ In a New Hampshire case it was held competent to show the price received for an undivided half of the property in question at an administrator's sale.²⁶ The ruling in another case may be shown by an extract from the opinion: "The petitioner offered evidence as to the value of the land taken, and situated on the shore of the pond, as an ice privilege. In reply to this, the respondents offered to show, by witnesses acquainted with the subject, the sums for which ice privileges and land to be used for that business had been recently sold, about the time of the taking of the land in question, in Peabody and Lynn. The ponds in these places are seven or eight miles from the pond in question. This evidence was rejected. In respect to such evidence much must be left to the discretion of the presiding officer; *Shattuck v. Stoneham Branch Railroad Co.*, 6 Allen, 115. Considering the distance between these ponds, and the importance of locality in fixing the value of an ice privilege, we think the officer decided properly in rejecting the evidence. It does not appear that it would aid the jury in determining the value of the petitioner's privilege."²⁷ A sale ten or twelve years before the time in question is clearly too remote, unless the circumstances are very peculiar.²⁸ In another case sales made within a year of the taking, in the town of Fall River, Mass., were held properly rejected as too remote in time in a place so liable to change in the value of property.²⁹ Proof of sales made subsequently to the taking are limited to those made at or about the time, since presumptions do not run backwards, and the existence of a condition of things at one time is not evidence of its previous existence for any great length of time. A sale made three years after the time in question was held too distant.³⁰ To render proof of sales competent,

²⁵ *Paine v. Boston*, 4 Allen, 168.

²⁶ *March v. Portsmouth & Concord R. R. Co.*, 19 N. H. 372.

²⁷ *Ham v. Salem*, 100 Mass. 350, 352.

²⁸ *Everett v. Union Pacific Ry. Co.*, 59 Ia. 243.

²⁹ *Green v. Fall River*, 113 Mass. 262.

³⁰ *Chandler v. Jamaica Pond Aqueduct Co.*, 122 Mass. 305. It is proper to state that the sale in this case was also held to have been improperly admitted, on ac-

they must be for money and not by way of exchange in whole or in part,³¹ and should be voluntary and not forced sales.³² Where property was taken for a park, sales of surrounding property after the park had been established and which had been greatly enhanced thereby were held incompetent.³³ The proof of sales must be made by witnesses testifying directly to the facts, not by the consideration recited in deeds between third parties.³⁴ Where railroad stock was taken in New Hampshire it was held competent to prove sales on the stock exchange of Boston.³⁵

§ 443a. **Proving effect upon other property in suits for depreciation.**—It has been held in the New York elevated railroad cases that it is not competent to prove the effect of the railroad upon other specific property similarly situated, for the purpose of showing the effect upon the property in suit.^{35a} But the general course of values may be

count of distance and dissimilarity in the property.

³¹ Hollingsworth v. Des Moines & St. Louis Ry. Co., 63 Ia. 443.

³² Mayor etc. of Baltimore v. Smith & S Brick Co., 80 Md. 458, 31 Atl. Rep. 423. But see Hadden v. Metropolitan El. R. R. Co., 75 Hun 63, 26 N. Y. Supp. 995.

³³ Kerr v. South Park Comrs., 117 U. S. 379.

³⁴ Rose v. Taunton, 119 Mass. 99; O'Hare v. Chicago etc. R. R. Co., 139 Ill. 151, 28 N. E. Rep. 923; Domschke v. Metropolitan El. R. R. Co., 148 N. Y. 337, 42 N. E. Rep. 804; Esch v. Chicago etc. R. R. Co., 72 Wis. 229, 39 N. W. Rep. 129.

³⁵ Gregg v. Northern R. R. Co., 67 N. H. 452, 41 Atl. Rep. 271.

^{35a} Jamieson v. Kings County Elevated R. R. Co., 147 N. Y. 322; Witmark v. N. Y. El. R. R. Co., 149 N. Y. 393; Innes v. Manhattan R. R. Co., 3 App. Div. 541, 38

N. Y. Supp. 286; Lyons v. N. Y. El. R. R. Co., 26 App. Div. N. Y. 57; Stuyvesant v. N. Y. El. R. R. Co., 4 App. Div. 159, 38 N. Y. Supp. 595; Douglass v. N. Y. El. R. R. Co., 14 App. Div. 471, 43 N. Y. Supp. 847. In the case first cited the court says: "The plaintiff sought to prove the evil effect of the road in diminishing values by the process of calling the owners of property in the vicinity and proving, in each case, what the particular premises owned by the witness rented for before the road was built and what thereafter. There were objections and exceptions. Such a process is not permissible. Each piece of evidence raised a collateral issue, and left the court to try a dozen issues over as many separate parcels of property." See also Lake Roland El. R. R. Co. v. Frick, 86 Md. 259.

shown and the general effect of the railroad upon abutting property.^{35b}

§ 444. **Proving the cost of the property or of improvements thereon.**—If the owner has purchased the property within a time so recent that its cost will afford any fair indication of its present value, it is competent to show the cost.³⁶ If such evidence is received, it is competent for the opposite party to show any change of circumstances or condition which would tend to make the value at the time of the taking more or less than the cost proved.³⁷ But, if the property was purchased at a forced sale, the cost price is not competent evidence.³⁸ What the owner paid for the property in question twelve or fourteen years before has been held incompetent.³⁹

§ 445. **Proving a sale of property claimed to be damaged made after the damage has been incurred.**—Such proof has been held to be competent in Massachusetts⁴⁰ and Wisconsin,⁴¹ and impliedly so in Minnesota.⁴² In the Massachusetts case a sale seventeen years after the damaging was held competent, while in the Minnesota case a sale one

^{35b} *Witmark v. N. Y. El. R. R. Co.*, 149 N. Y. 393, 400.

³⁶ *St. Louis & San Francisco Ry. Co. v. Smith*, 42 Ark. 265; *Ham v. Salem*, 100 Mass. 350, 352; and see *Hoffman v. Connor*, 76 N. Y. 121; *New Orleans etc. R. R. Co. v. Barton*, 43 La. An. 171, 9 So. Rep. 19. And see note 39 below. In the following cases it was held that evidence of the cost of structures was properly excluded: *New York, West Shore & Buffalo Ry. Co. v. Genett*, 37 Hun 317; *Schuylkill Navigation Co. v. Farr*, 4 W. & S. 362; and see *Squire v. Somerville*, 120 Mass. 579.

³⁷ *Ibid.*

³⁸ *Dietrichs v. Lincoln etc. R.*

R. Co., 12 Neb. 225. In *Rourke v. Kings County El. R. R. Co.*, 22 App. Div. N. Y. 511, it was held competent to prove what the owner paid for the property at public auction.

³⁹ *Denver etc. R. R. Co. v. Schmitt*, 11 Col. 56, 16 Pac. Rep. 842. Evidence of cost was held incompetent in the following cases: *Omaha Southern R. R. Co. v. Todd*, 39 Neb. 818, 58 N. W. Rep. 289; *San Antonio etc. R. R. Co. v. Ruby*, 80 Tex. 172, 15 S. W. Rep. 1040.

⁴⁰ *Whitman v. Boston & Maine R. R. Co.*, 7 Allen, 313.

⁴¹ *Watson v. Milwaukee & Madison Ry. Co.*, 57 Wis. 332.

⁴² *Sheldon v. Minneapolis &*

month afterwards was held to be too remote. There seems to be no reason why such sales are not competent within reasonable limits as to time.

§ 446. **Offers to buy or sell.**—It is not competent for the owner to prove what he has been offered for his property,⁴³ or what persons who have been looking for similar property were willing to give for it.⁴⁴ Nor is it competent to prove offers for adjacent and similar property,⁴⁵ or the price at which the owners of such property have offered it for sale.⁴⁶ Offers made by the condemning party to the owner, for the property in question, are in the nature of an attempt to compromise, and cannot be proved.⁴⁷ As a general rule, therefore, offers for property cannot be proven.⁴⁸ But it may be shown, as against the owner, what he has offered to take for the property in question, unless it was by way of com-

St. Louis Ry. Co., 29 Minn. 318. See also *Springer v. Chicago*, 37 Ill. App. 206.

⁴³ *Central Pacific R. R. Co. v. Pearson*, 35 Cal. 247; *St. Joseph & Denver City R. R. Co. v. Orr*, 8 Kan. 419; *Fowler v. County Comrs.*, 6 Allen, 92; *Dickenson v. Fitchburg*, 13 Gray, 546; *Watson v. Milwaukee & Madison Ry. Co.*, 57 Wis. 332; *Louisville, N. O. & T. R. R. Co. v. Ryan*, 64 Miss. 399; *Minnesota Belt Line R. R. Co. v. Gluek*, 45 Minn. 463, 48 N. W. Rep. 194; *Hine v. Manhattan R. R. Co.*, 132 N. Y. 477, 30 N. E. Rep. 985; *Ross v. Metropolitan R. R. Co.*, 57 N. Y. Supr. 412, 8 N. Y. Supp. 495; *Kuh v. Metropolitan El. R. R. Co.*, 58 N. Y. Supr. 138, 9 N. Y. Supp. 710; *Park v. Seattle*, 8 Wash. 78, 35 Pac. Rep. 594. Such evidence was held competent in *Mullin v. Southern Pac. R. R. Co.*, 83 Cal. 240, 23 Pac. Rep. 265.

⁴⁴ *Selma etc. R. R. Co. v. Keith*, 53 Ga. 178.

⁴⁵ *Davis v. Charles River Branch R. R. Co.*, 11 Cush. 506; *Lehmicke v. St. Paul, Stillwater etc. R. R. Co.*, 19 Minn. 464; *Concord R. R. Co. v. Greely*, 23 N. H. 237; *Roberts v. Boston*, 149 Mass. 346, 21 N. E. Rep. 668; *Leale v. Metropolitan El. R. R. Co.*, 61 Hun 613, 41 N. Y. St. 904, 16 N. Y. Supp. 419.

⁴⁶ *Winnisimmet Co. v. Greuby*, 111 Mass. 543; *Montclair R. R. Co. v. Benson*, 36 N. J. L. 557; see also *Drury v. Midland R. R. Co.*, 127 Mass. 571.

⁴⁷ *Upton v. South Branch Reading R. R. Co.*, 8 Cush. 600.

⁴⁸ *Chicago etc. R. R. Co. v. Muller*, 45 Kan. 85, 25 Pac. Rep. 210; *Grand Rapids v. Luce*, 92 Mich. 92, 52 N. W. Rep. 635; *Lawrence v. Metropolitan El. R. R. Co.*, 15 Daly, 502; *Hine v. Man-*

promise.⁴⁹ But it is not competent to show the price at which the owner has offered to sell to the party condemning after the proceedings were instituted.⁵⁰ An attempted sale made the day after the taking and without knowledge thereof was held competent, the owner being allowed to explain why he was willing to take less than he claimed in the proceedings.⁵¹

§ 447. **Purchases by the party condemning.**—What the party condemning has paid for other property is incompetent.⁵² Such sales are not a fair criterion of value, for the reason that they are in the nature of a compromise. They are affected by an element which does not enter into similar transactions made in the ordinary course of business. The one party may force a sale at such a price as may be fixed by the tribunal appointed by law. In most cases the same party must have the particular property, even if it costs more than its true value. The fear of one party or the other to take the risk of legal proceedings ordinarily results in the one party paying more or the other taking less than is con-

hattan R. R. Co., 58 N. Y. Supr. 377, 11 N. Y. Supp. 586.

⁴⁹ *Springfield v. Schmook*, 68 Mo. 394; *Springer v. Chicago*, 135 Ill. 552, 26 N. E. Rep. 514, 4 Am. R. R. & Corp. Rep. 52. When such an offer has been proven as against the owner he may explain all the circumstances attending it. *Webster v. Kansas City etc. R. R. Co.*, 116 Mo. 114, 22 S. W. Rep. 474.

⁵⁰ *Chicago, Evanston & Lake Superior R. R. Co. v. Catholic Bishop of Chicago*, 119 Ill. 525.

⁵¹ *Manning v. Lowell*, 173 Mass. 100.

⁵² *Kelliner v. Miller*, 97 Mass. 71; *Presbrey v. Old Colony & Newport R. R. Co.*, 103 Mass. 1; *Fall River Print Works v. Fall River*, 110 Mass. 428; *Cobb v. Boston*, 112 Mass. 181; *Donovan*

v. Springfield, 125 Mass. 371; *Springfield v. Schmook*, 68 Mo. 394; *Amoskeag Manf. Co. v. Worcester*, 60 N. H. 522; *Howard v. Providence*, 6 R. I. 514; *Streyer v. Georgia etc. R. R. Co.*, 90 Ga. 56, 15 S. E. Rep. 637; *Spokane etc. R. R. Co. v. Lieuellen*, 2 Idaho, 1101, 29 Pac. Rep. 854; *Peoria Gas L. & C. Co. v. Peoria Terminal R. R. Co.*, 146 Ill. 372, 34 N. E. Rep. 550; *White v. Fitchburg R. R. Co.*, 4 Cush. 440; *Providence & W. R. R. Co. v. Worcester*, 155 Mass. 35, 29 N. E. Rep. 56; *Laing v. United N. J. R. & C. Co.*, 54 N. J. L. 576, 25 Atl. Rep. 409; *In re Thompson*, 127 N. Y. 463, 28 N. E. Rep. 389; *Pennsylvania S. V. R. R. Co. v. Ziemer*, 124 Pa. St. 560, 17 Atl. Rep. 187. Such evidence was held competent under peculiar

sidered to be the fair market value of the property.⁵³ For these reasons such sales would not seem to be competent evidence of value in any case, whether in a proceeding by the same condemning party or otherwise.⁵⁴ So in a suit for damages to abutting property by a railroad in a street, it is not proper to show for what sum other owners have released their claims.⁵⁵

§ 448. **Assessment for taxation.**—The assessment of property for taxation, being made for another purpose, and not at the instance of either party and not usually at the market value of the property, is not admissible as evidence of value in condemnation proceedings.⁵⁶ But a sworn return made by the owner to the assessor, showing the market value of the property as required by statute, was held

circumstances in *Langdon v. New York*, 133 N. Y. 628, 31 N. E. Rep. 98, affirming 59 Hun 434, 37 N. Y. St. 99, 13 N. Y. Supp. 864. Owner may not show what another railroad company has paid him for right of way through the same tract. *Lyon v. Hammond etc. R. R. Co.*, 167 Ill. 527, 47 N. E. Rep. 775. The question was involved, but not referred to, in *King v. Iowa Midland R. R. Co.*, 34 Ia. 458. An agreement to sell is incompetent for the same reason. *Chapin v. Boston & Providence R. R. Co.*, 6 Cush. 422; *Providence & W. R. R. Co. v. Worcester*, 155 Mass. 35, 29 N. E. Rep. 56. A contrary view to the text is taken in *Wyman v. Lexington & West Cambridge R. R. Co.*, 13 Met. 316.

⁵³ See cases cited in last note, and especially *Presbrey v. Old Colony & Newport Ry. Co.*, 103 Mass. 1; *Fall River Print Works v. Fall River*, 110 Mass. 428; and *Cobb v. Boston*, 112 Mass. 181; *Peoria Gas Light & C. Co. v.*

Peoria Terminal R. R. Co., 146 Ill. 372, 34 N. E. Rep. 550.

⁵⁴ In *Brunswick & Albany R. R. Co. v. McLaren*, 47 Ga. 546, it was held, in a proceeding to condemn a right of way through certain lands, that it was not competent to show what another railroad had paid for a right of way through the same lands.

⁵⁵ *Lake Roland El. R. R. Co. v. Weir*, 86 Md. 273.

⁵⁶ *Texas & St. Louis Ry. Co. v. Eddy*, 42 Ark. 527; *Springfield & Memphis Ry. Co. v. Rhea*, 44 Ark. 258; *Brown v. Providence, Warren & Bristol R. R. Co.*, 5 Gray, 35; *San Jose & A. R. R. Co. v. Mayne*, 83 Cal. 566, 23 Pac. Rep. 522; *Miller v. Windsor Water Co.*, 148 Pa. St. 429, 23 Atl. Rep. 1132. And see *Smith v. Pennsylvania S. V. R. R. Co.*, 141 Pa. St. 68, 21 Atl. Rep. 505; *Vernon Shell Road Co. v. Savannah*, 95 Ga. 387, 22 S. E. Rep. 625; *Savannah etc. R. R. Co. v. Buford*, 106 Ala. 303, 17 So. Rep. 395.

admissible both to impeach the owner and as independent evidence of value.⁵⁷

§ 449. **Reports of commissioners, etc., as evidence.**—On an appeal from commissioners and trial de novo, the report appealed from is not evidence as to the amount of damages.⁵⁸ But, where a commissioner is examined as a witness, he may be cross-examined as to his report.⁵⁹ An award made for adjoining or neighboring property in another proceeding is not admissible.⁶⁰

§ 450. **Miscellaneous points.**—In a railroad case it was held proper to ask a witness how many times he had testified for the company.⁶¹ In the trial of a case to condemn a right of way through a farm for a railroad, it was held incompetent to prove the experience of the owners of other farms having railroads through them, as to the damages, losses and inconveniences arising from the existence and operation of the roads through them.⁶² In an action against an elevated railroad for damage to abutting property, it was held proper to show that rentals of similar property on the same street had diminished while rentals in neighboring streets had increased, since the railroad had been

⁵⁷ *Birmingham Mineral R. R. Co. v. Smith*, 89 Ala. 305, 7 So. Rep. 634, 2 Am. R. R. & Corp. Rep. 741; *West Chester & W. Plank Road Co. v. County of Chester*, 182 Pa. St. 40; *Manning v. Lowell*, 173 Mass. 100; *St. Louis etc. R. R. Co. v. Fowler*, 142 Mo. 670. But similar evidence was held incompetent in *Gulf etc. R. R. Co. v. Abney*, 3 Tex. Civ. App. p. 485, § 413.

⁵⁸ *Coyner v. Boyd*, 55 Ind. 166; *McKinsey v. Bowman*, 58 Ind. 88; *Corey v. Swagger*, 74 Ind. 211; *Winklemans v. Des Moines, Northwestern Ry. Co.*, 62 Ia. 11; *Seefeld v. Chicago, Mil. & St. Paul Ry. Co.*, 67 Wis. 96; *Chicago etc. R. R. Co. v. Broquet*, 47 Kan.

571, 28 Pac. Rep. 717; *Daigneault v. Woonsocket*, 18 R. I. 378, 28 Atl. Rep. 346. Contra: *White v. Boston & Providence R. R. Co.*, 6 Cush. 420; *Chapin v. Same*, 6 Cush. 422.

⁵⁹ *Munkwitz v. Chicago, Mil. & St. P. Ry. Co.*, 64 Wis. 403; *Benton v. Brookline*, 151 Mass. 250, 23 N. E. Rep. 846.

⁶⁰ *San Luis Obispo v. Brizzolara*, 100 Cal. 434, 34 Pac. Rep. 1083; *Howe v. Howard*, 158 Mass. 278; 33 N. E. Rep. 528.

⁶¹ *Setzler v. Pennsylvania & Schuylkill Valley R. R. Co.*, 112 Pa. St. 56.

⁶² *Fitchburg, Bradford & Buffalo Ry. Co. v. McCloskey*, 110 Pa. St. 436. To same effect: *Kier-*

in operation.⁶³ It is held incompetent to show how the property might be improved, and the cost of such improvements and what the property would be worth with such improvements on it.⁶⁴ Plats and photographs of property, when properly proven may be admitted in evidence.⁶⁵ In a suit for damages to abutting property by a railroad in a street, the company may not ask the owner if he would take a certain sum for his property nor ask its own witness if he would give a certain sum.⁶⁶ In a similar action, it was held competent to prove by a former tenant that he moved away because the premises were dark and smoky.⁶⁷ It is held that a court will take judicial notice that an ele-

nan v. Chicago etc. R. R. Co., 123 Ill. 188; Chicago v. Brennan, 61 Ill. App. 247; Kansas City etc. R. R. Co. v. Splitlog, 45 Kan. 68, 25 Pac. Rep. 202; Schuylkill Riv. E. S. R. Co. v. Stockton, 128 Pa. St. 233, 18 Atl. Rep. 397; Laffin v. Chicago etc. R. R. Co., 34 Fed. Rep. 859. And see La Mont v. St. Louis etc. R. R. Co., 62 Ia. 193; Standish v. Washburn, 21 Pick. 237; Kuh v. Metropolitan El. R. R. Co., 58 N. Y. Supr. 138, 9 N. Y. Supp. 710.

⁶³ Cook v. New York El. R. R. Co., 144 N. Y. 115, 39 N. E. Rep. 2. See also Rannow v. Hazard, 61 N. Y. Supr. 211; Sternberger v. Metropolitan El. R. R. Co., 2 Misc. 113, 20 N. Y. Supp. 857; Cook v. New York El. R. R. Co., 3 Misc. 248, 22 N. Y. Supp. 790; Gerber v. Metropolitan El. R. R. Co., 3 Misc. 427, 23 N. Y. Supp. 166; Hitchings v. Brooklyn El. R. R. Co., 6 Misc. 430, 27 N. Y. Supp. 132; Johnson v. New York El. R. R. Co., 10 Misc. 136, 30 N. Y. Supp. 920.

⁶⁴ Pennsylvania S. V. R. R. Co. v. Clary, 125 Pa. St. 442, 17 Atl.

Rep. 468; Myers v. Schuylkill Rev. E. S. R. R. Co., 5 Pa. Co. Ct. 634; Sixth Ave. R. R. Co. v. Metropolitan El. R. R. Co., 56 Hun 182, 30 N. Y. St. 521, 9 N. Y. Supp. 207; Patch v. Boston, 146 Mass. 52.

⁶⁵ Wrightsville etc. R. R. Co. v. Holmes, 85 Ga. 668, 11 S. E. Rep. 658; Chicago etc. R. R. Co. v. Dill, 41 Kan. 736, 21 Pac. Rep. 778; Chicago etc. R. R. Co. v. Davidson, 49 Kan. 589, 31 Pac. Rep. 131; Omaha Southern R. R. Co. v. Beeson, 36 Neb. 361, 54 N. W. Rep. 552; Miller v. Asheville, 112 N. C. 759, 16 S. E. Rep. 762.

⁶⁶ Auman v. Philadelphia etc. R. R. Co., 113 Pa. St. 93, 20 Atl. Rep. 1059. Somewhat similar questions are ruled upon in the following cases: Chesapeake etc. Tel. Co. v. Mackenzie, 74 Md. 36, 21 Atl. Rep. 690; Bookman v. N. Y. El. R. R. Co., 137 N. Y. 302, 33 N. E. Rep. 333; Richmond & M. R. R. Co. v. Humphreys, 90 Va. 425, 18 S. E. Rep. 901.

⁶⁷ Scott v. Metropolitan El. R. R. Co., 2 Misc. 150, 21 N. Y. Supp. 630.

vated railroad in New York City increases traffic on the street in which it is located.⁶⁸

⁶⁸ Steets v. New York El. R. R. Co., 79 Hun 288, 29 N. Y. Supp. 356. But what former tenants have said and hearsay generally are not admissible. Murtry v. Metropolitan El. R. R. Co., 14

Misc. 284, 35 N. Y. Supp. 708; Philadelphia etc. R. R. Co. v. Patterson, 3 Walker's Pa. Sup. Ct. 143; Cushing v. Nantucket Beach R. R. Co., 143 Mass. 77.

CHAPTER XX.

JUST COMPENSATION AND DAMAGES.

§ 451. **Right to compensation when the constitution does not require it in express terms.**—This question has lost most of its practical importance, from the fact that the constitutions of nearly all the States now expressly require compensation to be made when property is taken for public use.¹ The question has been discussed in several of the States in cases arising under former constitutions which contained no provision on this subject. In all the States which have been called upon to pass upon the question, except South Carolina,² compensation was held to be obligatory. The cases will be found collated and discussed in a former chapter.³

§ 451a. **Right to compensation generally. Scope of the chapter.**—The constitutions of all the States, as now construed, require that just compensation shall be made whenever private property is taken for public use. The constitutions of many of the States also require that like compensation shall be made whenever private property is injured or damaged for public use.⁴ As to whether property has been taken, injured or damaged within the meaning of these provisions are questions which have been discussed in former chapters.⁵ The right to compensation has been fully considered in those chapters. The object of the present chapter is to consider what constitutes just compensation, what is a sufficient provision therefor in the statutory authority, when it must be made and what elements and circumstances may be taken into account in ascertaining the amount.

¹ The exceptions are: New Hampshire, North Carolina and Virginia. See ante, §§ 38, 41, 50.

² See *ex parte Withers*, 3 Brevard, 83; *Patrick v. Comrs.*, 4

McCord, 541; *State v. Dawson*, 3 Hill, S. C. 101.

³ Ante, § 10.

⁴ Ante, § 221.

⁵ See Chapters III-VI, VIII.

§ 452. **Statutes which authorize a taking must provide for compensation.** —As the legislature is powerless to take private property without compensation, it is manifest that a statute which authorizes the taking of property without adequate provision is made for compensation in the same or some other statute, will be nugatory.⁶ Statutes which provide for a condemnation of private property, and fail to provide compensation therefor, have sometimes been spoken of as void.⁷ This is probably, however, a mere inadvertence of expression. Such acts would simply be inoperative so far as the power to condemn property is concerned,⁸ but might be carried into execution by the purchase of the requisite property,⁹ or aided by a subsequent act supply-

⁶ *Georgia Midland & G. R. R. Co. v. Columbus S. R. R. Co.*, 89 Ga. 205, 15 S. E. Rep. 65; *Brunswick & W. R. R. Co. v. Waycross*, 94 Ga. 102, 21 S. E. Rep. 145; *Corbin v. Marsh*, 2 Duv. 193; *Calder v. Police Jury*, 44 La. An. 173, 10 So. Rep. 726; *Pennsylvania R. R. Co. v. B. & O. R. R. Co.*, 60 Md. 263; *Godfrey v. District Court*, 44 Minn. 299, 46 N. W. Rep. 355; *Blake v. McCarthy*, 56 Miss. 654; *Welton v. Dickson*, 38 Neb. 767, 57 N. W. Rep. 559; *Glover v. Powell*, 10 N. J. Eq. 211; *State v. Perth Amboy*, 52 N. J. L. 132, 18 Atl. Rep. 670; *Cherry v. Board of Comrs.*, 52 N. J. L. 544, 20 Atl. Rep. 970; affirming 51 N. J. L. 417, 18 Atl. Rep. 299; *Forster v. Scott*, 136 N. Y. 577, 32 N. E. Rep. 976, 8 Am. R. R. & Corp. Rep. 428 note; S. C., 60 N. Y. Supr. Ct. 313; *Matter of Southern Boulevard R. R. Co.*, 58 Hun 497, 35 N. Y. St. Rep. 550, 12 N. Y. Supp., 466; S. C., 128 N. Y. 93; *Mitchell v. White Plains*, 62 Hun 231, 41 N. Y. St. Rep. 787, 16 So. Rep. 828; *Martin v. Tyler*, 4 N. D. 278, 60

N. W. Rep. 392; *In re Widening Burnish St.*, 140 Pa. St. 531, 21 Atl. Rep. 500; *Tuttle v. Justice*, 89 Tenn. 157, 14 S. W. Rep. 486; *Western Union Tel. Co. v. Williams*, 86 Va. 696, 11 S. E. Rep. 106, 2 Am. R. R. & Corp. Rep. 258; *Teter v. W. Va. Cent. etc. R. R. Co.*, 35 W. Va. 433, 14 S. E. Rep. 146; *In re Manderson*, 51 Fed. Rep. 501, 2 C. C. A. 490; *In re Montgomery*, 48 Fed. Rep. 896; ante, § 240.

⁷ *Bloodgood v. Mohawk & Hudson River R. R. Co.*, 18 Wend. 9; *Brown v. Bowman*, 9 Ga. 37; *State v. West Hoboken*, 37 N. J. L. 77; *Doe v. Georgia R. R. & Banking Co.*, 1 Ga. 524; *Watson, Executor, v. Trustees etc.*, 21 Ohio St. 667.

⁸ *Cribbs v. Benedict*, 64 Ark. 555. See *People v. Loew*, 39 Hun 490; S. C., 102 N. Y. 471; *Tuckahoe Canal Co. v. Tuckahoe etc. R. R. Co.*, 11 Leigh 42; *Wheelock v. Young*, 4 Wend. 647.

⁹ *Carbon Coal & Mining Co. v. Drake*, 26 Kan. 345; *Carson v. Coleman*, 11 N. J. Eq. 106; *Curreran v. Shattuck*, 24 Cal. 427.

ing the defect.¹⁰ Proceedings under such an act to take property in invitum will be quashed or set aside on motion,¹¹ and any interference with property thereunder may be enjoined.¹² If any injury has been done to property in pursuance of such an act, the owner may have his common law remedies of trespass or case.¹³ It has been held, however, that the owner of property taken under such an act may acquiesce in the taking and recover its value.¹⁴ Where the legislature, by special act, provide for the establishment of a particular highway and make no provision for compensation, it will be presumed that they intended the general road law to apply.¹⁵ All property is within the protection of the constitution, and a statute which permits a highway to be laid out through wild and uncultivated lands without the consent of the owner is unconstitutional, and the lay-out of a road under it will be void.¹⁶ Where the charter of a municipal corporation granted power to lay out and open streets, but contained no provisions for con-

¹⁰ *State v. Seymour*, 35 N. J. L. 47; *McCunley v. Weller*, 12 Cal. 500; *Bonaparte v. Camden & Amboy R. R. Co.*, 1 Bald. 205; *Cairo & Fulton R. R. Co. v. Turner*, 31 Ark. 494.

¹¹ *Matter of Cheesbrough*, 17 Hun 561; *State v. Perth Amboy*, 52 N. J. L. 132, 18 Atl. Rep. 670.

¹² *Watson v. Trustees etc.*, 21 Ohio St. 667; *Carbon Coal & Mining Co. v. Drake*, 26 Kan. 345; *Curran v. Shattuck*, 24 Cal. 427; *Brewer v. Bowman*, 9 Ga. 37; *Piscataqua Bridge Co. v. New Hampshire Bridge Co.*, 7 N. H. 35; *Trenton Water Power Co. v. Raff*, 36 N. J. L. 335; *Martin*, ex parte, 13 Ark. 198; *Georgia Midland & G. R. R. Co. v. Columbus S. R. R. Co.*, 89 Ga. 205, 15 S. E. Rep. 305; *Calder v. Police Jury*, 44 La. An. 173, 10 So. Rep. 726.

¹³ *Cogswell v. Essex Mill Corp.*, 6 Pick. 94; *Seneca Road Co. v.*

Auburn & Rochester R. R. Co., 5 Hill, 170; *Comins v. Bradbury*, 10 Me. 447; *Trenton Water Power Co. v. Raff*, 36 N. J. L. 335; *Williamson v. Canal Co.*, 78 N. C. 156; *Western Union Tel. Co. v. Williams*, 86 Va. 696, 11 S. E. Rep. 106, 2 Am. R. R. & Corp. Rep., 258. See further as to remedies, post chapters XXVII and XXVIII.

¹⁴ *Watkins v. Walker County*, 18 Tex. 585; *South Carolina R. Co. v. Steiner*, 44 Ga. 546.

¹⁵ *Warner v. Hennepin Co.*, 9 Minn. 139. See ante, § 260.

¹⁶ *Wallace v. Karlenowefski*, 19 Barb. 118; *Gould v. Glass*, 19 Barb. 179. See also *Smith v. Inge*, 80 Ala. 283; *Ward v. Peck*, 49 N. J. L. 42. The same rule applies to personal property as to real estate. *Teter v. W. Va. Cent. etc. R. R. Co.*, 35 W. Va. 433, 14 S. E. Rep. 146.

demning property therefor or making compensation, it was held that an ordinance providing a method and machinery for that purpose was ineffectual.¹⁷ The reserved right to alter, repeal or amend the charter of a corporation, does not authorize the State to take its property without compensation.¹⁸

§ 453. **Exceptional cases in New Jersey and Pennsylvania.**—Under the proprietary governments in these States it was customary to include with every grant of land a certain excess, being five per cent. in New Jersey and six per cent. in Pennsylvania, for public roads. The grantee and those claiming under him were regarded as trustees for the public, as to this excess, which might be required of them when needed.¹⁹ The constitution of New Jersey of 1844 recognized this right in the public by providing that “lands may be taken for public highways, as heretofore, until the legislature shall direct compensation to be made.”²⁰ Under this constitution it has been held that after the legislature has once made provision for compensation in such cases, it cannot rescind its action and take without compensation.²¹ The servitude or trust, however, only extends to public roads, including turnpikes,²² but not to other public ways,

¹⁷ *Brunswick & W. R. R. Co. v. Waycross*, 94 Ga. 102, 21 S. E. Rep. 145. See *State v. Perth Amboy*, 52 N. J. L. 132, 18 Atl. Rep. 670; ante, § 240.

¹⁸ *In re Opinion of the Justices*, 66 N. H. 629, 33 Atl. Rep. 1076.

¹⁹ *Fevee v. Melly*, 3 Yates, 153; *Plank Road Co. v. Thomas*, 20 Pa. St. 91; *Same v. Ramage*, *ibid.* 95; *Commonwealth v. Fisher*, 1 P. & W. (Pa.) 462; *Commonwealth v. McAllister*, 2 Watts, 190; *State v. Potts*, 4 N. J. L. 347; *Matter of Highway*, 22 N. J. L. 293; *Simmons v. Passaic*, 42 N. J. L. 619; *McClenachan v. Curwin*, 3 Yates, 362; S. C., 6 Binn. 509.

²⁰ Art. 1, § 16. In *State v. Seymour*, 35 N. J. L. 47, 53, the opinion is expressed that after the legislature had once provided for compensation in such cases it could not recede from its action and reimpose this servitude on private property. Private ways, though really public, are not within the exception. *Perrine v. Farr*, 22 N. J. L. 356.

²¹ *Cherry v. Board of Comrs.*, 52 N. J. L. 544, 20 Atl. Rep. 970, affirming 51 N. J. L. 417, 18 Atl. Rep. 299.

²² *McClenachan v. Curwin*, 3 Yates, 362; S. C., 6 Binn. 509; *Plank Road Co. v. Thomas*, 20

such as canals.²³ Nor could improvements be taken without compensation,²⁴ nor a turnpike laid out as a common highway.²⁵

§ 453a. **What constitutes a sufficient provision for compensation.**—A sufficient provision for compensation includes the providing of proper methods and machinery for ascertaining the amount and of securing its payment. The proper modes of procedure in ascertaining the amount of compensation have been considered in former chapters. It may be added that the mode of ascertaining the compensation is not invalid because it casts the initiative upon the owner and requires him to pursue his remedy within a specified time or be barred of any right.²⁶ But this cannot be done where the constitution requires that compensation shall be first made.²⁷ As to what is a sufficient provision for secur-

Pa. St. 91; *Same v. Ramage*, *ibid.* 95.

²³ *Commonwealth v. McAllister*, 2 Watts, 190; *McClenachan v. Curwin*, 3 Yeates, 362; S. C., 6 Binn. 509. See, however, *Commonwealth v. Fisher*, 1 P. & W., 462, 465.

²⁴ *Plank Road Co. v. Thomas*, 20 Pa. St. 91; and other cases cited in this section.

²⁵ *Matter of Highway*, 22 N. J. L. 293.

²⁶ *Draper v. Mackey*, 35 Ark. 497; *Dunlap v. Pulley*, 28 Ia. 469; *Purifoy v. Richmond & D. R. R. Co.*, 108 N. C. 100, 12 S. E. Rep. 741; *Branson v. Gee*, 25 Or. 462, 36 Pac. Rep. 527; *East Tenn. etc. R. R. Co. v. Telford's Ex'rs*, 89 Tenn. 293, 14 S. W. Rep. 776, 3 Am. R. R. & Corp. Rep. 364; *Sweet v. Rechel*, 159 U. S. 380, 16 S. C. Rep. 43; *Whitman v. Nantucket*, 169 Mass. 147; *Whoriskey v. Old Colony R. R. Co.*, 173 Mass. 432; *Bause v. Clark*, 69 Minn. 53.

²⁷ *Levee Comrs. v. Dancy*, 65 Miss. 335, 3 So. Rep. 568; *Askam v. King County*, 9 Wash. 1, 36 Pac. Rep. 1097; *Hayward v. Snohomish County*, 11 Wash. 429, 39 Pac. Rep. 652. In the case first cited it is said: "No act which devolves on the owner the duty of initiating proceedings for compensation for his property, as the condition of his obtaining it, is allowable. He cannot be required to become an actor under the penalty of losing his property and due compensation for it, if he shall not. He may enjoy his own, secure under constitutional guaranty, until an inquest by public authority determines that it is required for public use, and fixes the price to be paid him for the sale of it, and this price must be paid or tendered before his right can be divested, and a right to ask for compensation in three months or three years is not a valid substitute for the constitutional right to 'due com-

ing payment of the compensation is a question discussed in the following sections. It may be premised that in this, as in other respects, a statute will be so construed as to be valid, if possible,²⁸ and so will be construed as providing for just compensation, including damages to the part not taken, unless the language of the statute to the contrary is too plain for doubt.²⁹ Where a statute authorized a taking of private rights in tide-water flats and provided for an assessment of damages but did not provide by whom or how they should be paid, it was held invalid.³⁰

§ 454. **Express constitutional provisions with reference to the time or manner of making compensation.** —The constitutions of many of the States at the present time provide, either that compensation shall be first made in all cases, or that it shall be first made when the taking is by individuals or corporations or for certain specified purposes. Sometimes the provision is that it shall be first made, or deposited, or secured, in such manner as shall be provided by law. Some constitutions provide that compensation shall be made in money; some that benefits shall be excluded in all cases, or in certain specified cases.³¹ These provisions are imperative, and any law which violates them is incapable of enforcement.³² Where the constitution required compensa-

pensation first being made,'”
p. 341.

²⁸ *Cherry v. Board of Comrs.*, 52 N. J. L. 544, 20 Atl. Rep. 970, affirming 51 N. J. L. 417, 18 Atl. Rep. 299; *Western Union Tel. Co. v. Williams*, 86 Va. 696, 11 S. E. Rep. 106, 2 Am. R. R. & Corp. Rep. 258; and see *Chaplin v. Highway Comrs.*, 129 Ill. 651, 22 N. E. Rep. 484; *Odell v. De Witt*, 53 N. Y. 643; *Tuttle v. Justices*, 89 Tenn. 157, 14 S. W. Rep. 486; *Vogt v. Bexar County*, 5 Tex. Civ. App. 272, 23 S. W. Rep. 1044; *Tait's Ex'r v. Central Lunatic Asylum*, 84 Va. 271, 4 S. E. Rep. 697; *Monongahela Navigation*

Co. v. United States, 148 U. S. 312, 13 S. C. Rep. 622; *St. Joseph v. Zimmerman*, 142 Mo. 155.

²⁹ *Commissioners Court v. Street*, 116 Ala. 28, 22 So. Rep. 629; *Albany v. Gilbert*, 144 Mo. 224.

³⁰ *Bent v. Emery*, 173 Mass. 495.

³¹ See constitutional provisions, ante, §§ 14-52.

³² Under the recent constitutions of Alabama and Georgia: *Montgomery Southern Ry. Co. v. Sayse*, 72 Ala. 443; *Southern R. Co. v. Southern & Atlantic Tel. Co.*, 46 Ga. 43; *Chambers v. Cincinnati & Ga. R. R. Co.*, 69

tion to be first made except where the taking was by the State, it was held that the taking for a public highway to be paid for out of the treasury of a county was within the exception.³³ Where compensation was required to be first made or secured, the liability of a county was held a suffi-

Ga. 320. But the constitutional right of prepayment may be waived by the owner. *New Orleans & Selma R. R. Co. v. Jones*, 68 Ala. 48. Under Indiana constitution of 1851: *Norristown etc. Turnpike Co. v. Burkett*, 26 Ind. 53.—*Trustees of Iowa College v. Davenport*, 7 Ia. 213; *Atchison, Topeka & Santa Fe R. R. Co. v. Weaver*, 10 Kan. 344; *Eidemiller v. Wyandotte City*, 2 Dillon, 376; *Waller v. Martin*, 17 B. Mon. 181; *Evansville etc. R. R. Co. v. Grady*, 6 Bush. 144; *Municipality No. 2 for opening Emphrosine St.*, 7 La. An. 72; *Harsh v. First Division of the St. Paul & Pacific R. R. Co.*, 17 Minn. 439; *Warren v. Same*, 18 Minn. 384; *Leber v. Minneapolis & N. W. Ry. Co.*, 29 Minn. 256; *Northern Pacific R. R. Co. v. St. Paul etc. Ry. Co.*, 1 McCrary, 302; *Thompson v. Grand Gulf R. R. Co.*, 3 How. (Miss.) 240; *Pearson v. Johnson*, 54 Miss. 259; *Yazoo etc. Levee Board v. Dancy*, (Miss.) 3 So. Rep. 568; *New Central Coal Co. v. George's Creek Coal & Iron Co.*, 37 Md. 537; *Baltimore v. Hook*, 62 Md. 371; *Baltimore & Ohio R. R. Co. v. Boyd*, 63 Md. 325; *Blanchard v. Kansas City*, 5 McCrary, 217; *McElroy v. Same*, 21 Fed. Rep. 257. (The last two cases are under the Missouri constitution of 1875.) *Doughty v. Somerville etc. R. R.*

Co., 7 N. J. Eq. 51; *Same v. Same*, 21 N. J. L. 442; *Morris & Essex R. R. Co. v. Hudson Tunnel R. R. Co.*, 25 N. J. Eq. 384; *Redman v. Philadelphia etc. Ry. Co.*, 33 N. J. Eq. 165; *Champion v. Session's County Comrs.*, 1 Nev. 478; *S. C.*, 2 Nev. 271; *Oregon Ry. Co. v. Hill*, 9 Or. 377; *Harrisburg v. Crangle*, 3 W. & S. 460; *Sharpless v. West Chester*, 1 Grant's Case, 257; *S. C.*, 2 Phila. 130; *McClinton v. Pittsburgh etc. R. R. Co.*, 66 Pa. St. 404; *Philadelphia etc. R. R. Co. v. Cooper*, 105 Pa. St. 239; *Spencer v. Point Pleasant & Ohio R. R. Co.*, 23 W. Va. 406; *Smith v. Same*, *ibid.* 451; *Hale v. Same*, *ibid.* 454.

Organ v. Memphis etc. R. R. Co., 51 Ark. 235, 11 S. W. Rep. 96; *Asher v. L. & N. R. R. Co.*, 87 Ky. 391, 8 S. W. Rep. 854; *Covington Short Route Trans. R. R. Co. v. Piel*, 87 Ky. 267, 8 S. W. Rep. 449; *Carrico v. Colvin*, 92 Ky. 342, 17 S. W. Rep. 854; *American Tel. & Tel. Co. v. Smith*, 71 Md. 535, 18 Atl. Rep. 910, 1 Am. R. R. & Corp. Rep. 73; *Livingston v. Board of Comrs.*, 42 Neb. 277, 60 N. W. Rep. 555; *Martin v. Tyler*, 4 N. D. 278, 60 N. W. Rep. 392.

³³ *Rudisill v. State*, 40 Ind. 485. To same effect, *Dronberger v. Reed*, 11 Ind. 420; *Jeffersonville etc. R. R. Co. v. Dougherty*, 40 Ind. 33; *Bronson v. Gee*, 25 Or.

cient security.³⁴ Compensation was required to be first made; it was held that the money must be paid or tendered, and that the giving of security was not a compliance.³⁵ The same rule applies to a taking by municipal corporations as to others.³⁶ But payment into court for the owner satisfies the constitution.³⁷ The provision in the Pennsylvania constitution, that a corporate body or individual shall not be vested with the *privilege* of taking private property for public use without requiring compensation to be first made or secured, does not apply to a case where the *duty* of taking is imposed upon individuals.³⁸ The constitution of Kentucky requires that compensation shall be previously made. In some early cases this was held to be satisfied by the giving of adequate security.³⁹ Later cases indicate a tendency to depart from this doctrine, or at least to restrict it to a taking by the State.⁴⁰ Where the statute provided that the compensation for a ditch should be fixed and allowed by the county commissioners, it was held that the allowance by the commissioners was equivalent to a deposit of the same within the meaning of a constitutional provision which required the damages to be first paid or first secured by a deposit of money.⁴¹ The owner may waive prepayment

462, 36 Pac. Rep. 527; *Cherry v. Lane County*, 25 Or. 487, 36 Pac. Rep. 531; *Travis County v. Trogden*, 88 Tex. 302, 31 S. W. Rep. 358. But see *La Fayette v. Bush*, 19 Ind. 326.

³⁴ *State v. Messenger*, 27 Minn. 119; *Delaware County's Appeal*, 119 Pa. St. 159, 13 Atl. Rep. 62; *Bromley v. Philadelphia*, 20 Phil. 302.

³⁵ *Redman v. Philadelphia, M. & M. R. R. Co.*, 33 N. J. Eq. 165; *Asher v. L. & N. R. R. Co.*, 87 Ky. 391, 8 S. W. Rep. 854.

³⁶ *Martin v. Tyler*, 4 N. D. 278, 60 N. W. Rep. 392; *Lewis v. Seattle*, 5 Wash. 741, 32 Pac. Rep. 741.

³⁷ *Rothan v. St. Louis etc. R.*

Co., 113 Mo. 132, 20 S. W. Rep. 892; *State v. Heppenheimer*, 54 N. J. L. 268, 23 Atl. Rep. 664.

³⁸ *Yost's Report*, 17 Pa. St. 524.

³⁹ *Gashweller's Heirs v. McIlroy*, 1 A. K. Marsh. 84, 1817; *Jackson v. Winner's Heirs*, 4 Litt. 322, 1832.

⁴⁰ *Waller v. Martin*, 17 B. Mon. 181; *Evansville etc. R. R. Co. v. Grady*, 6 Bush. 144. Recent cases enforce the duty of actual prepayment whether the taking is by private or public corporations. *Asher v. L. & N. R. R. Co.*, 87 Ky. 391, 8 S. W. Rep. 854; *Carrico v. Colvin*, 92 Ky. 342, 17 S. W. Rep. 854.

⁴¹ *Zimmerman v. Canfield*, 42 Ohio St. 463.

and acquiescence in the taking without insisting upon prepayment has been held to amount to such waiver.⁴²

§ 455. **Questions which arise when the constitution is silent in these respects.**—Where the constitution simply provides that private property shall not be taken for public use without just compensation, the question arises as to what is a sufficient provision for compensation, to comply with the constitution. Must the compensation be made before the property is entered upon for the purpose of appropriation, or may it be made after such entry? And, if it may be made after such entry, what is a sufficient provision for securing compensation? Must compensation be made wholly in money or may benefits to other property be considered? These and other questions present themselves, which we shall now proceed to consider.

§ 456. **As to the time of making compensation.**—As an original question, it seems clear that the proper interpretation of the constitution requires that the owner should receive his just compensation before entry upon his property. When an individual is ousted from possession under a claim of right, his property is taken from him,⁴³ and, if he has not been paid an equivalent in money, it is taken from him without compensation. Some of the cases so hold.⁴⁴ But in

⁴² *Lewis v. Seattle*, 5 Wash. 741, 32 Pac. Rep. 794. See *Snyder v. Chicago etc. R. R. Co.*, 112 Mo. 527, 20 S. W. Rep. 885, where the facts were held not to constitute a waiver of prepayment.

⁴³ *Davis v. San Lorenzo R. R. Co.*, 47 Cal. 517; *Ante*, § 149.

⁴⁴ *California. San Francisco v. Scott*, 4 Cal. 114; *McCann v. Sierra Co.*, 7 Cal. 121; *McCauley v. Weller*, 12 Cal. 500; *Bensley v. Mountain Lake Water Co.*, 13 Cal. 306; *Johnson v. Alameda County*, 14 Cal. 106; *Gillan v. Hutchinson*, 16 Cal. 153; *Colton v. Rossi*, 9 Cal. 595; *Burnet v. Sacramento*,

12 Cal. 76; *Curran v. Shattuck*, 24 Cal. 427. In *Fox v. W. P. R. R. Co.*, 31 Cal. 538, the foregoing cases were reviewed, and the conclusion reached that an act authorizing a judge to make an order allowing possession pending proceedings, upon giving security to be approved by the court, was valid. This case was subsequently overruled and the prior doctrine repeatedly affirmed. *Brady v. Bronson*, 45 Cal. 640; *Davis v. San Lorenzo R. R. Co.*, 47 Cal. 517; *Cal. P. R. R. Co. v. Cent. P. R. R. Co.*, 47 Cal. 528; *San Mateo Water Co.*

most States it is held that the making of compensation need not precede an entry upon the property, provided some definite provision is made whereby the owner will certainly obtain compensation.⁴⁵

v. Sharpstein, 50 Cal. 284; Sanborn v. Belden, 51 Cal. 266; Vilhac v. S. & I. R. R. Co., 53 Cal. 208. In Sanborn v. Belden it is intimated that it might be different in case of a taking by the State or a municipal corporation. Potter v. Ames, 43 Cal. 75.

Illinois. Hall v. People, 57 Ill. 307; People v. Williams, 51 Ill. 63; Cook v. South Park Commissioners, 61 Ill. 115; People v. McRoberts, 62 Ill. 38; Shute v. Chicago & Milwaukee R. R. Co., 26 Ill. 436; Johnson v. Joliet etc. R. R. Co., 23 Ill. 202; Phillips v. South Park Commissioners, 119 Ill. 626; Chicago, St. Louis & Western R. R. Co. v. Gates, 120 Ill. 86. In Hall v. People the court say: "No man can be compelled to part with his property without just compensation. This is a constitutional right that he cannot be deprived of by any statute. No corporation, public or private, can appropriate the property of any one to their own use without first tendering or paying the damages assessed under the forms of law. The party ought not to be driven to his action against a corporation, responsible or irresponsible, for his damages. This would be to take his property without first making compensation and would be a plain violation of a constitutional right." See also Dunning v. Matthews, 16 Ill. 308; Norton v. Studley, 17 Ill. 556.

Maryland. Hamilton v. Annapolis & Elk Ridge R. R. Co., 1 Md. Ch. 107; Harness v. Chesapeake & Ohio Canal Co., 1 Md. Ch. 248.

Nebraska. Zimmerman v. Kearney County, 33 Neb. 620, 50 N. W. Rep. 1126; Livingston v. Board of Comrs., 42 Neb. 277, 60 N. W. Rep. 555.

Texas. Buffalo Bayou etc. R. R. Co. v. Ferris, 26 Tex. 588; Tait v. Matthews, 33 Tex. 112; Paris v. Mason, 37 Tex. 447. And see Avery v. Fox, 1 Abb. U. S. 246; Bonaparte v. Camden & Amboy R. R. Co., 1 Bald. 205; Sadler v. Langham, 34 Ala. 311; Foster v. Stafford, 57 Vt. 128; Hawley v. Harrall, 19 Conn. 142; Garrison v. New York, 21 Wall. 196.

⁴⁵ Alabama. Commissioners' Court v. Bowie, 34 Ala. 461. A contrary view is intimated in Sadler v. Langham, 34 Ala. 311.

Arkansas. Cairo & Fulton R. R. Co. v. Turner, 31 Ark. 494. Connecticut. Hawley v. Harrall, 19 Conn. 142.

Florida. Moody v. Jacksonville, Tampa & Key West R. R. Co., 20 Fla. 597; State ex rel. Moody v. Same, 20 Fla. 616.

Georgia, under the old constitution. Doe v. Georgia etc. R. R. Co., 1 Ga. 524; and see Young v. Harrison, 6 Ga. 130; Parham v. Decatur County, 9 Ga. 341; Hall v. Boyd, 14 Ga. 1; Powers v. Armstrong, 19 Ga. 427.

Indiana. Rubottom v. McClure, 4 Blackf. 505; Hankins v. Law-

Some courts have gone so far as to hold that the property may be occupied before compensation is made, provided the statute under which it is taken provides a mode for ascertaining the compensation, and requires its payment by the party taking, although the taking may be by an individual

rence, 8 Blackf. 266; McCormick v. La Fayette, 1 Ind. 48; New Albany & Salem R. R. Co. v. Connelly, 7 Ind. 32. The constitution of 1851 required prepayment except in case of taking by the State. This was held not to apply to charters in existence before 1851. Prather v. Jeffersonville etc. R. R. Co., 52 Ind. 16.

Maine. The doctrine in this State is that title does not pass until payment is made, but that possession may be taken and held for a reasonable length of time with a view to the acquisition of title, and three years has been held to be a reasonable time, that being the time limited for the owner to apply for an assessment of damages. Cushman v. Smith, 34 Me. 247; Nichols v. Somerset & Kennebec R. R. Co., 43 Me. 356; Davis v. Russell, 47 Me. 443; Riche v. Bar Harbor Water Co., 75 Me. 91.

Maryland. Prior to 1851 there was no provision for compensation in the Maryland constitution. In an early case it was held that, though compensation must be made, it need not be made before entry. Compton v. Susquehanna R. R. Co., 3 Bland Ch. 386. Later cases lay down a contrary doctrine. Hamilton v. Annapolis & Elk Ridge R. R. Co., 1 Md. Ch. 107; Harness v. Chesapeake & Ohio Canal Co., 1 Md. Ch. 248.

Massachusetts. Hazen v. Essex Co., 12 Cush. 475; Talbot v. Hudson, 16 Gray, 417; Haverhill Bridge Proprietors v. Essex Co., 103 Mass. 120; Briggs v. Cape Cod Ship Canal Co., 137 Mass. 71.

Michigan. People v. Michigan Southern R. R. Co., 3 Mich. 496 (under constitution of 1838); Smith v. McAdam, 3 Mich. 506; see Newcomb v. Smith, 1 Chand. 71.

Minnesota. State v. Otis, 53 Minn. 318, 55 N. W. Rep. 143. See Mathews v. St. Paul etc. R. Co., 18 Minn. 434.

New Jersey. Den v. Morris Canal etc. Co., 24 N. J. L. 587. This under a charter prior to constitution of 1844, which requires compensation to be first made.

New Hampshire. Orr v. Quimby, 54 N. H. 590; but see Ash v. Cummings, 50 N. H. 591, which seems to favor the view that compensation should be first made.

New York. Compensation need not be first made where the taking is by a State or a public corporation. Wheelock v. Young, 4 Wend. 647, 1830; Case v. Thompson, 6 Wend. 634, 1831; Coles v. Williamsburg, 10 Wend. 659, 666, 1833; Smith v. Helmer, 7 Barb. 416, 1849; Rexford v. Knight, 11 N. Y. 308, 1854; Chapman v. Gates, 54 N. Y. 132, 1873; Rider v. Stryker, 63 N. Y. 136,

or private corporation.⁴⁶ In many of these cases the owners of the property taken did not have the right to initiate proceedings.

1875; *Sage v. Brooklyn*, 89 N. Y. 189, 195, 1882; *Application of Church*, 92 N. Y. 1; *People v. Adirondack R. R. Co.*, 160 N. Y. 225, 241; *People v. Village of Haverstraw*, 80 Hun. 385, 30 N. Y. Supp. 325; *Kelley v. City of New York*, 6 Misc. 516, 27 N. Y. Supp. 164; but must be, when the taking is by a private corporation. *Bloodgood v. Mohawk & Hudson R. R. Co.*, 18 Wend. 9, overruling same case in 14 Wend. 51; *Jamaica etc. Road Co. v. N. Y. M. B. Ry. Co.*, 25 Hun. 585; *Dusenbury v. Mutual Union Telegraph Co.*, 64 How. Pr. 206. In the last case the court say that it is the settled doctrine of the State that compensation must be first made. But see matter of *St. Lawrence etc. R. R. Co.*, 66 Hun. 306, 21 N. Y. Supp. 131.

North Carolina. *Raleigh & Gaston R. R. Co. v. Davis*, 2 Dev. & B. (N. C.) 451; *State v. McIver*, 88 N. C. 686; *Johnston v. Rankin*, 70 N. C. 550; *McIntire v. Western N. C. R. R. Co.*, 67 N. C. 278; *State v. Lyle*, 100 N. C. 497, 6 S. E. Rep. 379; *Wellington & P. R. R. Co. v. Cashie etc. Co.*, 116 N. C. 924, 20 S. E. Rep. 964.

Ohio. *Mercer v. McWilliams, Wright*, 132; *Bates v. Cooper*, 5 Ohio, 115; *Ferris v. Bramble*, 5 Ohio St. 109; *Willyard v. Hamilton*, 7 Ohio Pt. 2, 111. See *Hueston v. Eaton etc. R. R. Co.*, 4 Ohio St. 685.

Pennsylvania. *Pittsburgh v. Scott*, 1 Pa. St. 309; *Hattermehl v. Dickinson*, 8 Phila. 282; *Yost's*

Report, 17 Pa. St. 524. But in case of private roads the statute required the damages to be first paid. *Clowes Private Road*, 31 Pa. St. 12.

Tennessee. *Wetherspoon v. State*, Mar. & Yerg. 118; *Anderson v. Turbeville*, 6 Coldw. 150; *Parker v. East Tenn. etc. R. R. Co.*, 13 Lea, 669; *Louisville & Nashville R. R. Co. v. Quinn*, 14 Lea, 65; *Saunders v. Railroad Co.*, 101 Tenn. 206, 47 S. W. Rep. 155.

Virginia. *Tuckahoe Canal Co. v. Tuckahoe etc. R. R. Co.*, 11 Leigh. 42.

Vermont. *Foster v. Stafford National Bank*, 57 Vt. 128.

Wisconsin. *Shepardson v. Milwaukee & Beloit R. R. Co.*, 6 Wis. 605; *Robbins v. Railroad Co.*, 6 Wis. 636; *Powers v. Bears*, 12 Wis. 213; *Smeaton v. Martin*, 57 Wis. 364; *State v. Hogue*, 71 Wis. 384, 36 N. W. Rep. 860. But see *Church v. Joint School District*, 55 Wis. 399; *Norton v. Peck*, 3 Wis. 714.

United States. *Cherokee Nation v. Southern Kansas R. R. Co.*, 135 U. S. 641, 10 S. C. Rep. 965; *Sweet v. Rechel*, 159 U. S. 380, 16 S. C. Rep. 43 (construing constitution of Massachusetts); *Great Falls Manf. Co. v. Garland*, 25 Fed. Rep. 521. The same thing is also implied in the cases cited in the following sections. *Chattanooga v. Terminal R. R. Co.*, 67 Fed. Rep. 273, intimates a contrary view.

⁴⁶ *Nicholas v. Somerset & Ken-*

§ 457. **Distinction between a taking by the public and by private parties.**—As a general rule, the courts which hold that compensation need not precede occupation also hold that some provision must be made for compensation whereby the owner will certainly obtain it, and that it is not enough that the law provides a mode for ascertaining the amount of compensation and imposes, on the party taking, the duty of making payment. A distinction is usually made by such courts between a taking by the public, that is by the State or public corporations, and a taking by private corporations or individuals.⁴⁷ In the former case the compensation is a public charge, the good faith of the public is pledged for its payment, and all the resources of taxation may be employed in raising the amount. Where, therefore, the law requires the compensation to be paid out of the

nebec R. R. Co., 43 Me. 356; Rubottom v. McClure, 4 Blackf. 505; Hankins v. Lawrence, 8 Blackf. 266; McCormick v. La Fayette, 1 Ind. 48; New Albany & Salem R. Co. v. Connelly, 7 Ind. 32; Prather v. Jeffersonville etc. R. R. Co., 52 Ind. 16. This case was under a charter passed prior to the constitution of 1851, which required prepayment. Compton v. Susquehanna R. R. Co., 3 Bland Ch. 386; Harness v. Chesapeake & Ohio Canal Co., 1 Md. Ch. 248; Hazen v. Essex Co., 12 Cush. 475; Raleigh & Gaston R. Co. v. Davis, 2 Dev. & B. (N. C.) 451; State v. McIver, 88 N. C. 686; McIntire v. Western N. C. R. Co., 67 N. C. 278; Mercer v. McWilliams, Wright (Ohio), 132; Bates v. Cooper, 5 Ohio, 115; Tuckahoe Canal Co. v. Tuckahoe etc. R. R. Co., 11 Leigh 42.

⁴⁷ Robbins v. Railroad Co., 6 Wis. 636; Smeaton v. Martin, 57 Wis. 364; Walther v. Warner, 25 Mo. 277. For cases which repudi-

ate this distinction see § 456 note 1. In Covington Short Route Transfer Co. v. Piel, 87 Ky. 267, 8 S. W. Rep. 449, it is said: "That the citizen would be more likely to receive compensation from the State out of an abundant treasury, and by reason of its power to enforce payment by exactions from its citizens in the form of taxation, than from a private corporation owning its corporation property, or the individual security given by it, will be readily conceded; but in what manner this protects the citizen who has been deprived of his property in his constitutional rights it is difficult to comprehend. The security may be more ample in the one case than in the other, and still his right of property has been destroyed in its appropriation to a public use, without just compensation previously made, and all that is left him, whether due by the municipality, county or corpora-

State treasury,⁴⁸ or makes it a charge upon the general resources of a public corporation, such as a county,⁴⁹ city,⁵⁰

tion, is the right, if a voluntary payment is not made at the end of the litigation, to take coercive measures for the recovery of the value of his property to which he was clearly entitled from the municipality or the private corporation before either could use it for public purposes. Viewed in any aspect of the case, whether taken by the sovereign or by the corporation under sovereign authority, it is a destruction of the constitutional guaranty for the protection of private property to appropriate it, without the consent of the owner, to a public use without first making compensation to him in money for the value of the property of which he has been deprived."

⁴⁸ *Young v. Harrison*, 6 Ga. 130; *People v. Michigan Southern R. R. Co.*, 3 Mich. 496; *Smith v. McAdam*, 3 Mich. 506; *Wheeler v. Young*, 4 Wend. 647; *Talbot v. Hudson*, 16 Gray, 417, 431. In the last case the act required that the amount ascertained should be paid out of the State treasury, and the governor was authorized to draw his warrant therefor. Of this the court say: "That such an appropriation affords a remedy sufficiently adequate and certain is too clear to admit of doubt. It is a pledge of the faith and credit of the commonwealth, made in the most solemn and authentic manner, for the payment of damages as soon as they are ascertained and liquidated by due process of

law. * * * The answer to the argument that no process is provided by which the payment can be secured and enforced is, that no such provision is necessary in cases where the power of eminent domain is exercised immediately by the State itself, in pursuance of a statute which enacts that compensation is to be made by a warrant drawn by the governor of the commonwealth upon the public treasury. We are bound to presume that the chief magistrate of the State will perform his duty by drawing his warrant in conformity with the requirements of law, and that payment of a public debt thus created will be duly made in like manner as all public dues and liabilities are paid out of the treasury of the State." So the responsibility of the Federal Government is deemed sufficient security. *Great Falls Manf. Co. v. Garland*, 25 Fed. Rep. 521.

⁴⁹ *Lowndes County v. Bowie*, 34 Ala. 461; *Gashweller's Heirs v. McElroy*, 1 A. K. Marsh. 84; *State v. Messenger*, 27 Minn. 119; *Yost's Report*, 17 Pa. St. 524; *Haverhill Bridge Proprietors v. County Comrs. of Essex*, 103 Mass. 120; *State v. McIver*, 88 N. C. 686; *Hughes v. Milligan*, 42 Kan. 396, 22 Pac. Rep. 313; *Bronson v. Gee*, 25 Or. 462, 36 Pac. Rep. 527; *Cherry v. Lane County*, 25 Or. 487, 36 Pac. Rep. 531; *Delaware County's Appeal*, 119 Pa. St. 159, 13 Atl. Rep. 62; *State v. Hogue*, 71 Wis. 384, 36 N. W. Rep. 860.

⁵⁰ *Pittsburgh v. Scott*, 1 Pa. St.

town,⁵¹ or school district,⁵² it is held that such sure and certain provision is made for obtaining compensation as satisfies the constitution. But, if it can be shown that the resources of a municipal corporation, from taxation or otherwise, are insufficient to enable it to make compensation in a reasonable time, an entry will be enjoined until security is given.⁵³ It has been held that where the statute provides for payment of the compensation out of the proceeds to be levied upon the property benefited by the improvement, the security is not sufficient to authorize an entry before payment.⁵⁴ A law will, if possible, be so construed as to sustain its validity in respect to making compensa-

309; *Coles v. Williamsburgh*, 10 Wend. 659; *Hatermehl v. Dickinson*, 8 Phila. 282; *Case v. Thompson*, 6 Wend. 634; *Matter of Application etc. of New York*, 34 Hun 441; *aff.* 99 N. Y. 569; *In re City of Cedar Rapids*, 85 Ia. 39, 51 N. W. Rep. 1142; *State v. Otis*, 53 Minn. 318, 55 N. W. Rep. 143; *People v. Village of Haverstraw*, 80 Hun 385, 30 N. Y. Supp. 325; *Keeley v. City of New York*, 6 Misc. 516, 27 N. Y. Supp. 164; *Bromley v. Philadelphia*, 20 Phil. 302; *Wilkes-Barre Paper Mfg. Co. v. Wilkes-Barre*, 5 Luzerne Leg. Reg. Rep. 333; *State v. City of Superior*, 81 Wis. 649, 51 N. W. Rep. 1014; *Sweet v. Rechel*, 159 U. S. 380, 16 S. C. Rep. 43; *Browning v. Collis*, 21 Misc. N. Y. 155.

⁵¹ *Brock v. Hishen*, 40 Wis. 674; *Dronberger v. Reed*, 11 Ind. 420; *Jeffersonville, M. & I. R. R. Co. v. Dougherty*, 40 Ind. 33; *Application of Church*, 92 N. Y. 1.

⁵² *Chamberlain v. Morgan*, 68 Pa. St. 168; *Long v. Fuller*, 68 Pa. St. 170.

⁵³ *Keene v. Bristol*, 26 Pa. St. 46. In this case a bill was filed

to enjoin the opening of a road through the complainant's grounds. It appeared that the damage would be considerable, that the borough could only levy a tax of thirty cents on the hundred dollars, and that that tax barely enabled it to meet ordinary expenses. The opening was enjoined until the giving of bond with surety to be approved by the court. But in the case of *In re City of Cedar Rapids*, 85 Ia. 39, 51 N. W. Rep. 1142, it was held no defence to proceedings of condemnation by a city that the city had no funds with which to pay for the land or that it would thereby incur an indebtedness in excess of the constitutional limit.

⁵⁴ *Sage v. Brooklyn*, 89 N. Y. 189; *Chapman v. Gates*, 54 N. Y. 132; *Rider v. Stryker*, 2 Hun 115; but see *S. C.*, 63 N. Y. 136; *Hammersley v. Mayor etc. of New York*, 56 N. Y. 533; *Coles v. Williamsburgh*, 10 Wend. 659; *Lawrence v. Newark*, 38 N. J. L. 151; *Baldwin v. Same*, *Ibid.* 158; *Mitchell v. White Plains*, 62 Hun 231, 41 N. Y. St. Rep. 787, 16

tion as in other respects.⁵⁵ Directing the payment of compensation out of the earnings of a railroad, the property of the State, is not a provision sufficiently certain to satisfy the constitution.⁵⁶ A statute of New York in reference to the Niagara Falls Reservation provided that, unless the legislature made an appropriation to pay the amount awarded within two years, all the proceedings taken should be void. Within two years an act was passed appropriating just the amount of the award. It was contended that the appropriation was insufficient, because it made no provision for the contingency of the award being increased on a new hearing, but it was held otherwise.⁵⁷

§ 458. **What is sufficient security when the taking is by private parties.**—Those courts which hold that the compensation must be secured in some way so that it will not be subject to the ordinary perils of collection, have found great difficulty in dealing with private corporations and individuals. The Supreme Court of Wisconsin, after reviewing prior cases in that State, sum up the whole matter as follows: “These cases conclusively establish that one of two things must invariably be done before the public can, against the will of the owner, acquire the right to enter upon and permanently occupy his land, which may be needed for public uses.

“1. The value of the property to be taken must be ascertained by some legal and proper proceeding, and be paid; or,

“2. If the value thus ascertained be not paid to, or

N. Y. Supp. 828; *Matter of South Market St.*, 67 Hun 594, 22 N. Y. Supp. 432. But where there was a general liability for any deficiency it was held otherwise. *State v. City of Superior*, 81 Wis. 649, 51 N. W. Rep. 1014.

⁵⁵ *Sage v. Brooklyn*, 89 N. Y. 189.

⁵⁶ *Conn. River R. R. Co. v. County Commissioners*, 127 Mass.

50. A writ of prohibition was granted against proceedings to

condemn, although it was admitted that the earnings of the road would be ample for the payment, and although an act had been passed subsequently to the filing of the petition to condemn which made the compensation payable absolutely by the State.

⁵⁷ *Matter of Commissioners of State Reservation at Niagara*, 102 N. Y. 734; S. C., 15 Abb. N. C. 159 and 395.

secured by, the owner, an adequate and safe fund must be provided, from which he may at some future time be compensated.

"These, it seems to us, are the results of those cases, and they are such as we should be unwilling to depart from. The latter proposition, in the case of a private corporation, like a railroad company, would undoubtedly require it to tender or offer in money the amount of the ascertained damages, or compensation with expenses, if any, to the owner or person interested, and if, on the ground of an intended appeal or otherwise, he should refuse to receive it, the company would be required to deposit the same with some proper officer or person, to be kept good for the owner until the end of the litigation, or until such time as he should apply for and signify his readiness to accept it."⁵⁸ The Supreme Court of Texas takes a similar position. "The property must be paid for when taken, or within a reasonable time thereafter, and the making of compensation must be as absolutely certain as that the property is taken."⁵⁹ But the court do not say what will satisfy this requirement. A bond with surety to be approved by a judge or court has been held sufficient security.⁶⁰ In Ohio, where compensation was to be first paid or secured by a deposit of money, a bond was held ineffectual.⁶¹ In California such a bond is held insufficient.⁶² A deposit in court of double the amount awarded by commissioners was held to be sufficient security.⁶³ Some courts have gone so far as to hold

⁵⁸ Powers v. Bears, 12 Wis. 213, 221.

⁵⁹ Buffalo Bayou etc. R. R. Co. v. Ferris, 26 Tex. 588.

⁶⁰ Cairo & Fulton R. R. Co. v. Turner, 31 Ark. 494; Walther v. Warner, 25 Mo. 277; Doe v. Georgia R. R. Co., 1 Ga. 524; Old Colony R. R. Co. v. Framingham Water Co., 153 Mass. 561, 27 N. E. Rep. 662; Wellington & P. R. R. Co. v. Cashie etc. Co., 116 N. C. 924, 20 S. E. Rep. 964.

⁶¹ Ferris v. Bramble, 5 Ohio. St. 109.

⁶² Sanborn v. Belden, 51 Cal. 266; Vilhac v. Stockton & I. R. R. Co., 53 Cal. 208; see also Moody v. Jacksonville etc. R. R. Co., 20 Fla. 597.

⁶³ Cherokee Nation v. Southern Kans. R. R. Co., 135 U. S. 641, 10 S. C. Rep. 965. And see Matter of St. Lawrence etc. R. R. Co., 66 Hun 306, 21 N. Y. Supp. 131.

that it is sufficient to provide a remedy whereby the owner may obtain judgment for his damages, to be enforced by execution in the ordinary way,⁶⁴ or by enjoining the use of the property, if the judgment is not paid.⁶⁵ But the weight of authority is against this position, as it certainly ought to be.⁶⁶ If the owner is to be compelled to give up possession of his property for public use, and perhaps see it placed beyond the possibility of being restored to its former estate, before receiving his just compensation, he ought at least to have an adequate fund provided or security given, whereby he will certainly obtain what the constitution guarantees him. This is the very least that the constitutional provision should be held to ensure him.⁶⁷

§ 459. **Summary as to time of compensation.**—It is thus seen that in those States where the constitution contains no specific provision as to the time or manner of compensation, the cases divide themselves into two principal classes: first, those which hold that the compensation must be paid before entry; second, those which hold that it may be ascertained and paid after entry. The second class again divide themselves into two subordinate classes: first, those which hold that the compensation must be secured, and, second, those which hold that no security is necessary. The first of these may be again divided into those which make a distinction in respect of public corporations, and those which do not. This

⁶⁴ *McCormick v. La Fayette*, 1 Ind. 48; *Hazen v. Essex Co.*, 12 Cush. 475; *McIntire v. Western N. C. R. R. Co.*, 67 N. C. 278; *Johnson v. Rankin*, 70 N. C. 550; *Willyard v. Hamilton*, 7 Ohio Pt. 2, 111. And see § 456 note 46.

⁶⁵ *Brickett v. Haverhill Aqueduct Co.*, 142 Mass. 394.

⁶⁶ *Moody v. Jacksonville etc. R. R. Co.*, 20 Fla. 597; *Thompson v. Grand Gulf R. R. etc. Co.*, 3 How. (Miss.) 240; *Pearson v. Johnson*, 54 Miss. 259; *Piscataque Bridge Co. v. New Hampshire Bridge*

Co., 7 N. H. 35; *Buffalo Bayou etc. R. R. Co. v. Ferris*, 26 Tex. 588; *Tait v. Matthews*, 33 Tex. 112; *Foster v. Stafford National Bank*, 57 Vt. 128; *Newell v. Smith*, 15 Wis. 101; *Gilman v. Sheboygan & Fond du Lac R. R. Co.*, 37 Wis. 317.

⁶⁷ *Walther v. Warner*, 25 Mo. 277; *Bloodgood v. Mohawk & Hudson R. R. Co.*, 18 Wend. 9; *Chapman v. Gates*, 54 N. Y. 132; *Sage v. Brooklyn*, 89 N. Y. 189, 195.

great diversity and confusion in the authorities shows the lack of any guide in the constitution when it is once held that the compensation need not be first made. All these decisions distinguishing between public and private corporations, and laying down various requirements as to security in case of a taking by the latter, are clear cases of judicial legislation. They are probably due in a large measure to an erroneous idea as to what constitutes a taking. It was the view of the earlier cases that there was no taking without the transfer of the legal title. By holding that the legal title did not vest until the compensation was paid, it was thought the constitution was satisfied. But any interference with the rights of property is a taking.⁶⁸ The occupation of property is clearly such an interference,⁶⁹ and should not be permitted until the compensation is paid.

§ 460. **Compensation must be made in money.**—Some constitutions provide that compensation shall be made irrespective of benefits. Some courts hold the same in the absence of any such provision in the constitution. Others hold that benefits to property not taken may be considered in reduction of damages. These questions will be discussed hereafter.⁷⁰ But, whether benefits are excluded or not, the just compensation, when ascertained, must be paid in money.⁷¹ Some of the constitutions expressly require that the compensation shall be made in money.⁷² In any event, no part of the just compensation is paid in benefits, but benefits are considered in estimating the amount of the just compensation. The compensation cannot be paid in canal scrip, even at its market value,⁷³ nor by certificates of indebted-

⁶⁸ Ante, Chap. 111.

⁶⁹ *San Mateo Water Works v. Sharpstein*, 50 Cal. 284; *Fox v. Western Pacific R. R. Co.*, 31 Cal. 538; ante, § 149.

⁷⁰ Post, §§ 465-476.

⁷¹ *Hamilton v. Annapolis & Elk River R. R. Co.*, 1 Md. Ch. 107; *S. C.*, 1 Md. 553; *Matter of New York, West Shore & Buffalo R. R. Co.*, 28 Hun 426; *Burlington*

etc. R. R. Co. v. Schweikart, 10 Col. 178; *Chicago etc. R. R. Co. v. McGrew*, 104 Mo. 282, 15 S. W. Rep. 931; *Chesapeake etc. R. R. Co. v. Patton*, 6 W. Va. 147; *Railroad Co. v. Halstead*, 7 W. Va. 301.

⁷² See *Arkansas, Kansas, and Vermont*, ante §§ 16, 26, 49.

⁷³ *State v. Beackmo*, 8 Blackf. 246.

ness against municipal corporations.⁷⁴ Whether the owner may be required to accept in lieu of money the doing of certain things by the party condemning, or certain concessions in his favor as to the use of the property taken, or other similar advantages, are questions which are discussed hereafter.⁷⁵

§ 461. **The legislature cannot fix the compensation or prescribe the rules for its computation.** —In the ascertainment of the just compensation to be made for property taken, the parties are entitled to an impartial tribunal and to an opportunity to appear and be heard before such tribunal.⁷⁶ It follows, therefore, that the legislature cannot fix the compensation, or determine in what it shall consist, or prescribe the rules or principles upon which it shall be computed.⁷⁷ An act of Congress authorized the condemnation of a lock and dam belonging to the Monongahela Navigation Company, and provided "that in estimating the sum to be paid by the United States, the franchise of said corporation to collect tolls shall not be considered or estimated." In a proceeding under that act this proviso was disregarded and compensation was given for the franchise.⁷⁸ The court says: "By this legislation, Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial and not a legislative question. The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, through

⁷⁴ *Butler v. Sewer Comrs.*, 39 N. J. L. 665.

⁷⁵ *Post*, § 505.

⁷⁶ *Ante*, §§ 313, 363, 368.

⁷⁷ *Pennsylvania R. R. Co. v. Baltimore & Ohio R. R. Co.*, 60 Md 263; *Commonwealth v. Pittsburgh & Connellsville R. R. Co.*, 58 Pa. St. 26; *Isom v. Mississippi Central R. R. Co.*, 36 Miss. 300; *Enfield Toll Bridge Co. v. Conn.*

Riv. Co., 7 Conn. 28; *State v. Chicago etc. R. R. Co.*, 36 Minn. 402; *In re Opinion of the Justices*, 66 N. H. 629, 33 Atl. Rep. 1076; *Newburyport Water Co. v. Newburyport*, 85 Fed. Rep. 723.

⁷⁸ *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 13 S. C. Rep. 622. See also *Chaplin v. Highway Comrs.*, 129 Ill. 651, 22 N. E. Rep. 484; *Tait's Exr*

Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry." The effect of the decision is also that where the legislature prescribes an erroneous rule of compensation, and the statute is complete without it, the erroneous rule will be regarded as expunged and the statute enforced without it.

§ 462. **Meaning of the phrase "just compensation."**—The etymology of the word "compensation" presents the idea of balancing one thing against another. To compensate is to render something which is equal to that taken or received. The word "just" was not intended to have a mere literal meaning as opposed to unjust, but as placing the matter upon a broad and equitable basis. "It is difficult to imagine an unjust compensation; but the word 'just' is used evidently to intensify the meaning of the word 'compensation;' to convey the idea that the equivalent to be rendered for property taken shall be real, substantial, full, ample; and no legislature can diminish by one jot the rotund expression of the constitution." ⁷⁹ "The noun 'compensation,' standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages, the former being the equivalent for the injury done, and the latter imposed by way of punishment. So that if the adjective 'just' had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be the equivalent of the property. And this is made emphatic by the adjective 'just.' There can in view of the combination of these two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken." ⁸⁰ "Just

v. Central Lunatic Asylum, 84 Va. 271, 4 S. E. Rep. 697.

⁸⁰ Monongahela Nav. Co. v. United States, 148 U. S. 312, 326,

⁷⁹ Virginia etc. R. R. Co. v. Henry, 8 Nev. 165.

13 S. C. Rep. 622.

compensation," therefore, as used in the constitution, means a fair and full equivalent for the loss sustained by the taking for public use.⁸¹ It may be more or it may be less than the mere money value of the property actually taken. The exercise of the power being necessary for the public good, and all property being held subject to its exercise when, and as the public good requires it, it would be unjust to the public that it should be required to pay the owner more than a fair indemnity for the loss he sustains by the appropriation of his property for the general good.⁸² On the other hand, it would be equally unjust to the owner if he should receive less than a fair indemnity for such loss. To arrive at this fair indemnity, the interests of the public and of the owner and all the circumstances of the particular appropriation should be taken into consideration.⁸³

§ 463. **Measure of damages when an entire tract is taken.**—This case presents but little difficulty, and, so far as we have observed, there is no difference in the authorities as to the proper measure of damages. A fair equivalent for any

⁸¹ *San Francisco etc. R. R. Co. v. Caldwell*, 31 Cal. 367; *Alton & Sangamon R. R. Co. v. Carpenter*, 14 Ill. 190; *McIntire v. State*, 5 Blackf. 384; *Sater v. Burlington & Mount Pleasant Plank Road Co.*, 1 Ia. 386; *Bangor & Piscataquis R. R. Co. v. McComb*, 60 Me. 290; *Winona & St. Peter R. R. Co. v. Denman*, 10 Minn. 267; *Symonds v. Cincinnati*, 14 Ohio, 147; *Livingston v. New York*, 8 Wend. 85; *Bigelow v. West Wisconsin Ry. Co.*, 27 Wis. 478; *Chesapeake & Ohio Canal Co. v. Key*, 3 Cranch, C. C. 599; *Grand Rapids etc. R. R. Co. v. Cheseboro*, 74 Mich. 466, 42 N. W. Rep. 66; *Fisher v. Baden Gas Co.*, 138 Pa. St. 301, 22 Atl. Rep. 29; *Spring City Gas Light Co. v. Penn. S. V. R. R. Co.*, 167 Pa. St. 6, 31 Atl. Rep. 368; *Alloway v. City of*

Nashville, 88 Tenn. 510, 13 S. W. Rep. 123, 1 Am. R. R. & Corp. Rep. 671.

⁸² The compensation must be just to the public as well as to the owner. *Searl v. School District*, 133 U. S. 553, 562, 10 S. C. Rep. 374.

⁸³ In speaking of the meaning of the words in question the court in *McIntire v. State*, 5 Blackf. 384, says: "That meaning is, not that property thus taken shall be valued and its price paid in money, but that the individual who claims to be a sufferer, in consequence of the exercise of the right of eminent domain over his property, shall be recompensed for the actual injury which he may have sustained, all circumstances considered, by the measure of which he complains."

entire piece of property is its market value in money.⁸⁴ The circumstances which may be taken into consideration in fixing this value, and the manner in which it shall be arrived at, are considered elsewhere.⁸⁵

§ 464. When part is taken, just compensation includes damages to the remainder.—Upon this point there is entire unanimity of opinion.⁸⁶ “The constitutional provision can-

p. 387. And, as illustrating the same view, the court in *Bangor & Piscataquis R. R. Co. v. McComb*, 60 Me. 290, says: “The words selected are significant—‘just compensation.’ These words cover more than the mere value of the quantity taken, measured by rods or acres. They intend nothing less than to save the owner from suffering in his property or estate, by reason of this setting aside of his right of property—as far as compensation in money can go—under the rules of law applicable to such cases.” p. 296. And again: “Just compensation consists in making the owner good by an equivalent in money for the loss he sustains in the value of his property by being deprived of a portion of it.” *Bigelow v. West Wisconsin Ry. Co.*, 27 Wis. 478.

⁸⁴ *Cooley*, Const. Lims, p. 567; *San Francisco etc. R. R. Co. v. Caldwell*, 31 Cal. 367; *Hollingsworth v. Des Moines & St. Louis Ry. Co.*, 63 Ia. 443; *City of Santa Ana v. Harlin*, 99 Cal. 538, 34 Pac. Rep. 234; *Brown v. Calumet Riv. R. R. Co.*, 125 Ill. 600, 18 N. E. Rep. 283; *Reed v. Ohio & Miss. R. R. Co.*, 126 Ill. 48, 17 N. E. Rep. 807; *Chicago etc. R. R. Co. v. Parsons*, 51 Kans. 408, 32 Pac. Rep. 1083; *San Diego L. & Todd*, 39 Neb. 818, 58 N. W. Rep.

T. Co. v. Neale, 78 Cal. 63, 20 Pac. Rep. 372; *Gardner v. Brookline*, 127 Mass. 358. See *Los Angeles v. Pomeroy*, 124 Cal. 597, 57 Pac. Rep. 585.

⁸⁵ *Post*, § 478 et seq.

⁸⁶ *Little Rock etc. R. R. Co. v. Allen*, 41 Ark. 431; *Colorado M. R. R. Co. v. Brown*, 15 Col. 193, 25 Pac. Rep. 87; *Orange Belt R. R. Co. v. Craver*, 32 Fla. 28, 13 So. Rep. 444; *Kiernan v. Chicago etc. R. R. Co.*, 123 Ill. 188; *Chicago etc. R. R. Co. v. Nix*, 137 Ill. 141, 27 N. E. Rep. 81; *Farneman v. Mt. Pleasant Cem. Ass.*, 135 Ind. 344, 35 N. E. Rep. 271; *Bolls v. Boston*, 136 Mass. 398; *Grand Rapids etc. R. R. Co. v. Cheseboro*, 74 Mich. 466, 42 N. W. Rep. 66; *Adolph v. Minneapolis etc. R. R. Co.*, 42 Minn. 170, 43 N. W. Rep. 848; *Kremer v. Chicago etc. R. R. Co.*, 51 Minn. 15, 52 N. W. Rep. 977; *Duluth & W. R. R. Co. v. West*, 51 Minn. 163, 53 N. W. Rep. 197; *Kansas City etc. R. R. Co. v. Story*, 96 Mo. 611, 10 S. W. Rep. 203; *Doyle v. Kansas City & S. R. R. Co.*, 113 Mo. 280, 20 S. W. Rep. 970; *Blakeley v. Chicago etc. R. R. Co.*, 25 Neb. 207, 40 N. W. Rep. 956; *Smith v. Crete etc. R. R. Co.*, 29 Neb. 142, 45 N. W. Rep. 287; *Omaha Southern R. R. Co. v.*

not be carried out, in its letter and spirit, by anything short of a just compensation for all the direct damages to the owner of the lot, confined to that lot, occasioned by the taking of his land. The paramount law intends that such owner, so far as that lot is in question, shall be put in as good a condition, pecuniarily, by a just compensation, as he would have been in if that lot of land had remained entire, as his own property. How much less is that lot and its erections, thereon remaining, worth to the owner, as property to be used or leased or sold the day after the part was taken, to be used for the purpose designed, than the whole lot intact was the day before such taking?"⁸⁷ In considering damages to the remainder, however, the whole remainder must be taken into account. If part is damaged and part benefited the question will be whether the whole is worth less than before the taking.⁸⁸

289; *Martin v. Fillmore County*, 44 Neb. 719, 62 N. W. Rep. 863; *Newman v. Metropolitan R. R. Co.*, 118 N. Y. 618, 23 N. E. Rep. 901, 2 Am. R. R. & Corp. Rep. 318; *Hendrick v. Carolina Central R. R. Co.*, 101 N. C. 617, 8 S. E. Rep. 236; *Liverman v. Roanoke etc. R. R. Co.*, 114 N. C. 692, 19 S. E. Rep. 64; *Beekman v. Jackson County*, 18 Or. 283, 22 Pac. Rep. 1074, 1 Am. R. R. & Corp. Rep. 665; *Dalrymple v. Whitingham*, 26 Vt. 345; *Lafelin v. Chicago etc. R. R. Co.*, 33 Fed. Rep. 415; *Greeley etc. R. R. Co. v. Yount*, 7 Col. App. 189, 42 Pac. Rep. 1023; *Omaha etc. R. R. Co. v. Doney*, 3 Kan. App. 515, 43 Pac. Rep. 831; *Duncan v. Levee Comrs.*, 74 Miss. 125; *Bennett v. Woody*, 137 Mo. 377; *Churchill v. Beethe*, 48 Neb. 87, 66 N. W. Rep. 992; *Matter of Grade Crossing Comrs.*, 6 app. Div. 327, 40 N. Y. Supp. 520; *St. Louis etc. R. R. Co.*

v. Postal Tel. Co., 173 Ill. 508.

⁸⁷ *Bangor & Piscataquis R. R. Co. v. McComb*, 60 Me. 290. To the same effect, *Indiana, B. & W. Ry. Co. v. Allen*, 100 Ind. 409; *Virginia & Truckee R. R. Co. v. Henry*, 8 Nev. 165; *Dearborn v. Boston, Concord & Montreal R. R. Co.*, 24 N. H. 179; *Petition of Mount Washington Road Co.*, 35 N. H. 134; *Albany etc. R. R. Co. v. Dayton*, 10 Abb. Pr. N. S. 182; *Taits Exr. v. Central Lunatic Asylum*, (Va.) 4 S. E. Rep. 697; *Baltimore & Ohio R. R. Co. v. P. W. & Ky. R. R. Co.*, 17 W. Va., 812. The same rule is held in nearly all the cases cited in the succeeding sections, where the question of benefits is discussed.

⁸⁸ *Page v. Chicago, Milwaukee & St. Paul Ry. Co.*, 70 Ill. 324; *Schuykill Riv. E. S. R. R. Co. v. Stocker*, 128 Pa. St. 233, 18 Atl. Rep. 399.

§ 465. **The question of benefits.**—While the authorities are agreed that, where part of a tract is taken, just compensation includes not only the value of that which is taken, but damages, if any, to the remainder, there is great diversity of opinion as to the right to take into consideration the benefits which may accrue to the remainder by reason of the appropriation of a part to public use. In some States the consideration of benefits is prohibited by the constitution.⁸⁹ Sometimes the statute conferring authority to condemn prohibits any deduction for benefits in estimating the compensation or damages. In the absence of any such constitutional or statutory provisions, it becomes a question of construction as to the meaning of the phrase “just compensation” in the constitution. The decisions may be divided into five classes, according as they maintain one or the other of the following propositions:

First. Benefits cannot be considered at all.

Second. Special benefits may be set off against damages to the remainder, but not against the value of the part taken.

Third. Benefits, whether general or special, may be set off as in the last proposition.

Fourth. Special benefits may be set off against both damages to the remainder or the value of the part taken.

Fifth. Both general and special benefits may be set off as in the last proposition.

It will be observed that these propositions pass from one extreme to the other. The decisions and the grounds upon which they rest will now be examined.

§ 466. **Cases holding that benefits cannot be considered at all.**—The only State in which this doctrine is maintained is Mississippi. The question first arose in *Brown v. Beatty*.⁹⁰ The charter of the Mississippi Central Railroad Company provided that “the jury, in estimating the damages, if for the ground occupied by the said road, shall take into the estimate the benefit resulting to such owner or owners, by reason of said road passing through or upon said land,

⁸⁹ See ante, Chap. II.

⁹⁰ 34 Miss. 227, 241, 1857.

towards the extinguishment of said claim for damages." The court held that this provision was void. The reasoning of the court is as follows: "The party, at the time the assessment was made, was entitled to 'just compensation' for the injury sustained in consequence of the appropriation of his property to the uses of the road. No diversity can exist as to the true construction of the language of the Bill of Rights. He was entitled to the cash value of the land when the assessment was made, and also to be indemnified for the damage to his adjacent land, consequent upon the location of the road. He was entitled to be paid in money. It was as clearly incompetent for the legislature to prescribe in what he should be paid, as to prescribe how much or how little he should receive. Manifestly, a party whose property has been taken and appropriated to public use in the construction of a railroad, cannot be compelled to receive as compensation the estimated enhancement in the value of his remaining property. The cash value and the actual damage are the true standard by which to determine the compensation to which, in such cases, the party is entitled. We think, therefore, that the provision in the eighth section, by which the jury are directed in assessing the damages, when land is the subject, to take into the estimate as an off-set to the claim of compensation 'the benefits' to the owner, resulting from the location of the road upon his land, is invalid." The doctrine has been repeatedly affirmed.⁹¹

⁹¹ *Isom v. Mississippi Central R. R. Co.*, 36 Miss. 300; *Pensici v. Wallis*, 37 Miss. 172; *New Orleans etc. R. R. Co. v. Moye*, 39 Miss. 374. In *Balfour v. Louisville etc. R. R. Co.*, 62 Miss. 508, the rule is apparently departed from. In the latter case the rule of damages is said to be the difference in value of the whole tract before the taking and the remainder after the taking. This would allow the consideration of

benefits. The point really decided, however, was that the value of the strip taken was not properly estimated by considering it as a strip by itself and out of its relation to the remainder. The rule of the *Isom* case as to benefits was expressly affirmed in *Board of Levee Comrs. v. Harkelroads*, 62 Miss. 807. Compare later Kentucky cases cited, post § 468 note 2.

§ 467. Cases holding that special benefits only may be set off against damages to the remainder, but not against the value of the land taken.—This is the doctrine in Maryland,⁹² Nebraska,⁹³ Tennessee,⁹⁴ Virginia,⁹⁵ West Virginia,⁹⁶ and Wisconsin.⁹⁷

The reasoning of the courts may be gathered from the

⁹² Shipley v. Baltimore etc. R. R. Co., 34 Md. 336; Tide Water Canal Co. v. Archer, 9 Gill. & J. 479. And see Friedenwald v. City of Baltimore, 74 Md. 116, 21 Atl. Rep. 555.

⁹³ Wagner v. Gage County, 3 Neb. 237; Freemont, Elkhorn & Mo. Valley R. R. Co. v. Whalen, 11 Neb. 585; Martin v. Fillmore County, 44 Neb. 719, 62 N. W. Rep. 863; City of Omaha v. Howell Lumber Co., 30 Neb. 633, 46 N. W. Rep. 919; Dayton v. City of Lincoln, 39 Neb. 74, 57 N. W. Rep. 754; Chicago etc. R. R. Co. v. Wiebe, 25 Neb. 545, 41 N. W. Rep. 297; Smith v. Crete etc. R. R. Co., 29 Neb. 142; 45 N. W. Rep. 287; Lowe v. City of Omaha, 33 Neb. 587, 50 N. W. Rep. 760; Kirkendall v. City of Omaha, 39 Neb. 1, 57 N. W. Rep. 752; Omaha Southern R. R. Co. v. Todd, 39 Neb. 818, 58 N. W. Rep. 289; Barr v. City of Omaha, 42 Neb. 342, 60 N. W. Rep. 591. See Chicago etc. R. R. Co. v. Buel, 56 Neb. 205.

⁹⁴ Woodfolk v. Nashville & Chattanooga R. R. Co., 2 Swan, 422; East Tenn. & Va. R. R. Co. v. Love, 3 Head, 63; Memphis v. Bolton, 9 Heisk. 508; Paducah & Memphis R. R. Co. v. Storall, 12 Heisk. 1; Mississippi R. R. Co. v. McDonald, 12 Heisk. 54. Some of these cases do not appear to distinguish between general and

special benefits, but in the last case it is expressly ruled that benefits common to the community cannot be set off, and this is said to be the rule established or intended by the earlier cases. In Chattanooga v. Geiler, 13 Lea, 611, it is held that, in a suit for damages by change of grade under the statute, benefits both general and special may be set off. But this involves simply a construction of the statute and not of the constitution, since damages by a change of grade are not a taking.

⁹⁵ Mitchell v. Thornton, 21 Gratt. 164; James River & Kanawha Co. v. Turner, 9 Leigh 313. And see City of Norfolk v. Chamberlain, 89 Va. 196, 16 S. E. Rep. 730.

⁹⁶ Railroad Company v. Tyree, 7 W. Va. 693; Railroad Company v. Foreman, 24 W. Va. 662.

⁹⁷ Robins v. Milwaukee & Horicon R. R. Co., 6 Wis. 636; Neilson v. Chicago etc. Ry. Co., 58 Wis. 516; Washburn v. Milwaukee & Lake Winnebago R. R. Co., 59 Wis. 364. See also Brown v. Merrill, 3 Chand. 46; Milwaukee & Mis. R. R. Co. v. Eble, 4 Chand. 72; Pick v. Rubicon Hydraulic Co., 27 Wis. 433; Bigelow v. West Wis. Ry. Co., 27 Wis. 478; Holton v. Milwaukee, 31 Wis. 27; Driver v. Western Union R. R. Co., 32 Wis. 569.

leading case in Tennessee, from which we quote as follows:

"But the contested and embarrassing question, still arises upon the rule prescribed in this law, for ascertaining the 'just compensation' to the owner of the land, the use and title of which he is thus forced to surrender to the corporation. On the one hand, in making the valuation of the land, the 'loss or damages' which may accrue to the owner by taking the land is to be fixed; on the other, the 'benefit or advantage' to the owner from the erection of the road, is to be estimated, and the excess of the former over the latter, in the language of the act, 'shall form the measure of the valuation of said land.'

"Is this the measure of 'compensation,' prescribed in the constitution? Was the compensation secured to the owner for the loss of his property to be paid in money, or may it be made in other property, or incidental 'benefits and advantages?' Was it intended, that the citizen should not only be forced to give up his land for the common or public use, but to take in payment for it, anything it might suit the party taking it, to offer? If such be the true meaning of the constitution, it is certainly a poor protection of private rights against the exactions of power, and is only calculated to excite false hopes of security. By the supreme law, the legislature are empowered, where, in their opinion, the good of the whole people requires it, and for the use and benefit of the whole, to compel him who owns property to give it up, upon the payment to him by the same public, for whose use it is taken, of a 'just compensation,' or, in other words, a fair price, or the value in money for the property taken.

"He cannot be paid off in 'benefits and advantages,' which are thus forced upon him, against his consent. He may be compelled to submit to the encroachment upon his private rights, when they come thus in conflict with the public interest, but with the charter of his liberties in his hand, he can say to the powers that be, 'Thus far shalt thou come and no farther.' In the appropriation of the property, the public power is exhausted. It cannot be allowed to prescribe how

much and in what he shall be paid. The value of the thing taken, must be assessed by a just and proper tribunal, and the amount paid, in the lawful coin of the United States—in money. It is a debt against those who take the property, and must be paid like all other debts. The creditor in this case cannot be coerced to receive as compensation, ameliorations of his remaining property, or the enhancement of its value, nor any other ‘benefit or advantage,’ either real or imaginary, that may be conferred upon him. He may not wish to part with a portion of his land to have the price of that which remains enhanced. The increase of price without any improvement of its fertility or beauty, is no advantage to him, if he does not wish to sell it; it only increases his public burdens in the way of taxation. What others might regard as a great ‘advantage and benefit,’ he might consider a decided injury. If his lands are appreciated, and his facilities for travel and trade increased by this improvement, these are benefits to which he is entitled, with the community in general, and for which he has to pay, in common with others, in taxes and other burthens. But there can be no good reason, why any more should be taken from him than others, for these common benefits.

“Then we arrive at the conclusion, that the plaintiff is entitled to the value of the land, taken from him by the defendants, in money, and that this value, when ascertained, cannot be liquidated in whole, or in part, by any ‘benefit or advantage’ he may in fact or by supposition, derive from the making of the road, in the appreciation of his remaining land, or otherwise. * * *

“Here, the constitutional provision ends; its inhibition upon the government goes no farther. The legislature may make any regulations it thinks right and proper for an account, or estimate of incidental ‘loss or damage,’ or injuries to the land-owner. These may consist of the necessity created for the building of new fences, the removal of buildings, separating him from his spring, well, mills, negro houses, barns, etc. And against this may be set off the ‘benefits and advantages’ to the owner, in the enhancement of

the value of his remaining land, of the same, or any adjoining tract, his increased facilities of travel, etc.”⁹⁸

§ 468. Cases holding that benefits, both general and special, may be set off against damages to the remainder, but not against the value of the part taken.—This position is maintained in Georgia,¹ Kentucky,² Louisiana,³ and Texas.⁴

⁹⁸ Woodfolk v. Nashville etc. R. R. Co., 2 Swan's Reports (Tenn.) 422, 434 et seq. and 440. Compare Weber v. Stagrays, 75 Mich. 32, 42 N. W. Rep. 665. Compare Kentucky cases cited in the next section.

¹ Jones v. Wills Valley R. R. Co., 30 Ga. 43; Savannah v. Hart-ridge, 37 Ga. 113; Atlanta v. Central R. R. Co., 53 Ga. 120; Selma etc. R. R. Co. v. Keith, 53 Ga. 178. And see Smith v. Atlanta, 92 Ga. 119, 17 S. E. Rep. 981. In Augusta v. Marks, 50 Ga. 612, it was held that an act which required that, in case of opening streets, the appraisers should consider benefits and set off the benefits against the damages, having been passed since the cases cited from 30 Ga. and 37 Ga., should be held to mean the same as the rule laid down in those cases. The case of Jones v. Wills Valley R. R. Co., in which this doctrine is established, makes no reference to the prior case of Young v. Harrison, 17 Ga. 30, in which a different doctrine is laid down after much deliberation.

² Sutton's Heirs v. Louisville, 5 Dana, 28; Rice v. Danville, Lancaster & Nicholasville Turnpike Co., 7 Dana, 81; Jacob v. Louisville, 9 Dana, 114; Henderson & Nashville R. R. Co. v. Dicker-

son, 17 B. Mon. 173; Louisville & Nashville R. R. Co. v. Thompson, 18 B. Mon. 735; Same v. Glazebrook, 1 Bush. 325; Elizabethtown & Paducah R. R. Co. v. Helm's Heirs, 8 Bush. 681.

Later Kentucky cases seem to change somewhat the rule in that State. In Louisville & N. R. R. Co. v. Ingram, 14 S. W. Rep. 534, the correct rule is said to be as follows: "First, to ascertain the value of the entire tract, excluding all consideration of the question of the enhancement of the value of the land, resulting from the proposed improvement; then, what will be its value after appropriation of such part of it as may be taken. The difference in value thus found, still excluding the enhancement, is the true compensation to which the owner is entitled. * * * The diminution in value of the entire tract is as much a taking, within the meaning of the constitution as is the strip of land upon which the roadbed lies. It is this taking that the owner is entitled to compensation for, without reference to any supposed or actual enhancement of the value of the land in that neighborhood, including that of defendant. Such general enhancement in value of the tract not taken, by reason of

*Sutton's Heirs v. Louisville*⁵ is the leading case in support of the doctrine that the "just compensation" requires that the owner should receive the value of the property actually taken, in money, irrespective of any benefit which may accrue to him from the taking. Upon this question the court say:

"Hence, when the property of one citizen is taken without his consent, for the use of the whole community of which he is a member, the constitution imperiously requires—not that the public shall decide whether he is entitled to any compensation, but that a just compensation shall be paid or secured; and that compensation implies the value, at least, of the thing taken. No citizen can be compelled to give his land to the public without an equivalent. And what is that equivalent but the value, in money, of the land surrendered to public use? He may act unreasonably and unjustly, in an imaginable case, by insisting on a pecuniary compensation, or in refusing to make the surrender with-

the improvement, cannot be set off against the value to be ascertained according to the foregoing rules. But the ordinary inconvenience and damage that may result from the prudent operation of the road may be set off by the benefits and advantages, if any, that may be reasonably anticipated from the construction and operation of the road." The same views are adopted and enforced in the following cases: *Asher v. L. & N. R. R. Co.*, 87 Ky. 391, 8 S. W. Rep. 854; *Louisville & N. R. R. Co. v. Asher*, 15 S. W. Rep. 517; *West Virginia etc. R. R. Co. v. Gibson*, 94 Ky. 234, 21 S. W. Rep. 1055. These decisions serve to place Kentucky in one or the other of the classes previously considered, or, perhaps, in a distinct class by itself.

⁵ *New Orleans etc. R. R. Co. v.*

Lagarde, 10 La. An. 150; *R. R. Co. v. Calderwood*, 15 La. An. 481; *New Orleans Pacific Ry. Co. v. Gay*, 31 La. An. 430; *Vicksburg etc. R. R. Co. v. Dillard*, 35 La. An. 1045; *New Orleans Pacific Ry. Co. v. Murrell*, 36 La. An. 344.

⁴ *Buffalo Bayou etc. R. R. Co. v. Ferris*, 26 Tex. 588; *Tait v. Matthews*, 33 Tex. 112; *Paris v. Mason*, 37 Tex. 447; *Texas & St. Louis R. R. Co. v. Matthews*, 60 Tex. 215; *Dulaney v. Nolan County*, 85 Tex. 225, 20 S. W. Rep. 70; *Southern Cotton etc. Co. v. Galveston Wharf Co.*, 3 Tex. Civ. App. p. 309, §§ 256-258; *Worsham v. G. H. & W. R. R. Co.*, 3 Tex. Civ. App. p. 496, § 425; *Travis County v. Trogden*, 88 Tex. 302, 31 S. W. Rep. 358.

⁵ 5 Dana, 28, 34, 1837.

out exacting the value of the property. But he has a right to insist on being paid the value of the thing taken from him, although he may be incidentally benefited, with others, in the appropriation of it to public use. If, however, claiming more than the value of the property taken, he seeks indemnity for consequential inconvenience or injury, then the true question will be whether, upon a survey of all advantages, as well as disadvantages, which will be likely to result to him, the balance will be for or against him; and if ascertained to be in his favor, then, of course, he will be entitled to nothing for alleged damages for such inconvenience or injury, because, the whole case being properly considered, in all its bearings, he will sustain no damage. Thus, and only thus, advantages and disadvantages may be compared and set off, the one against the other. And, in reference to the question we are now considering, this is the only constitutional sense of the term 'advantage.'

"For property taken for public use without the owner's consent, the constitution entitles him to be paid, in money, the actual value of the property, and the actual or supposed advantage to him, of the appropriation, cannot be set off against that value."

Upon the point that damages to the remainder may be off-set by general as well as special benefits thereto, the same court, in the case of *Henderson & Nashville R. R. Co. v. Dickerson*,⁶ say:

"In this case, however, the court instructed the jury who assessed the damages, that they were not to take into consideration in estimating the consequential damages which the owner might sustain, any advantage that he might derive from the construction of the road, unless it were a special individual benefit, which was not common to others in the same neighborhood. In this exposition of the law, we think that the court erred.

"The advantages which the owner may derive from the construction of the road are not in the least diminished by the fact that they will be enjoyed by others, nor does it fur-

⁶ 17 B. Mon. 173, 180-181.

nish any reason why they should be excluded from the estimate in comparing the advantages and disadvantages that will result to him from the establishment of the road. Other persons, it is true, may enjoy the same advantages, without being subjected to the same inconvenience; but this results from the nature of the improvement itself, and does not in any degree detract from the value of these advantages to the owner of the land through which the road passes."

§ 469. Cases holding that special benefits only may be set off against both the value of the part taken and damages to the remainder.—This doctrine is maintained by the courts of the following States: Connecticut,⁷ Kansas,⁸ Maine,⁹ Massachusetts,¹⁰ Minnesota,¹¹ Missouri,¹² New Hampshire,¹³

⁷ *Nicholson v. New York & New Haven R. R. Co.*, 22 Conn. 74; *Nichols v. Bridgeport*, 23 Conn. 189; *Trinity College v. Hartford*, 32 Conn. 452.

⁸ *Harding v. Funk*, 8 Kan. 315; *Commissioners of Pottawattamie Co. v. O'Sullivan*, 17 Kan. 58; *Marcey v. Fries*, 18 Kan. 353; *Tobie v. Comrs. of Brown County*, 20 Kan. 14; *Roberts v. Same*, 21 Kan. 247; *Tosper v. Comrs. of Saline County*, 27 Kan. 391. In a taking for right of way by a corporation the constitution requires benefits to be excluded. *Post*, § 472.

⁹ *Bangor & P. R. R. Co. v. McComb*, 60 Me. 290; *Chase v. City of Portland*, 86 Me. 367, 29 Atl. Rep. 1104.

¹⁰ *Commonwealth v. Coombs*, 2 Mass. 489; *Same v. Sessions of Middlesex*, 9 Mass. 388; *Avery v. Vandusen*, 5 Pick. 182; *Palmer Co. v. Ferrill*, 17 Pick. 58; *Meacham v. Fitchburg R. R. Co.*, 4 Cush. 291; *Upton v. South Branch Reading R. R. Co.*, 8 Cush. 600; *Heard v. Proprietors of the Mid-*

dlex Canal, 5 Met. 81; *Tufts v. Charlestown*, 4 Gray, 537; *Farwell v. Cambridge*, 11 Gray, 413; *Gile, Admr. v. Stevens*, 13 Gray, 146; *First Church in Boston v. Boston*, 14 Gray, 214; *Hosmer v. Warner*, 15 Gray, 46; *Whitman v. Boston & Maine R. R. Co.*, 7 Allen, 313; *Dorgan v. Boston*, 12 Allen, 223; *Whitney v. Boston*, 98 Mass. 312; *Chase v. Worcester*, 108 Mass. 60; *Allen v. Charlestown*, 109 Mass. 243; *Howe v. Ray*, 113 Mass. 88; *Upham v. Worcester*, 113 Mass. 97; *Green v. Fall River*, 113 Mass. 262; *Wood v. Hudson*, 114 Mass. 513; *Bancroft v. Boston*, 115 Mass. 377; *French v. Lowell*, 117 Mass. 363; *Hilbourne v. County of Suffolk*, 120 Mass. 393; *Parks v. County of Hampden*, 120 Mass. 395; *Clark v. Worcester*, 125 Mass. 226; *Cross v. Plymouth*, 125 Mass. 557; *Butcher's Slaughtering & M. Ass. v. Commonwealth*, 169 Mass. 103.

¹¹ *Winona & St. Peter R. R. Co. v. Denman*, 10 Minn. 267; *Same v. Waldron*, 11 Minn. 515; *Carli*

New Jersey,¹⁴ North Carolina,¹⁵ Oregon,¹⁶ Pennsylvania,¹⁷

v. Stillwater & St. Paul R. R. Co., 16 Minn. 260; Weir v. St. Paul etc. R. R. Co., 18 Minn. 155; Simmons v. St. Paul & Chicago Ry. Co., 18 Minn. 184; Grannis v. Same, *ibid*, 194; Colvill v. St. Paul & Chicago Ry. Co., 19 Minn. 283; St. Paul & Sioux City R. R. Co. v. Murphy, 19 Minn. 500; Arbrush v. Oakdale, 28 Minn. 61; County of Blue Earth v. St. Paul & Sioux City R. R. Co., 28 Minn. 503; Cedar Rapids etc. R. R. Co. v. Ryan, 37 Minn. 38, 34 N. W. Rep. 222; Miller v. Towns of Beaver & LeRoy, 37 Minn. 203, 33 N. W. Rep. 559; Whitely v. Miss. Water Power & Boom Co., 38 Minn. 523, 38 N. W. Rep. 753; Sigafos v. Minneapolis etc. R. R. Co., 39 Minn. 8, 38 N. W. Rep. 627; McKusick v. City of Stillwater, 44 Minn. 372, 46 N. W. Rep. 769; Hayner v. City of Duluth, 47 Minn. 458, 50 N. W. Rep. 693.

¹² Newby v. Platte County, 25 Mo. 258; Louisiana & Frankford Plank Road Co. v. Pickett, 25 Mo. 535; Pacific R. R. Co. v. Chrystal, 25 Mo. 544; St. Louis & St. Joseph R. R. Co. v. Richardson, 45 Mo. 466; Lee v. Tebo & Neosho R. R. Co., 53 Mo. 178; Quincy etc. R. R. Co. v. Ridge, 57 Mo. 599; Mississippi River Bridge Co. v. Ring, 58 Mo. 491; Hoshier v. Kansas City etc. R. R. Co., 60 Mo. 303; State ex rel. v. St. Louis, 62 Mo. 244; Springfield v. Schmoock, 68 Mo. 394; Wyandotte etc. Ry. Co. v. Waldo, 70 Mo. 629; Combs v. Smith, 78 Mo. 32; Jackson County v. Waldo, 85 Mo. 637; State v. City of Kansas,

89 Mo. 34; Daugherty v. Brown, 91 Mo. 26; Wells v. Chicago, B. & K. C. Ry. Co., 19 Mo. App. 127; McReynolds v. Kansas City etc. R. R. Co., 110 Mo. 484, 19 S. W. Rep. 824; Ragan v. Kansas City etc. R. R. Co., 111 Mo. 456, 20 S. W. Rep. 234; Lingo v. Burford, 112 Mo. 149, 20 S. W. Rep. 459, 18 S. W. Rep. 1081; In re Wyandotte and Central Sts., 117 Mo. 446, 23 S. W. Rep. 127; Hickman v. City of Kansas, 120 Mo. 110, 25 S. W. Rep. 225; Spencer v. Metropolitan St. R. R. Co., 120 Mo. 154, 23 S. W. Rep. 126; St. Louis etc. R. R. Co. v. St. Louis Union Stock Yards Co., 120 Mo. 541, 25 S. W. Rep. 399; Smith v. City of St. Joseph, 122 Mo. 643, 27 S. W. Rep. 344; Chicago etc. R. R. Co. v. Vivian, 33 Mo. App. 583; Kansas City v. Ward, 134 Mo. 172, 35 S. W. Rep. 600; Bennett v. Woody, 137 Mo. 377; St. Joseph v. Zimmerman, 142 Mo. 155; St. Louis etc. R. R. Co. v. Fowler, 142 Mo. 670; St. Joseph v. Geiwetz, 148 Mo. 210, 49 S. W. Rep. 1000.

¹³ Carpenter v. Landaff, 42 N. H. 218; Adden v. Railroad Company, 55 N. H. 413.

¹⁴ The question does not appear yet to be very definitely or satisfactorily settled in this State. We have found no decision by the Court of Errors covering the question. The doctrine of this section is approved in Swayze v. New Jersey Midland R. R. Co., 36 N. J. L. 295; Loweree v. Newark, 38 N. J. L. 151; Baldwin v. Same, 38 N. J. L. 158; see also State v. Miller 23 N. J. L. 383;

Matter of Application for Drainage, 35 N. J. L. 497. In *Carson v. Coleman*, 11 N. J. Eq. 106, the chancellor decides that just compensation cannot be made in benefits. This decision is commented upon in *Loweree v. Newark*, 38 N. J. L. 151, 158.

Recent decisions place New Jersey in the class here assigned to it. *Packard v. Bergen Neck R. R. Co.*, 54 N. J. L. 553 (Court of Errors and Appeals), 25 Atl. Rep. 506, affirming 54 N. J. L. 229, 23 Atl. Rep. 722; *State v. Hudson County*, 55 N. J. L. 88, 25 Atl. Rep. 322.

¹⁵ *Frudle v. North Carolina R. R. Co.*, 4 Jones Law, 89; *Commissioners v. Johnston*, 71 N. C. 398; *Raleigh & Augusta Air Line R. R. Co. v. Wicker*, 74 N. C. 220; *Wilmington & W. R. R. Co. v. Smith*, 99 N. C. 131, 5 S. E. Rep. 237; *Haislip v. Wilmington & W. R. R. Co.*, 102 N. C. 376, 8 S. E. Rep. 926.

¹⁶ *Beekman v. Jackson County*, 18 Or. 283, 22 Pac. Rep. 1074, 1 Am. R. R. & Corp. Rep. 665. But see *Putnam v. Douglas County*, 8 Or. 328.

¹⁷ *Schuylkill Navigation Co. v. Thoburn*, 7 S. & R. 411; *Quigley's Case*, 3 P. & W. 139; *McMasters v. Commonwealth*, 3 Watts, 292; *Railroad Co. v. Gilson*, 3 Watts, 243; *Harvey v. Lloyd*, 3 Pa. St. 331; *Pennsylvania R. R. Co. v. Heister*, 8 Pa. St. 445; *Plank Road Co. v. Rea*, 20 Pa. St. 97; *Brown v. Corey*, 43 Pa. St. 495; *East Penn. R. R. Co. v. Holtensine*, 47 Pa. St. 28; *Hornstein v. Atlantic etc. R. R. Co.*, 51 Pa. St. 87; *Delaware etc. R. R. Co. v. Burson*, 61 Pa. St. 369; *Susanna*

Root's Case, 77 Pa. St. 276; *Shenango & Allegheny R. R. Co. v. Braham*, 79 Pa. St. 447; *East Brandywine etc. R. R. Co. v. Ranck*, 78 Pa. St. 454; *Cummings v. Williamsport*, 84 Pa. St. 472; *Hoffer v. Pennsylvania Canal Co.*, 87 Pa. St. 221; *Pittsburgh etc. R. R. Co. v. Robinson*, 95 Pa. St. 426; *Pittsburgh etc. Ry. Co. v. McClosky*, 110 Pa. St. 436; *Setzler v. Pennsylvania Schuylkill Valley R. R. Co.*, 112 Pa. St. 56; *In re Fairmount Park*, 9 Phila. 553. Of these cases special attention may be called to those in 7 S. & R. 411, 51 Pa. St. 87; 95 Pa. St. 426, and 112 Pa. St. 56; *Long v. Harrisburg & P. R. R. Co.*, 126 Pa. St. 143, 19 Atl. Rep. 39; *Fisher v. Baden Gas Co.*, 138 Pa. St. 301, 22 Atl. Rep. 29; *Harris v. Schuylkill Riv. E. S. R. R. Co.*, 141 Pa. St. 242, 21 Atl. Rep. 590; *Philadelphia v. Rudderow*, 166 Pa. St. 241, 31 Atl. Rep. 53.

Compare *Geissinger v. Hellertown*, 133 Pa. St. 522, 19 Atl. Rep. 412; *Graham v. Pittsburgh etc. R. R. Co.*, 145 Pa. St. 504, 22 Atl. Rep. 983; *Jenks v. Philadelphia etc. R. R. Co.*, 17 Phila. 65; *Griffin v. Penn. Schuylkill V. R. R. Co.*, 1 Mont. Co. L. R. 169; *In re Passyunk Ave.*, 2 Pa. Co. Ct., 269. The measure of damages laid down in these cases would seem to permit general benefits to be set off.

In the last case (112 Pa. St. 56, 65), after quoting with approval from the case in 7 S. & R. 411, the rule there laid down that the measure of damages is the "difference between what the property unaffected by the obstruction would have sold for at

Vermont,¹⁸ and Washington.¹⁹ So also the District of Columbia.²⁰ In one of the cases cited from Connecticut the court say: "There are obviously three classes of benefits that may result from the openings of highways: one, the general benefit which the public as such receive from the opening of a new avenue of travel; another, the special benefits which those receive who reside or own land upon the

the time the injury was committed and what it would have sold for as affected by the injury," the court proceed to interpret the rule as follows:

"The adjustment of this difference involves, in all cases, a fair and just comparison of the advantages and disadvantages resulting from the opening and operation of the road, and the construction of its works; but the advantages to be considered are such only as are special, and the disadvantages such as are actual. The general appreciation of property in the neighborhood, consequent to the projected construction of the road, cannot enter into the calculation; to this the land-owner whose lands have been taken is as fairly entitled as is his neighbor whose possession and enjoyment have not been disturbed. The general increase of value, resulting from the growth of public improvements, railroads, canals and highways, accrues to the public benefit, and in the computation of damages the land-owner cannot be charged therewith. The question in each case is whether or not the special facilities afforded by the improvement have advanced the market value of the property beyond the mere gen-

eral appreciation of property in the neighborhood. So, also, on the other hand, the disadvantages must be actual, not speculative; they must be such as substantially affect the present market value of the land. Merely speculative damages cannot be allowed. The inconvenience arising from a division of the property, or from increased difficulty of access, the burden of increased fencing, the ordinary danger from accidental fires to fences, fields or farm buildings, not resulting from negligence, and generally all such matters as, owing to the peculiar location of the road, may affect the convenient use and future enjoyment of the property, are proper matters for consideration; but, they are to be considered in comparison with the advantages only as they affect the market value of the land."

¹⁸ *Livermore v. Jamaica*, 23 Vt. 361; *Adams v. St. Johnsbury & Lake Champlain R. R. Co.*, 57 Vt. 240.

¹⁹ *Lewis v. City of Seattle*, 5 Wash. 741, 32 Pac. Rep. 794.

²⁰ *Bauman v. Ross*, 167 U. S. 548, 17 S. C. Rep. 966; *Maryland etc. R. R. Co. v. Hiller*, 8 App. Cas. D. C. 289.

new highway, in the more convenient access that is given to their lands; and another, the strictly local benefit which land as such may receive from the opening and construction of the road; an illustration of which would be drainage, if it should happen to be drained by the road and its ditches, or the filling up of low ground by surplus earth that has to be disposed of in lowering some neighboring hill. As to the character of these classes* of benefits, and as to their general relation to the road with reference to questions of assessment and damage, there seems to be no serious difference between the claims of the parties. The mere public benefit could not be assessed at all, and is only to be considered with reference to the question how much of the expense of the road shall be paid by general taxation. The merely local benefit is clearly to be deducted from the damage that would be allowed the owner for the part of his land taken for the road, and it goes so far to reduce the actual damage done to him in taking his land. The special benefits, within the limits fixed by the law, are clearly to be considered in assessing benefits; and, if nothing was to be done except to assess the benefits, there would probably be no difference of opinion as to the rule to be adopted in determining the proportions in which the burden of the road should be laid upon the benefits. The sole question is in the case where the same person has received benefits, and has also a claim for damages. We will suppose his claim for damages is \$1,000, that he gets no local benefit, and that his special benefit is exactly \$1,000. Now if he had received only a benefit, and was assessed for that benefit with all the other persons enjoying special benefits, he probably would be assessed only a moderate percentage upon it. We will suppose that assessment would be ten per cent., so that he would be called upon to pay \$100 on account of his having received \$1,000 of benefit. Now the counsel for the petitioners contend that, where the same person has a claim for \$1,000 damage, he should not have the whole benefit he has received applied to the damage, satisfying it in full and leaving him nothing, but only the ten per cent. which he would have been assessed for his benefit, if the benefit had

been independently assessed, should be so applied and the balance, \$900, should be paid for his damage. There is much that is plausible in this claim, and it is not altogether unreasonable. But the rule has been long settled in this State, not only in practice, but by repeated decisions of this court, that where a land-owner has a claim for damage for land taken, and has received local and special benefits equal to the damage, the value of the benefits shall be set off against the damage, and he shall be allowed nothing. It is true that his entire benefit may be exhausted in this application, while the benefits received by his neighbors are assessed only a small percentage, and thus there may be a seeming and perhaps a real inequality, but so long as his benefit equals his damage he cannot be said to have suffered by the laying out of the road, and there would be an injustice in compelling others to pay him for damage that has really no existence. Whatever may be said against the reasonableness and justice of this rule, it is too well settled in this State to be shaken, and is one so simple in its application, and that does on the whole so little real injustice, that we should not be disposed to change the rule if we felt perfectly at liberty to do so.”²¹

While some of the cases cited from Minnesota seem to sanction the consideration of general benefits, yet, where that particular question is considered, the judgment of the court is always against it. The cases in 11 Minn. 515, 16 Minn. 260, and 28 Minn. 61, very fully and carefully state the doctrine of the court. In 11 Minn. 515, 537, the court say: “The benefits which result to the country generally or to particular communities, by reason of the construction and operation of railroads, and other internal improvements prosecuted by private enterprise although for public use, are to be shared equally by the citizens affected by them. The railroad company, the appellant, is a private corporation, and possesses only the rights conferred by the statute. The State has granted to it important and valuable rights and franchises, among them a corporate existence, the right

²¹ *Trinity College v. Hartford*, 32 Conn. 452, 476-8.

to take, in invitum, the land of the private citizen for the construction and operation of a railroad, and the right to take fare, freight and tolls for carrying passengers and merchandise. In the consideration of these and other privileges, the company contracts to build and operate the road in accordance with the terms of the act. The charter gives it no right to assess upon lands benefited by the road through which it does not pass, any sum to aid in the construction, pay damages or otherwise; and, whatever may be the case when a public improvement is prosecuted by the public, in this instance no such right exists. It would scarcely be claimed by the appellant here that it could maintain an action against a land-holder through whose land the road does not pass to recover any sum for general benefits accruing to him from the construction of the road. This principle being established, it follows that if benefits of this character are to be recouped from damages suffered by the owner of the land through which the road passes the operation of the law must be very unequal and unjust.

“These allowances will fall upon but a small portion of those receiving benefits, and that portion, those whose lands have been taken and injured without their consent; thus requiring them to bear the whole public burden, and at the same time denying to them advantages conferred upon others. Such construction of the charter would be unreasonable; the benefits to be deducted must be those resulting directly to the land, a part of which is taken, from the construction of the road, not through the vicinity, but through the land.”

In most of the cases cited the right to set off special benefits is assumed, and the questions discussed are the right to consider general benefits and what constitute special benefits. They all proceed upon the theory that just compensation is that which will make the owner whole or put him relatively in as good a position as his neighbors whose property is not taken. Special and peculiar benefits, therefore, which are not shared by his neighbors and which add to the value of what remains, should be taken into consideration. General benefits should be excluded, because other-

wise the owner whose land was taken would alone pay for such benefits, while the rest of the community would enjoy them without price.

§ 470. Cases holding that benefits, both general and special, may be set off against both damages to the remainder and the value of the part taken. — This is the law in Alabama,²² California,²³ Delaware,²⁴ Illinois,²⁵ Indiana,²⁶ New York,²⁷ Ohio,²⁸ Oregon²⁹ and South Carolina.³⁰ The early

²² Alabama & Florida R. R. Co. v. Burkett, 46 Ala. 569; S. C., 42 Ala. 83. This case was under a statute granted prior to the constitution of 1807, which prohibited any deduction for benefits, and the court held the charter was a contract and not affected by the new constitution.

²³ San Francisco etc. R. R. Co. v. Caldwell, 31 Cal. 367; California Pacific R. R. Co. v. Armstrong, 46 Cal. 85. Compare Moran v. Ross, 79 Cal. 549, 21 Pac. Rep. 958, which, however, was controlled by a statute.

²⁴ Whitman, Ex. v. Wilmington & Susquehanna R. R. Co., 2 Harr. 514; Fulton v. Dover, 8 Houston 78.

²⁵ State v. Evans, 2 Scam. 208; Alton & Sangamon, R. R. Co. v. Carpenter, 14 Ill. 190; Curry v. Mount Sterling, 15 Ill. 320; People v. Williams, 51 Ill. 63.

²⁶ McIntire v. State, 5 Blackf. 384; Vanblaricum v. State, 7 Blackf. 209; Indiana Central R. R. Co. v. Hunter, 8 Ind. 74; Siderner v. Essex, 22 Ind. 201; Haggaman v. Moore, 84 Ind. 496; Ross v. Davis, 97 Ind. 79; Goodwine v. Evans, 134 Ind. 262, 33 N. E. Rep. 1031; Hire v. Knisley, 130 Ind. 295, 29 N. E. Rep. 1132; Forsyth

v. Wilcox, 143 Ind. 144, 41 N. E. Rep. 371.

²⁷ Troy & Boston R. R. Co. v. Lee, 13 Barb. 169; Betts v. Williamsburgh, 15 Barb. 255; Rexford v. Knight, 15 Barb. 627; Matter of the Utica etc. R. R. Co., 56 Barb. 456; Granger v. Syracuse, 38 How. Pr. 308 (decision of the court of appeals 1869); People v. Eldredge, 3 Hun, 541; Long Island R. R. Co. v. Bennett, 10 Hun. 91; Matter of New York, Lackawanna & Western Ry. Co. v. Arnot, 27 Hun, 151; Eldridge v. Binghampton, 42 Hun, 202; Livingston v. New York, 8 Wend. 85; Genet v. Brooklyn, 99 N. Y. 296; Eldridge v. Binghamton, 120 N. Y. 309, 24 N. E. Rep. 462; Becker v. Metropolitan El. R. R. Co., 131 N. Y. 509, 30 N. E. Rep. 499; Storck v. Metropolitan El. R. R. Co., 131 N. Y. 514, 30 N. E. Rep. 497; Sperb v. Metropolitan El. R. R. Co., 137 N. Y. 596, 33 N. E. Rep. 319; Sutro v. Metropolitan El. R. R. Co., 137 N. Y. 592, 33 N. E. Rep. 334; Bischoff v. New York El. R. R. Co., 138 N. Y. 257, 33 N. E. Rep. 1073; Saxton v. New York El. R. R. Co., 139 N. Y. 320, 34 N. E. Rep. 728; Huggins v. Manhattan R. R. Co., 1 Misc. 110,

cases in Georgia held the same doctrine.³¹ As the doctrine itself is as well stated here as in any case, we quote the following illustration of the process by which the conclusion is arrived at: "No one can dispute the strong natural equity which dictates the propriety of considering the advantages, which the land holder has gained by reason of his land having been taken for some public work, as an offset to the injuries. And if this be naturally just, and the forms of law do not obstruct, why should not the award or verdict be rendered accordingly?"

"The terms employed, and the character of the proceeding, support the idea, that this is what is intended. Compensation is the thing provided for—just compensation—not payment in money. And the term compensation seems to have been advisedly adopted. It is borrowed from the civil law, where its use and signification strikingly favor the view we are submitting. We know, too, that damages for a civil injury might be compensated, or pleaded as an offset in some cases at the civil law. (Inst. L. 10, § 2 D. de Compens.) When, then, we find the word employed in the common law and the constitution, to the case in question, the presumption is that it was done advisedly; that the word was used in its most familiar legal sense; that it was thereby intended that 'recompense,' not alone payment in money,

20 N. Y. Supp. 648; *Nette v. New York El. R. R. Co.*, 2 Misc. 62, 20 N. Y. Supp. 844; *Nette v. New York El. R. R. Co.*, 1 Misc. 342, 20 N. Y. Supp. 627; *Krumweide v. Manhattan R. R. Co.*, 9 Misc. 552, 30 N. Y. Supp. 400. A different view was taken in *People v. Brooklyn*, 6 Barb. 209. See also *Newman v. Metropolitan El. R. R. Co.*, 118 N. Y. 618, 23 N. E. Rep. 901, 2 Am. R. R. & Corp. Rep. 318, where the rule laid down in § 471, post, is adopted.

²⁸ *Symonds v. Cincinnati*, 14 Ohio, 147; *Brown v. Same*, 14 Ohio, 541; *Columbus etc. R. R.*

Co. v. Simpson, 5 Ohio St. 251; *Kramer v. Cleveland etc. R. R. Co.*, 5 Ohio St. 140; *Platt v. Pennsylvania Co.*, 43 Ohio St. 228. These cases arose prior to the constitution of 1851, which prohibited any deduction for benefits.

²⁹ *Putnam v. Douglas County*, 6 Or. 328.

³⁰ *Greenville & Columbia R. R. Co. v. Parlou*, 5 Rich. 428; *White v. Charlotte etc. R. R. Co.*, 6 Rich. 47.

³¹ *Young v. Harrison*, 17 Ga. 30.

should be made to the land holder; that as just compensation was required, it should be made upon principles of equity; and that accordingly, all such advantages or benefits derived by the land holder, by reason of the public work, or the exercise of the franchise, upon his land, as made it just and equitable that he should not be paid in money for his land, should be carried to the account of such compensation. (42-3.) * * *

"It is sometimes said that the benefits derived by a land holder from a public work, for the benefit of which his land has been taken, should not be considered except so far as they are advantages peculiar to himself (as the erection of a station for example, which enhances the value of his land) and not enjoyed by other land-owners contiguous to the improvement. But this is not logical. What matters it, if others have been benefited? They are taking no issue with those who construct the public work. But he whose land has been taken is making such issue, and the duty has been devolved on his fellow-citizens of ascertaining whether or not he has been injured, and if so, how much. And can they say he has been injured and is justly entitled to compensation, if they find he has been benefited?

"It is very true that the method of arriving at such compensation is, in its nature, not very precise, and more or less dependent upon the speculative opinions of witnesses. But this is no good objection, as a very large portion of that testimony which is constantly and necessarily received in courts of justice, for the purpose of ascertaining the value of property and the damage done to it, would be excluded." (43-4.)³²

A late case in Texas also holds the same doctrine, although without overruling and even without any reference to prior cases that hold a different position.³³ Some cases in the federal courts favor the same view.³⁴ The reasoning

³² *Young v. Harrison*, 17 Ga. 30, 42.

³³ *Bourgeois v. Mills*, 60 Tex. 76. For the prior cases see ante, § 468.

³⁴ *Chesapeake & Ohio Canal Co. v. Key*, 3 Cranch C. C. 599; *Kennedy v. Indianapolis*, 103 U. S. 599.

of these cases is that it is immaterial how the owner of land is benefited or that others whose lands are not taken are benefited to an equal or even greater extent—that it is enough for him that the value of his land is enhanced by the construction of the improvement over it.³⁵

The Illinois decisions cited are prior to the constitution of 1870, which provides that private property shall not be taken or damaged for public use without just compensation. In 1872 the legislature passed an act “to provide for the exercise of the right of eminent domain.”³⁶ Section 9 of this act provides “that no benefits or advantages which may accrue to lands or property affected shall be set off against or deducted from such compensation in any case.” It is difficult to state what the law of Illinois is at the present time (1888) in regard to the measure of damages where part of a tract is taken. In *Carpenter v. Jennings*,³⁷ the court held that the constitution of 1870 prohibited the setting off of benefits against the value of the land taken. This decision was followed in *Deitrick v. Highway Comrs.*³⁸ In *Keithsburg & Eastern R. R. Co. v. Henry*³⁹ it is held that under the act of 1872 general benefits cannot be set off either against the value of the part taken or damages to the remainder. The question whether special benefits could thus be set off was expressly reserved until a case arose involving it. The doctrine of the latter cases seems to be that the owner is entitled to the value of the part taken, without reduction for benefits of any kind,⁴⁰ and that special benefits only may be set off against damages to the remainder.⁴¹

³⁵ See especially *Allen & Sangamon R. R. Co. v. Carpenter*, 14 Ill. 190; *Greenville & Columbia R. R. Co. v. Partlow*, 5 Rich. L. (S. C.) 428; *Young v. Harrison*, 17 Ga. 30.

³⁶ Chap. 47 R. S.

³⁷ 77 Ill. 250.

³⁸ 6 Ill. App. 70.

³⁹ 79 Ill. 290.

⁴⁰ *Green v. Chicago*, 97 Ill. 370;

Hyslop v. Finch, 99 Ill. 171; *St. Louis etc. R. R. Co. v. Kirby*, 104 Ill. 345.

⁴¹ *Hyde Park v. Dunham*, 85 Ill. 569; *McReynolds v. Burlington & Ohio Ry. Co.*, 106 Ill. 152; *Dupris v. Chicago & North Wisconsin Ry. Co.*, 115 Ill. 97; *Chicago & Evanston R. R. Co. v. Blake*, 116 Ill. 163. Compare *Bloomington v. Miller*, 84 Ill. 621;

§ 471. **Conclusion as to the question of benefits.**—The law in regard to benefits is now pretty well settled in every State, either by the decisions of its courts, or by its statutes, or its constitution. While different and conflicting rules prevail in the different States under precisely the same constitutional provisions, it is evident that there can be but one absolutely correct rule. In taking private property for public use the State acts rightfully and not as a wrong-doer. It guarantees just compensation, and nothing more. In arriving at what is just compensation the matter is to be viewed in the same light as though the State had bargained with the owner for a portion of his land and had agreed to make him a just compensation therefor. It is self-evident that, where a part of a tract is taken, the just compensation cannot be determined without considering the manner in which the part is taken, the purpose for which it is taken, and the effect of the taking upon that which remains. All the authorities concede this so far as damages to the remainder are concerned, and the justice of so doing may be taken for granted. But what justice is there in considering the effect in so far as it produces damage only? If a railroad is constructed through a farm and drains a valuable spring whereby the remainder is depreciated five hundred dollars, it is conceded that just compensation must include this five hundred dollars. But if, instead of draining a valu-

Chicago & Pacific R. R. Co. v. Francis, 70 Ill. 238; Page v. Chicago, M. & St. P. Ry. Co., 70 Ill. 324; Eberhart v. Same, 70 Ill. 347.

The cases decided since the first edition appear to settle the law in accordance with the text. Harwood v. Bloomington, 124 Ill. 48; Wabash etc. R. R. Co. v. McDougall, 126 Ill. 111, 18 N. E. Rep. 291; Chicago etc. R. R. Co. v. Aldrich, 134 Ill. 9, 24 N. E. Rep. 763; Springer v. Chicago, 135 Ill. 552, 26 N. E. Rep. 514; Chicago etc. R. R. Co. v. Eaton, 136 Ill. 9, 26 N. E. Rep. 575; Washington Ice

Co. v. Chicago, 147 Ill. 327, 35 N. E. Rep. 378; Metropolitan West Side El. R. R. Co. v. Stickney, 150 Ill. 362, 37 N. E. Rep. 1098; Metropolitan West Side El. R. Co. v. Clancy, 153 Ill. 270, 38 N. E. Rep. 557; Allmon v. Chicago etc. R. R. Co., 155 Ill. 17, 39 N. E. Rep. 569; Waggeman v. North Peoria, 155 Ill. 545, 40 N. E. Rep. 485; Winkleman v. Drainage District, 24 Ill. App. 242; Drainage Comrs. v. Volke, 59 Ill. App. 283; Gordon v. Comrs., 169 Ill. 510; Metropolitan W. S. El. R. Co. v. Springer, 171 Ill. 170,

able spring, it drains a marshy tract so as to make it worth five hundred dollars more for actual use, the same sense of justice requires that this five hundred dollars of benefits should be considered.

The distinction which is taken by so many courts between the value of the part taken and damages to the remainder, seems without foundation. This is very clearly demonstrated by the Supreme Court of Minnesota in an early case from which we quote as follows:

"I am unable to see a ground for any such distinction. It seems to me the right to compensation for both elements of damage is found in the same source, the fundamental right of the citizen to just compensation when his private property is taken for public use. The compensation is for the taking and its proximate consequences; otherwise it leaves the right of the citizen to redress for these consequences at the option of the legislature, to which I do not assent. To take land of the citizen for public use by the State when necessary, is an essential incident to sovereignty. The right of eminent domain is not conferred by the constitution; but, if affected at all, is limited thereby, and only to the extent of the limitation can the citizen obtain any redress. If, therefore, the limitation extends only to requiring compensation for the land taken, any other injury being done under the power of eminent domain, and in pursuance of statute, must be *damnum absque injuria*, and the citizen has no redress. This would take from the principle contained in the constitutional provision half its virtue, and in many, if not in most cases, render the citizen comparatively without remedy. For in this day we know that, in many cases, the value of the strip of land actually taken for a railroad, is but a small portion of the actual damage to the owner by the construction of the road through his land. Nor can I discover that the nature of the injury is more aggravated, or the right infringed more sacred, in one case than the other. In one instance the possession of a small part of a tract of land may be taken, and in the other the whole tract or parcel may be rendered comparatively useless or valueless. The constitution should receive no such narrow and technical

construction. It was intended to declare a fundamental principle of government, that when the public exigency requires the government to take for public use the property of the citizen, full compensation shall be made for the injury; not only the value of the portion of land taken, but the damages caused by taking it. Const. art. 1, sec. 13; *Ib.* art. 10, sec. 4; *Pet. of Mt. Wash. R. Co.*, 35 N. H. 146. If this view is correct, then the damages are a unit, although composed of integral parts, and if benefits are to be deducted at all, they must be deducted from the aggregate sum; and it would seem but just and equitable that if the same act at the same time inflicts injury and confers benefits, the one should be set off against the other in determining the compensation due for the injury; then a just and full compensation is ascertained, and, thus ascertained, must be paid in money."⁴²

The distinction between general and special benefits seems to be well taken. General benefits consist of an increase in the value of land common to the community generally, arising from the supposed advantages which will accrue to the community by reason of the work or improvement in question.⁴³ These advantages may never be realized, and if they are it is unjust that one person should be obliged to pay for them by a contribution of property while

⁴² *Winona etc. R. R. Co. v. Waldron*, 11 Minn. 515, 538, 539. The opposite view is ably maintained in *District of Columbia v. Prospect Hill Cemetery*, 5 App. Cas. D. C. 497, in which the court says: "Even if the just compensation payable under the guarantees of the constitution could be violently construed as payable in land, or in the increased value of land; or in some possible or problematical benefit or advantage or convenience that may enure to a person, it would be in any event payment for present loss by a mere promise, that

might never be realized, of future advantages. If these supposed advantages can be made the subject of legislative cognizance otherwise than by enhanced assessment, for ordinary taxation, it is time enough so to make them when the improvement has become an accomplished fact. It is not reasonable or just to pay for land taken for the public use in promises of increased values for the remainder that may have no foundation in fact."

⁴³ See post, § 476.

his neighbor whose property is not taken enjoys the same advantages without price. Moreover, it is in part to secure these very advantages, that the legislature is induced to authorize the particular work or improvement. In the case of individuals and corporations, these general advantages stand, in a measure, as the consideration for the grant of authority to condemn property and of the franchise of constructing and operating works thereon. Such being the case, the community and each individual of the community is entitled to enjoy these advantages without otherwise paying for them.⁴⁴

Where part of the tract is taken, just compensation would, therefore, consist of the value of the part taken and damages to the remainder, less any special benefits to such remainder by reason of the taking and use of the part for the purpose proposed; or, what is the same thing, it is the value of the whole tract irrespective of the taking less the value of that which is not taken, taking into consideration the purpose for which the part taken is to be used and excluding any but special benefits to the property which remains. Just compensation, thus estimated, is a sum of money which makes the owner whole, and, in respect to general benefits or damages resulting from the work or improvement, leaves him in as good a situation as his neighbor no part of whose property has been taken.⁴⁵

⁴⁴ See generally in support of this view *St. Louis etc. R. R. Co. v. Morris*, 35 Ark. 622; *Whiteley v. Miss. Water Power & Boom Co.*, 38 Minn. 523, 38 N. W. Rep. 753; *In re Wyandotte & Central Sts.*, 117 Mo. 446, 23 S. W. Rep. 127; *Smith v. City of St. Joseph*, 122 Mo. 643, 27 S. W. Rep. 344; *Chicago etc. R. R. Co. v. Wiebe*, 25 Neb. 545, 41 N. W. Rep. 297; *Lowe v. Omaha*, 33 Neb. 587, 50 N. W. Rep. 760; *Dayton v. City of Lincoln*, 39 Neb. 74, 57 N. W. Rep. 754; *Sullivan v. North*

Hudson County R. R. Co., 51 N. J. L. 518, 18 Atl. Rep. 689; *State v. Hudson County Board*, 55 N. J. L. 88, 25 Atl. Rep. 322; *Richmond v. James River & Kanawha Company*, 9 Leigh 313; *In re Rugheimer*, 36 Fed. Rep. 376; *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 13 S. C. Rep. 622.

⁴⁵ Judge Cooley, in his work on *Constitutional Limitations*, lays down the following rules: "The question, then, in these cases, relates, first, to the value

§ 471a. **Measure of damages where part of a tract is taken.**—Owing to the variable decisions in regard to benefits, as shown in the preceding sections, the only general rule which can be laid down where part of a tract is taken, is that the measure of damages consists of the value of the part taken and damages to the remainder, less such benefits,

of the land appropriated; which is to be assessed with reference to what it is worth for sale, in view of the uses to which it may be applied, and not simply in reference to its productiveness to the owner in the condition in which he has seen fit to leave it. Second, if less than the whole estate is taken, then there is further to be considered how much the portion not taken is increased or diminished in value in consequence of the appropriation. But, in making this estimate, there must be excluded from consideration those benefits which the owner receives only in common with the community at large in consequence of his ownership of other property, and also those incidental injuries to other property, such as would not give to other persons a right to compensation, while allowing those which directly affect the value of the remainder of the land not taken; such as the necessity for increased fencing, and the like. And, if an assessment on these principles makes the benefits equal the damages, and awards the owner nothing, he is nevertheless to be considered as having received full compensation, and consequently as not being in position to complain." Cooley, Con. Lim. 567-570.

The measure of damages, or general rule for ascertaining the just compensation, is considered in the following cases: St. Louis etc. R. R. Co. v. Morris, 35 Ark. 622; Little Rock etc. R. R. Co. v. Allen, 41 Ark. 431; Fayetteville etc. R. R. Co. v. Combs, 51 Ark. 324, 11 S. W. Rep. 418; Colorado M. R. R. Co. v. Brown, 15 Col. 193, 25 Pac. Rep. 87; Kierman v. Chicago etc. R. R. Co., 120 Ill. 188; Board of Comrs. v. Hogan, 39 Kan. 606, 18 Pac. Rep. 611; Chicago etc. R. R. Co. v. Broquet, 47 Kan. 571, 28 Pac. Rep. 717; Asher v. L. & N. R. Co., 87 Ky. 391, 8 S. W. Rep. 854; Boles v. Boston, 136 Mass. 398; Driscoll v. City of Taunton, 160 Mass. 486, 36 N. E. Rep. 495; Sigafos v. Minneapolis etc. R. R. Co., 39 Minn. 8, 38 N. W. Rep. 627; Adolph v. Minneapolis etc. R. R. Co., 42 Minn. 170, 43 N. W. Rep. 848; Doyle v. Kansas City etc. R. R. Co., 113 Mo. 280, 20 S. W. Rep. 970; Blakeley v. Chicago etc. R. R. Co., 25 Neb. 207, 40 N. W. Rep. 956; Smith v. Crete etc. R. R. Co., 29 Neb. 142, 45 N. W. Rep. 287; Packard v. Bergen Neck R. R. Co., 54 N. J. L. 553, 25 Atl. Rep. 506; Black River etc. R. R. Co. v. Barnard, 9 Hun. 104; Pennsylvania S. V. R. R. Co. v. Clary, 125 Pa. St. 442, 17 Atl. Rep. 468; Geissinger v. Hellertown, 133 Pa. St. 522, 19 Atl. Rep.

if any, as may be set off by the law of the forum.⁴⁶ Many cases state the measure of damages to be the difference between the value of the whole tract before the taking and the value of the remainder after the taking.⁴⁷ This, however, would permit the consideration of benefits of every kind and should be qualified by excluding general benefits, in jurisdictions where only special benefits can be taken into account, and by excluding all benefits, where such is the law.⁴⁸ Other cases state the measure of damages to be the value of the part taken and the diminution in value of the part not taken, or the difference in value of the part not

412; *Graham v. Pittsburgh etc. R. R. Co.*, 145 Pa. St. 504, 22 Atl. Rep. 983; *Hoffman v. Bloomsburg & S. R. R. Co.*, 157 Pa. St. 174, 27 Atl. Rep. 564; *Jenks v. Philadelphia etc. R. R. Co.*, 17 Phila. 65.

⁴⁶ *Moran v. Ross*, 79 Cal. 549, 21 Pac. Rep. 958; *Colorado M. R. R. Co. v. Brown*, 15 Col. 193, 25 Pac. Rep. 87; *Chicago etc. R. R. Co. v. Vivian*, 33 Mo. App. 583; *Chicago etc. R. R. Co. v. Wiebe*, 25 Neb. 545, 41 N. W. Rep. 297; *Omaha Southern R. R. Co. v. Todd*, 39 Neb. 818, 58 N. W. Rep. 289; *Fremont etc. R. R. Co. v. Bates*, 40 Neb. 381, 58 N. W. Rep. 959; *Beekman v. Jackson County*, 18 Or. 283, 22 Pac. Rep. 1074, 1 Am. R. R. & Corp. Rep. 665; *Penley, Complt.*, 89 Me. 313, 36 Atl. Rep. 397; *Bennett v. Woody*, 137 Mo. 377; *Chicago etc. R. R. Co. v. Buel*, 56 Neb. 205.

⁴⁷ *Little Rock etc. R. R. Co. v. Allen*, 41 Ark. 431; *Fayetteville etc. R. R. Co. v. Combs*, 51 Ark. 324, 11 S. W. Rep. 418; *Wabash etc. R. R. Co. v. McDougall*, 126 Ill. 111, 18 N. E. Rep. 291; *Chicago etc. R. R. Co. v. Broquet*, 47 Kan. 571, 28 Pac. Rep. 717;

Asher v. L. & N. R. R. Co., 87 Ky. 391, 8 S. W. Rep. 854; *Sigafoos v. Minneapolis etc. R. R. Co.*, 39 Minn. 8, 38 N. W. Rep. 627; *Adolph v. Minneapolis etc. R. R. Co.*, 42 Minn. 170, 43 N. W. Rep. 848; *Haynes v. City of Duluth*, 47 Minn. 458, 50 N. W. Rep. 693; *Blakeley v. Chicago etc. R. R. Co.*, 25 Neb. 207, 40 N. W. Rep. 956; *Black River etc. R. R. Co. v. Barnard*, 9 Hun 104; *Jenks v. Philadelphia etc. R. R. Co.*, 17 Phil. 65; *Hoffman v. Bloomsburg etc. R. R. Co.*, 157 Pa. St. 174, 27 Atl. Rep. 564; *Struthers v. Phila. etc. R. R. Co.*, 174 Pa. St. 288, 34 Atl. Rep. 443; *Walker v. So. Chester R. R. Co.*, 174 Pa. St. 291, 34 Atl. Rep. 560; *Galbraith v. Phila. Co.*, 2 Pa. Supr. Ct. 359; *Sparks Mfg. Co. v. Newton (N. J. Eq.)*, 45 Atl. Rep. 596.

⁴⁸ *West Virginia etc. R. R. Co. v. Gibson*, 94 Ky. 234, 21 S. W. Rep. 1055; *Louisville & N. R. R. Co. v. Ingram (Ky.)*, 14 S. W. Rep. 535; *Louisville & N. R. R. Co. v. Asher (Ky.)*, 15 S. W. Rep. 517; *Lowe v. Omaha*, 33 Neb. 587, 50 N. W. Rep. 760; *Sullivan v. North Hudson County*, 51 N. J. L. 518, 18 Atl. Rep. 689.

taken before and after the taking, or with and without the improvement.⁴⁹ This is open to the same objection as the rule just noticed, since it permits the consideration of benefits of all kinds, and should be qualified in this respect according to the law of the forum touching benefits. These forms of stating the measure of damages are inadvertent and occur in cases in which there was no contention as to benefits and accuracy in that regard was not required. The measure of damages may be stated in various ways, but any statement to be complete and accurate must exclude such benefits, if any, as, by the law of the forum, may not be taken into consideration. However stated it involves three lines of inquiry, the value of the part taken, the damage to the remainder, and the benefits to the remainder.⁵⁰ What it is proper to prove and take into consideration in determining value, damage or benefit, is considered in the remaining sections of the chapter.

§ 472. **Constitutional provisions as to benefits.**—The recent constitutions of Alabama, Arkansas, Kansas, Ohio and South Carolina contain a provision that, when property

⁴⁹ Chicago etc. R. R. Co. v. Bowman, 122 Ill. 595; Kiernan v. Chicago etc. R. R. Co., 123 Ill. 188; Chicago etc. R. R. Co. v. Greiney, 137 Ill. 628, 25 N. E. Rep. 798; Snodgrass v. Chicago, 152 Ill. 600, 38 N. E. Rep. 790; Allmon v. Chicago etc. R. R. Co., 155 Ill. 17, 39 N. E. Rep. 569; Louisville etc. R. R. Co. v. Barrett, 91 Ky. 487, 16 S. W. Rep. 278; Boles v. Boston, 136 Mass. 398; Doyle v. Kansas City etc. R. R. Co., 113 Mo. 280, 20 S. W. Rep. 970; Smith v. Crete etc. R. R. Co., 29 Neb. 142, 45 N. W. Rep. 287; Dalrymple v. Whitingham, 26 Vt. 345; Mobile etc. R. R. Co. v. Riley, 119 Ala. 260, 24 So. Rep. 858; Galesburg etc. R. R. Co. v. Milroy, 181 Ill. 243;

Shreveport etc. R. R. Co. v. Hinds, 50 La. An. 781, 24 So. Rep. 287; Chicago etc. R. R. Co. v. George, 145 Mo. 38, 47 S. W. Rep. 11; Lorain St. R. R. Co. v. Sinning, 17 Ohio C. C. 649.

⁵⁰ A rule frequently approved in the Missouri courts is stated as follows: "In estimating the damages to the land the jury will consider the quantity and value of the land taken by the railway company for the right of way and the damage to the whole tract by reason of the road running through it; and deduct from these amounts the benefits, if any, peculiar to said tract of land arising from running the road through the same." St. Louis etc. R. R. Co. v. Fowler, 142 Mo. 670.

is taken for the right of way for any corporation, compensation shall be made "irrespective of any benefit from any improvement proposed by such incorporation."⁵¹ The constitutions of California and Washington contain a similar provision, except that it does not apply to municipal corporations.⁵² These provisions are held to exclude benefits altogether in the cases to which they apply.⁵³ In *Atchison, etc., R. R. Co. v. Blackshire*;⁵⁴ this instruction was held correct. "The fair way of determining the injury is to determine the fair market value of the premises before the right of way is set apart, and then again after, and difference will be the true measure of damages." This was held to exclude the consideration of benefits, but it is difficult to see why it does not permit benefits of all kinds to be considered so far as they affect the value of the premises. In *Little Miami R. R. Co. v. Collett*⁵⁵ it is doubted whether, notwithstanding the constitution, special benefits might not be set off against damages to the remainder. In *Kansas* it is held that the provision does not apply to a taking for a highway, since it is not for the use of any corporation nor an improvement proposed by any corporation, but is for the public at large.⁵⁶

⁵¹ Alabama, 1867, Art. 13, § 5, in force only until 1875; Arkansas, 1874, Art. 2, § 22; Kansas, Art. 12, § 4; Ohio, 1851, Art. 13, § 5; South Carolina, 1868, Art. 12, § 3.

⁵² Cal., 1879, Art. 1, § 14; Wash., Art. 1, § 16.

⁵³ *St. Louis etc. R. R. Co. v. Anderson*, 39 Ark. 167; *Springfield and Memphis Ry. Co. v. Rhea*, 44 Ark. 258; *St. Joseph etc. R. R. Co. v. Orr*, 8 Kan. 419; *Hunt v. Smith*, 9 Kan. 137; *Reisner v. Union Depot & R. R. Co.*, 27 Kan. 382; *Cincinnati etc. Railway Company v. Longworth*, 30 Ohio St. 108; *Pacific Coast R. R. Co. v. Porter*, 74 Cal. 261; *San Bernardino & E. R. R. Co. v. Haven*, 94 Cal. 489, 29 Pac.

Rep. 875; *Wichita & W. R. R. Co. v. Kuhn*, 38 Kan. 104, 16 Pac. Rep. 75; *Wichita & W. R. R. Co. v. Kuhn*, 38 Kan. 675, 17 Pac. Rep. 322; *Leroy & W. R. R. Co. v. Ross*, 40 Kan. 598, 20 Pac. Rep. 197; *Rapid Transit R. R. Co. v. Simpson*, 45 Kan. 714, 26 Pac. Rep. 393; *Chicago etc. R. R. Co. v. Woodward*, 47 Kan. 191, 27 Pac. Rep. 836; *Florence etc. R. R. Co. v. Shepherd*, 50 Kan. 438, 31 Pac. Rep. 1002; *Chicago etc. R. R. Co. v. Emery*, 51 Kan. 16, 32 Pac. Rep. 631; *Lewis v. City of Seattle*, 5 Wash. 741, 32 Pac. Rep. 794. See *Norwood v. Baker*, 172 U. S. 269.

⁵⁴ 10 Kan. 417.

⁵⁵ 6 Ohio St. 182.

⁵⁶ Commissioners of Pottawa-

The rule for assessing damages is the same under the above provision and under one which provides that compensation shall be assured "without deduction for benefits to any property of the owner."⁵⁷

The constitution of Iowa has always provided that the compensation for property taken shall in all cases be assessed by a jury "who shall not take into consideration any advantages that may result to said owner on account of the improvement for which it is taken."⁵⁸ Under this provision the measure of damages has been repeatedly held to be the difference between the fair marketable value of the premises on which the proposed improvement is to pass, irrespective of such improvement, and the value of the same in the condition in which they will be immediately after the land for the improvement has been taken, irrespective of the benefit which will result from the improvement.⁵⁹ All benefits, though special, must be excluded.⁶⁰

§ 473. **Statutory provisions as to benefits and measure of damages.**—It is not competent for the legislature to limit or in any way detract from the constitutional provision for compensation.⁶¹ Any law which necessarily requires such a construction is to that extent inoperative. But, since the legislature may annex any conditions to the exercise of the power of eminent domain which it pleases, it may prescribe

tomie County v. O'Sullivan, 17 Kan. 58.

⁵⁷ *Giesy v. Cincinnati etc. R. R. Co.*, 4 Ohio St. 308. Sec. 6, Art. 13, of the Constitution of Ohio recognizes the right to make local assessments. This may be enforced notwithstanding any deduction for benefits is prohibited by Art. 319. *Cleveland v. Wick*, 18 Ohio St. 303.

⁵⁸ Art. 1, § 18.

⁵⁹ *Sater v. Burlington & Mt. Pleasant Plank Road Co.*, 1 Ia. 386; *Henry v. Dubuque & Pacific R. R. Co.*, 2 Ia. 288; *Ken-*

nedy v. Same, 2 Ia. 521; *Harrison v. Iowa Midland R. R. Co.*, 36 Ia. 323; *Brooks v. Davenport & St. Paul R. R. Co.*, 37 Ia. 99; *Britton v. Des Moines etc. R. R. Co.*, 59 Ia. 540; *Ham v. Wisconsin etc. Ry. Co.*, 61 Ia. 716; *Israel v. Jewett*, 29 Ia. 475; *Ball v. Keokuk & N. W. R. R. Co.*, 74 Ia. 132, 37 N. W. Rep. 110.

⁶⁰ *Frederick v. Shane*, 32 Ia. 254; *Bland v. Hixenbaugh*, 39 Ia. 532; *Britton v. Des Moines etc. R. R. Co.*, 59 Ia. 540.

⁶¹ *Martin v. Fillmore County*, 44 Neb. 719, 62 N. W. Rep. 863.

a rule of damages more favorable to the property-owner than the constitution requires. This has frequently been done by excluding the consideration of benefits.

An act was passed in Indiana in 1852 providing that "no deduction should be made for any benefit that may be supposed to result to the owner in estimating damages."⁶² This act has been construed in a number of cases but its provisions are too plain to require comment.⁶³

Statutes will always be given such a construction as will make them constitutional and valid where that is possible. Hence a statute which provides for an assessment of the value of the land taken will be held to include damages to the remainder as well.⁶⁴ So a statute which provides for a set-off of benefits will be held to mean only special benefits.⁶⁵ A statute which provides for an assessment of the damages sustained by the owner was held to preclude the consideration of benefits.⁶⁶ A statute of Illinois passed in 1852 required the commissioners to fix the compensation for the land taken, "and also estimate and assess the damages sustained by any person or persons by reason of the con-

⁶² 2 R. S. 1852, p. 193, § 711.

⁶³ *McMahon v. Cincinnati & Chicago Short Line R. R. Co.*, 5 Ind. 413; *Newcastle & Richmond R. R. Co. v. Brumback*, 5 Ind. 543; *Evansville etc. R. R. Co. v. Fitzpatrick*, 10 Ind. 120; *Same v. Stringer*, 10 Ind. 551; *White Water Valley R. R. Co. v. McClure*, 29 Ind. 536; *Grand Rapids & Indiana R. R. Co. v. Horn*, 41 Ind. 479; *Montmorency Gravel Road Co. v. Stockton*, 43 Ind. 328. The convention which adopted the constitution of 1851 voted down a proposition to exclude benefits in estimating damages for property taken for public use. See *Indiana Central R. R. Co. v. Hunter*, 8 Ind. 74, 79.

⁶⁴ *Colvill v. St. Paul & Chicago Ry. Co.*, 19 Minn. 283; *Scott v.*

Same, 21 Minn. 322; *Albany Northern R. R. Co. v. Lansing*, 16 Barb. 68; *Bigelow v. West Wisconsin Ry. Co.*, 27 Wis. 478.

⁶⁵ *Weir v. St. Paul etc. R. R. Co.*, 18 Minn. 155; *Arbrush v. Oakdale*, 28 Minn. 61; *Freedle v. North Carolina R. R. Co.*, 4 Jones Law 89; *Long v. Harrisburg & P. R. R. Co.*, 126 Pa. St. 143, 19 Atl. Rep. 39.

⁶⁶ *Crater v. Fritts*, 44 N. J. L. 374. The act in regard to public roads required an assessment of the damages over and above the advantages, etc. The act in regard to private roads required the assessment of the damages only. The decision was based upon the omission of any reference to advantages in the latter statute.

struction and use of the work specified in the petition, taking into consideration and estimating the benefits and advantages to the parties, resulting from the construction and use of the road," etc. This was construed to mean that benefits to the remainder could be set off against damages to the remainder, but not against the value of the part taken.⁶⁷ A statute provided for compensation to the owner of land appropriated, "irrespective of any increased value thereof by reason of the proposed improvement by such corporation." This was construed to mean that the value of that taken should be estimated irrespective of any additional value given to it by the improvement, not that the owner should get damages to the remainder without deduction for benefits.⁶⁸

A few miscellaneous cases construing statutes are referred to below.⁶⁹

§ 474. **Benefits or damages to a different tract.**—Where part of a tract is taken, only damages and benefits to that tract can be considered.⁷⁰ Thus an owner who had part of a tract of land taken for a railroad claimed damages in the same proceeding to a mill which was situated at some distance on a distinct parcel of land, no part of which was taken. It was held error to allow such claim to be included in the assessment.⁷¹ So where land on one side of a street was taken for railroad purposes it was held that damages

⁶⁷ *Hayes v. Ottawa etc. R. R. Co.*, 54 Ill. 373; *Wilson v. Rockford etc. R. R. Co.*, 59 Ill. 273; *Buckles v. Northern Bank of Kentucky*, 63 Ill. 268; *Emerson v. Western Union R. R. Co.*, 75 Ill. 176; *Todd v. Kankakee & Illinois River R. R. Co.*, 78 Ill. 530.

⁶⁸ *Oregon Central R. R. Co. v. Wait*, 3 Or. 91; *S. C.*, 3 Or. 428. And see *Willamet Falls Canal & Lock Co. v. Kelly*, 3 Or. 99.

⁶⁹ *Ventura Co. v. Thompson*, 51 Cal. 577; *Susanna Root's Case*,

77 Pa. St. 276; *Chicago & Mexican Central R. R. Co. v. Ritter*, 1 Tex. App. Civil Cases, p. 107; *Bowen v. Atlantic etc. R. R. Co.*, 17 S. C. 574; *Bevier v. Dillingham*, 18 Wis. 529; *Vicksburg etc. R. R. Co. v. Calderwood*, 15 La. An. 481; *Spokane Falls & N. R. R. Co. v. Ziegler*, 61 Fed. Rep. 392, 9 C. C. A. 548.

⁷⁰ *Cleveland etc. R. R. Co. v. Ball*, 5 Ohio St. 568.

⁷¹ *Selma, Rome & Dalton R. R. Co. v. Camp*, 45 Ga. 180.

to a lot on the opposite side of the street, not used in common with the former, could not be recovered.⁷² Nor does it matter that the owner intended to use them for a common purpose in the future.⁷³ Other cases are to the same effect.⁷⁴ So benefits to a separate and distinct parcel of land, not contiguous to or used in connection with that taken, cannot be considered.⁷⁵ After the passage of an ordinance for the opening of a street through certain property and before any proceedings taken under the ordinance, the owner sold all but the part to be taken for the street. It was held that he was entitled to the value of the land taken without any deduction for benefits to the parts sold.⁷⁶

§ 475. What constitutes an entire tract. — Under the rule that, where part of a tract is taken, damages or benefits to the entire tract may be considered, it sometimes becomes a question of some difficulty to determine what is to be regarded as the entire tract. In general it is so much as belongs to the same proprietor as that taken, and as continuous with it and used together for a common purpose. Thus the whole of a farm is one tract, although it may consist of several government subdivisions,⁷⁷ or lie partly

⁷² *White v. Metropolitan West Side El. R. R. Co.*, 154 Ill. 620, 39 N. E. Rep. 270; *Wellington v. Boston & M. R. R. Co.*, 164 Mass. 380, 41 N. E. Rep. 652.

⁷³ *White v. Metropolitan West Side El. R. R. Co.*, 154 Ill. 620, 39 N. E. Rep. 270.

⁷⁴ *Wellington v. Boston & M. R. R. Co.*, 158 Mass. 185, 33 N. E. Rep. 393; *Potts v. Penn. S. V. R. R. Co.*, 4 Mont. Co. L. R. 121.

⁷⁵ *State v. Digby*, 5 Blackf. 543; *Meacham v. Fitchburg R. R. Co.*, 4 Cush. 291; *Lexington v. Long*, 31 Mo. 369; *Railroad Co. v. Gilson*, 8 Watts, 243; *Paducah & Memphis R. R. Co. v. Stovall*, 12 Heisk. 1; *Missionary Society v. New York El. R. R. Co.*, 12 Misc.

359, 33 N. Y. Supp. 648; *Worsham v. G. H. & W. R. R. Co.*, 3 Tex. Ct. of App. p. 496, § 425; *Lewis v. City of Seattle*, 5 Wash. 741, 32 Pac. Rep. 794.

⁷⁶ *Whitaker v. Phoenixville*, 141 Pa. St. 327, 21 Atl. Rep. 604.

⁷⁷ *Wilmes v. Minneapolis & North Western Ry. Co.*, 29 Minn. 242; *Cedar Rapids etc. Ry. Co. v. Ryan*, 37 Minn. 38; *Kansas City etc. R. R. Co. v. Merrill*, 25 Kan. 421; *Wyandotte etc. Ry. Co. v. Waldo*, 70 Mo. 629; *Ham v. Wisconsin, Iowa & Neb. Ry. Co.*, 61 Ia. 716; *Fayetteville etc. R. R. Co. v. Hunt*, 51 Ark. 330, 11 S. W. Rep. 418; *Hartsham v. Chicago etc. R. R. Co.*, 52 Ia. 613; *Chicago etc. R. R. Co. v.*

in different counties,⁷⁸ or have its parts separated by a highway⁷⁹ or railroad or canal,⁸⁰ and though the fee of the canal is in the state.⁸¹ But, where a man has two farms which are contiguous, and occupies one himself and rents the other, and part of one is taken, he cannot have damages to both.⁸² Whether they are two farms or one is held to be a question of fact for the jury. A man had 265 acres of land, eighty of which were cut off by a highway. This eighty acres had been worked as a separate farm and leased to a tenant for two years. The court held it to be a question for the jury whether the whole was one farm or not.⁸³ A lot may be occupied by several buildings which are leased to different tenants and still be one tract.⁸⁴ Where a man had a farm of ninety acres and released the right of way,

Brunson, 43 Kan. 371, 23 Pac. Rep. 495; Cedar Rapids etc. R. R. Co. v. Ryan, 37 Minn. 38, 34 N. W. Rep. 222; Chicago etc. R. R. Co. v. Baker, 102 Mo. 553, 15 S. W. Rep. 64; Northeastern Neb. R. R. Co. v. Frazier, 25 Neb. 42, 40 N. W. Rep. 604; Omaha Southern R. R. Co. v. Todd, 39 Neb. 818, 58 N. W. Rep. 289; In *McReynolds v. Kansas City etc. R. R. Co.*, 34 Mo. App. 581, a farm of 1,100 acres was treated as one tract.

⁷⁸ *Atchison & Nebraska R. R. Co. v. Gough*, 29 Kan. 94.

⁷⁹ *Kansas City etc. R. R. Co. v. Merrill*, 25 Kan. 421; *Matter of New York, West Shore & Buffalo R. R. Co. v. Le Fevre*, 27 Hun 537; *Welch v. Milwaukee & St. Paul Ry. Co.*, 27 Wis. 108; *Ham v. Wisconsin, Iowa & Neb. Ry. Co.*, 61 Ia. 716. See *Baltimore & P. R. R. Co. v. Sloan*, 131 Pa. St. 568, 18 Atl. Rep. 903; *Lincoln v. Commonwealth*, 164 Mass. 368, 41 N. E. Rep. 489.

⁸⁰ *Matter of Boston, Hoosac*

Tunnel and Western Ry. Co., 31 Hun 461.

⁸¹ *Cameron v. Pittsburgh etc. R. R. Co.*, 157 Pa. St. 617, 27 Atl. Rep. 668. But where a farm of 455 acres was divided by a railroad, the fee of which was in the company, and with no crossing over it, it was held that it could not be considered as an entire tract, in a proceeding to condemn a right of way through one of the parts. *Cameron v. Chicago etc. R. R. Co.*, 42 Minn. 75, 43 N. W. Rep. 785. For similar cases see *Chicago etc. R. R. Co. v. Hunccheon*, 130 Ind. 529, 30 N. E. Rep. 636; *Haines v. St. Louis etc. R. R. Co.*, 65 Ia. 216; *Leavenworth etc. R. R. Co. v. Wilkins*, 45 Kans. 674, 26 Pac. Rep. 16.

⁸² *Minnesota Valley R. R. Co. v. Doran*, 15 Minn. 230.

⁸³ *St. Paul & Sioux City R. R. Co. v. Murphy*, 19 Minn. 500.

⁸⁴ *Whitney v. Boston*, 98 Mass. 312; *White v. Bridge Co.*, 189 Pa. St. 500. But see *Reilly v.*

through the east forty acres, it was held, in proceedings to condemn a right of way through the other fifty, that only the damages and benefits to that fifty could be considered.⁸⁵

If two or more contiguous city or village lots are improved and used as one tract, and any part of any one is taken, the owner may recover the damage to all;⁸⁶ so, where a tract is subdivided into lots and blocks, but continues to be used as before for agricultural purposes, the subdivision being a mere paper one.⁸⁷ In the last case it is intimated that a different rule might prevail if the lots were merely held for sale. Two lots in a block all of which belonged to the same owner were taken for a railroad. All were vacant and unoccupied. It was held that damages to the other lots could not be recovered, there being no connected use.⁸⁸ Where a block is divided by a street, the parts become distinct tracts as to each other where they are merely held for sale or use as building lots.⁸⁹ It is held that the subdivision of land into lots, makes each lot, *prima facie*, a separate and distinct tract, and if the owner claims damages to all or

Manhattan R. R. Co., 43 N. Y. App. Div. 80; Gibson v. Bridge Co., 192 Pa. St. 55.

⁸⁵ St. Louis etc. R. R. Co. v. Brown, 58 Ill. 61.

⁸⁶ Chicago & Evanston R. R. Co. v. Dresel, 110 Ill. 89; Cummins v. Des Moines & St. Louis Ry. Co., 63 Ia. 397; Reisner v. Union Depot & R. R. Co., 27 Kan. 382; Port Huron etc. Ry. Co. v. Voorhies, 50 Mich. 506; Sherwood v. St. Paul & Chicago Ry. Co., 21 Minn. 122; Matter of Mayor etc. of New York, 39 N. Y. App. Div. 589. See Phillips v. St. Clair Inclined Plane Co., 166 Pa. St. 21, 31 Atl. Rep. 69; Kansas City Suburban Belt R. R. Co. v. Norcross, 137 Mo. 415.

⁸⁷ Sheldon v. Minneapolis & St. Louis Ry. Co., 29 Minn. 318; Welch v. Milwaukee & St. Paul

Ry. Co., 27 Wis. 108; Cox v. Mason City etc. R. R. Co., 77 Ia. 20, 41 N. W. Rep. 475; Currie v. Waverly etc. R. R. Co., 52 N. J. L. 381, 20 Atl. Rep. 56.

⁸⁸ Wilcox v. St. Paul & Northern Pacific Ry. Co., 35 Minn. 439; Koerper v. St. Paul & N. R. R. Co., 42 Minn. 340, 44 N. W. Rep. 195.

⁸⁹ Pittsburg, Ft. Wayne & Chi. R. R. Co. v. Reich, 101 Ill. 157; Metropolitan West Side El. R. R. Co. v. Springer, 159 Ill. 434, 42 N. E. Rep. 871. Where three blocks were used together for elevator purposes it was held that they found one tract for the purpose of estimating damages. Union Elevator Co. v. Kansas City Suburban R. R. Co., 135 Mo. 353, 36 S. W. Rep. 1071.

more than the lot taken, he must produce evidence to overcome this presumption.⁹⁰

A brewery property was divided by an alley, the fee of which was in the adjoining owners. On the west side was the brewery proper, on the other side was the malt house, horse-power, etc., with connections between the two underneath the alley. The property on the east side was taken. It was all held to be one tract and the owner to be entitled to damages to the part on the west side of the alley.⁹¹ But, when the property is divided into blocks bounded by streets actually in use, and part of a block is taken, the assessment of damages must be confined to that block, although the owner has other adjacent blocks and all are used in the same business.⁹² In one case the plaintiff owned an ore-bed and a railroad four or five miles long connecting the ore-bed with a railroad. It was proposed to take part of the railroad for railroad purposes. The commissioners allowed simply the value of the land taken, including the value of the iron, ties, etc. It was held the owner was entitled to damages to the whole property, including the railroad and ore mine.⁹³ Parties engaged in quarrying and shipping marble owned a quarry, a shipping yard, a mile from the quarry and also a yard in Philadelphia, to which the marble was sent. A railroad company took part of the shipping yard. Damages were claimed both for depreciation of the quarry and the yard in Philadelphia. The claim was disallowed.⁹⁴

⁹⁰ *Koerper v. St. Paul & N. R. R. Co.*, 42 Minn. 340, 44 N. W. Rep. 195. The fact that all were leased to one person and used for piling lumber was held not sufficient to overcome the presumption as to the owner.

⁹¹ *Hannibal Bridge Co. v. Schanbacher*, 57 Mo. 582; and see *Union Terminal R. R. Co. v. Peet Bros. Mfg. Co.*, 58 Kan. 197; *Randolph v. Penn. S. V. R. R. Co.*, 186 Pa. St. 541.

⁹² *Flemming v. Chicago etc. R.*

Co. 34 Ia. 353; *In matter of New York Central etc. R. R. Co.*, 6 Hun 149.

⁹³ *Matter of Poughkeepsie etc. R. R. Co.*, 63 Barb. 151. To same effect, *Witman v. Reading*, 191 Pa. St. 134, 43 Atl. Rep. 140.

⁹⁴ *Potts v. Penn. S. V. R. R. Co.*, 119 Pa. St. 278. The court says: "In order that two properties, having no physical connection, may be regarded as one, in the assessment of damages for right of way, they must be so

Three quarter sections of land lying contiguous were owned in severalty by three persons, but were used in common for grazing, under a contract between the owners, and each quarter was more valuable to be so used. One quarter had water on it and the others had none. The water privilege was rendered more valuable by supplying a larger territory, and the quarters without water were more valuable by having a right to the water in question. A highway was laid out taking part of each quarter and separating a part of each tract from the water. It was held that each owner was entitled to compensation for the loss in value to his tract by interfering with the privileges secured by the contract.⁹⁵

In a proceeding to condemn the right to construct a telegraph line over a railroad right of way extending through three counties, it was held that the whole length of railroad was to be considered as one tract.⁹⁶

The English Land Clauses Act provides compensation for lands taken and "for injury done or to be done to the lands held therewith." In construing this section it has been held that lands might be held with those taken without being contiguous thereto.⁹⁷

inseparably connected in the use to which they are applied, as that the injury or destruction of one must necessarily and permanently injure the other." In another case the rule is said to be that the "damages must be confined to the tract of land over which the right of way is condemned, unless the owner has other lands contiguous thereto, and so situated with respect to the same that the value is appreciably augmented by their use in connection therewith as a single farm, and the appropriation of said right of way has destroyed or seriously interfered with such use." *Leavenworth*

etc. R. R. Co. v. Wilkins, 45 Kan. 674, 26 Pac. Rep. 16. And see *Providence & W. R. R. Co. v. Worcester*, 155 Mass. 35, 29 N. E. Rep. 56.

⁹⁵ *Board of Comrs. v. Lahore*, 37 Kan. 480.

⁹⁶ *Houston etc. R. R. Co. v. Postal Tel. Cable Co.*, 18 Tex. Civ. App. 502, 45 S. W. Rep. 179.

⁹⁷ *Essex v. Local Board of Acton*, L. R. 14, H. L. 153. Lord Watson says: "Where several pieces of land, owned by the same person, are so near to each other, and so situated that the possession and control of each gives an enhanced value to all of them, they are lands held to-

The party condemning is bound to take notice of what the entire tract is and be prepared to meet any claim for damages thereto, and no answer or cross petition is necessary.⁹⁸

Whether two or more parcels of land constitute one tract, for the purpose of estimating damages or benefits, is a question of fact and not of law.⁹⁹

§ 476. **What are special benefits?**—Special benefits are such as affect the actual use and enjoyment of property, and thereby render it more valuable in the market. The matter is very well put by the Supreme Court of Kansas in an opinion from which we quote as follows:

“We think the court below erred in several particulars; but all the errors probably arose from the erroneous opinion seemingly entertained by the court, ‘that all conveniences and benefits are proper subjects for the jury to take into consideration in arriving at a proper conclusion as to what damages should be allowed to the plaintiff.’

“Now, ‘all conveniences and benefits’ are not proper subjects for the jury to consider in awarding damages to a land-owner who is seeking damages for supposed injuries to his land, claimed to have been caused by the location of a road over his premises. It has already been decided by this court that ‘in the appropriation of the right of way for a public road, the public has a right, in the absence

gether within the meaning of the act; so that if one piece is compulsorily taken, and converted to uses which depreciate the value of the rest, the owner has a right to compensation.”

⁹⁸ *First Church in Boston v. Boston*, 14 Gray, 214; *Minnesota Valley R. R. Co. v. Doran*, 15 Minn. 230; *Wyandotte etc. R. R. Co. v. Waldo*, 70 Mo. 629; *Springfield & Southern Ry. Co. v. Calkins*, 90 Mo. 538; *Fayetteville etc. R. R. Co. v. Hunt*, 51 Ark. 330,

11 S. W. Rep. 418; *Chicago etc. R. R. Co. v. Huncheon*, 130 Ind. 529, 30 N. E. Rep. 636; *Chicago etc. R. R. Co. v. Brunson*, 43 Kan. 371, 23 Pac. Rep. 495; *Northeastern Neb. R. R. Co. v. Frazier*, 25 Neb. 42, 40 N. W. Rep. 604.

⁹⁹ *St. Paul etc. R. R. Co. v. Murphy*, 19 Minn. 500; *Charleston etc. Bridge Co. v. Comstock*, 36 W. Va. 263, 15 S. E. Rep. 69. Compare *Brooklyn El. R. R. Co. v. Flynn*, 147 N. Y. 344, 41 N. E. Rep. 704.

of any special statutory or constitutional restrictions, to reduce the damages to be awarded to the land-owner by the amount of benefits which inure to him as the direct and special result of the proposed road, but not by any which he received in common with the rest of the public' (Pottowatomie Co. v. O'Sullival, 17 Kan. 58). That is, the benefits which may be taken into consideration for the purpose of reducing the damages to be awarded to the land-owner are such as are direct and special as to him and his land, and not such as are received in common by the whole community; and with reference to cause and effect, they are such as are direct, certain and proximate, and not such as are indirect, contingent or remote. It is true, that increased value of the land is often taken into consideration in fixing the amount of the damages; but this is done only where such increased value arises from such direct, special and proximate cause, such as the draining of the land, or building bridges across streams running through the land, or making some other valuable improvement on or near the land, by means of which the owner will be enabled to enjoy his land with greater advantage. That is, the increased value must be founded upon something which affects the land itself directly and proximately. It must be founded upon something which increases the actual or usable value of the land, as well as the market or salable value thereof, and not such as increase merely the market or salable value alone. Increased value founded upon merely increased facilities for travel and transportation by the public in general, is not the kind of increased value which may be taken into consideration in reducing the damages to be awarded to the land-owner. That kind of increased value is too indirect and too remote from the original cause, which cause is the laying out of the road. Besides, it is a kind of increased value which is common to the whole community in general, and to each individual thereof to a greater or less extent; and it has no relation to the use of the land as land, but it is merely an increased market value founded upon the extraneous circumstances

of increased facilities for public travel and transportation."¹

Some cases maintain that any increase in value caused by the work or improvement is a special benefit. "Special benefits are such benefits flowing from the proposed public work as appreciably enhance the value of the particular tract of land alleged to be benefited."² In the case referred

¹ *Roberts v. Comrs. of Brown Co.*, 21 Kan. 247, 251-2. See also *Springfield v. Schmooch*, 68 Mo. 394; *Palmer Company v. Ferrill*, 17 Pick. 58; *Chase v. City of Portland*, 86 Me. 367, 29 Atl. Rep. 1104; *Miller v. Towns of Beaver and LeRoy*, 37 Minn. 203, 33 N. W. Rep. 559; *Sullivan v. North Hudson County R. R. Co.*, 51 N. J. L. 518, 18 Atl. Rep. 689; *Wilmington & W. R. R. Co. v. Smith*, 99 N. C. 131, 5 S. E. Rep. 237; *Beekman v. Jackson County*, 18 Or. 283, 22 Pac. Rep. 1074, 1 Am. R. R. & Corp. Rep. 665; *Long v. Harrisburg & P. R. R. Co.*, 126 Pa. St. 143, 19 Atl. Rep. 39; *Harris v. Schuylkill River E. S. R. R. Co.*, 141 Pa. St. 242, 21 Atl. Rep. 590; *Mahaffey v. Beech Creek R. R. Co.*, 163 Pa. St. 158, 29 Atl. Rep. 881. In *Sullivan v. North Hudson County R. R. Co.*, 51 N. J. L. 518, 18 Atl. Rep. 689, it is said: "The benefits which may accrue to a land owner by reason of the construction and operation of a railroad across his land are usually regarded as consisting of two classes, general benefits, being those which affect the whole community or neighborhood, by increasing the facility of transportation, attracting population and the like; and special benefits, being those which directly increase the value

of the particular tract crossed, as if a cut required by the railroad should drain a swamp, or a necessary embankment should maintain a mill pond, or if a bridge which the railroad company had to build, should afford a better way between portions of the tract."

² *Metropolitan West Side El. R. R. Co. v. Stickney*, 150 Ill. 362, 37 N. E. Rep. 1098, 10 Am. R. R. & Corp. Rep. 1. This case was approved and followed in *Metropolitan West Side El. R. R. Co. v. Clancy*, 153 Ill. 270, 38 N. E. Rep. 557. Compare decision by the same court in *Washington Ice Co. v. Chicago*, 147 Ill. 327, 35 N. E. Rep. 378, and *Same v. White*, 166 Ill. 375, 46 N. E. Rep. 978. In *Kirkendall v. City of Omaha*, 39 Neb. 1, 57 N. W. Rep. 752, it is said: "The term 'special benefits' implies benefits, such as are conferred specially upon private property by public improvement, as distinguished from such benefits as the general public is entitled to receive therefrom. In common with the general public, the owner of adjacent property is entitled to travel upon the improved highway; and although, by reason of the improvement, such travel may be rendered easier or more pleasant, yet the benefit is general, because it is en-

to, an increase in value caused by the construction of an elevated railroad was held to be a special benefit, though common to property all along the line.

The benefits resulting from opening a street through property, whereby additional frontage is created or it is rendered more accessible, are special.³ So, when a street is widened, any increase in value in the part not taken, by reason of fronting on a wider street, is a special benefit.⁴ Benefits resulting from the location of a depot near the

joyed by the public in common with the owners of adjacent property. If the improvement should result in an increase in the value of adjacent property, which increase is enjoyed by other adjacent property owners, as to the property of each exclusively, the benefit is special; and it is none the less so because several adjacent lot-owners derive, in like manner, special benefits, each to his own individual property. Such fact, if it exists, in no respect decreases the increment in value enjoyed by any one of the adjacent property owners; and, by way of offset, such increment should therefor be treated as a special benefit in favor of whomsoever it may arise." This was a suit to recover damages to abutting property by changing the grade of the street. The same views were approved and followed in *Barr v. City of Omaha*, 42 Neb. 342, 60 N. W. Rep. 591. Compare *City of Omaha v. Schaller*, 26 Neb. 522, 42 N. W. Rep. 721. And see on the general subject *Newman v. Metropolitan El. R. R. Co.*, 118 N. Y. 618, 23 N. E. Rep. 901, 2 Am. R. R. & Corp. Rep. 318; *Bohm v. Metropolitan El. R. R. Co.*, 129 N. Y. 576, 29

N. E. Rep. 802, 5 Am. R. R. & Corp. Rep. 416; *Friedenwald v. City of Baltimore*, 74 Md. 116, 21 Atl. Rep. 555; *Butchers' Slaughtering & M. Ass. v. Commonwealth*, 169 Mass. 103.

³ *Trosper v. Comrs. of Saline Co.*, 27 Kan. 391; *Allen v. Charlestown*, 109 Mass. 243; *Sexton v. North Bridgewater*, 116 Mass. 200; *Allegheny v. Black's Heirs*, 99 Pa. St. 152; *Waggeman v. North Peoria*, 155 Ill. 545, 40 N. E. Rep. 485. But in a proceeding to lay out a street through a 90-acre tract, which was covered with water and used for cutting ice, it was held that no special benefits to land not taken could be set off unless it was shown that the street would be so improved as to be passable.

⁴ *Hilbourne v. County of Suffolk*, 120 Mass. 393; *Cross v. Plymouth*, 125 Mass. 557; but see *Farwell v. Cambridge*, 11 Gray, 413; *Parks v. County of Hampden*, 120 Mass. 395; *Abbott v. Cottage City*, 143 Mass. 521; *Lewis v. City of Seattle*, 5 Wash. 741, 32 Pac. Rep. 794. So where a street is graded and rendered available for business purposes. *Lowe v. Omaha*, 33 Neb. 587, 50 N. W. Rep. 760.

property in question have been held to be special in Massachusetts⁵ and Pennsylvania,⁶ but otherwise in Wisconsin.⁷ Benefits by increased transportation facilities have been held to be special.⁸ Where land was taken for a sewer, the construction of which would relieve the owner from the easement of maintaining an old sewer, the benefits resulting from an extinguishment of the easement were held to be special.⁹ Benefits resulting to the petitioner's land by the removal of a cemetery adjacent to it by reason of a railroad being laid through it were held not to be special.¹⁰ Land was situated on a large pond which was raised in winter by a dam. The owner used the pond for cutting ice. In a proceeding for damages by reason of the dam it was held proper to show that by raising the pond it was rendered more convenient to get ice from it and that this was a special benefit to the land in question.¹¹ Other illustrations of special benefits will be found in the cases cited in the preceding sections. Where part of a tract was taken on which there was chestnut timber it was held that it could not be shown that the railroad would create a de-

⁵ *Shattuck v. Stoneham Branch R. R. Co.*, 6 Allen, 115.

⁶ *Pittsburg and Lake Erie R. R. Co. v. Robinson*, 95 Pa. St. 426.

⁷ *Washburn v. Milwaukee & Lake Winnebago R. R. Co.*, 59 Wis. 364; and see *Hayes v. Ottawa etc. R. R. Co.*, 54 Ill. 373. In *Nette v. New York El. R. R. Co.*, 2 Misc. 62, 20 N. Y. Supp. 844, it was held proper to take into account the benefit resulting from the proximity of a station, but the contrary was held in *Sloan v. New York El. R. R. Co.*, 63 Hun, 300, 44 N. Y. St. Rep. 583, 17 N. Y. Supp. 769, on the ground that the company might at any time remove the station.

⁸ *Colorado Cent. R. R. Co. v. Humphreys*, 16 Col. 34, 26 Pac. Rep. 165; *St. Louis etc. R. R. Co.*

v. St. Louis Union Stock Yard Co., 120 Mo. 541, 25 S. W. Rep. 399; *St. Louis etc. R. R. Co. v. Fowler*, 142 Mo. 670. And see *Tonica etc. R. R. Co. v. Cooper*, 22 Ill. 224; *Lafin v. Chicago etc. R. R. Co.*, 33 Fed. Rep. 415; *Lewiston etc. R. R. Co. v. Ayer*, 27 App. Div. N. Y. 571. May not show that new road has decreased freight rates for the purpose of showing benefits by such road. *Reading & P. R. R. Co. v. Balt-haser*, 119 Pa. St. 472, 13 Atl. Rep. 294; 126 Pa. St. 1, 17 Atl. Rep. 518.

⁹ *French v. Lowell*, 117 Mass. 363.

¹⁰ *Minnesota Central R. R. Co. v. McNamara*, 13 Minn. 508.

¹¹ *Paine v. Woods*, 108 Mass. 160.

mand for chestnut ties and thereby enhance the value of the property.¹²

§ 476a. **Assessing or taxing the part not taken to pay the damages awarded.** —Where part of a lot is taken and the remainder is found to be damaged, such remainder cannot be assessed with benefits for the same improvement in a subsequent proceeding.¹³ The first adjudication that the property has been damaged concludes both parties while it stands. An alley was opened through the middle of two lots. Damages were awarded for the parts taken and for injury to the parts not taken. Afterwards it was proposed to levy a special tax upon the parts not taken to pay the damages awarded. It was held that this would amount to a taking without compensation, and the proceeding for the special tax was dismissed.¹⁴ Where part of a tract is taken for a street and no damages are awarded for the part not taken, the part not taken may be assessed for benefits by the opening. But whether the whole value of the land taken and the costs of both proceedings can be assessed back upon the part not taken is a question.¹⁵ If such a course is upheld the owner would be compelled to pay for the privilege of having his land taken from him and devoted to public use. And where a city was author-

¹² Childs v. New Haven & Northampton R. R. Co., 133 Mass. 253.

¹³ Leopold v. City of Chicago, 150 Ill. 568, 37 N. E. Rep. 892; Goodrich v. Omaha, 10 Neb. 98; Davis v. City of Newark, 54 N. J. L. 595, 25 Atl. Rep. 336; City of Norfolk v. Chamberlain, 89 Va. 196, 16 S. E. Rep. 730. But see Terry v. City of Hartford, 39 Conn. 286, 291. So where damages were awarded for a change of grade it was held that the same property could not be assessed for benefits by the same improvement. Freeman v. Hunter, 7 Ohio C. C. 117. See Bartley v.

Cincinnati, 8 Ohio C. C. 226. Where part of a tract is taken for street, the part not taken, cannot be assessed more than it will be benefited by the improvement. Norwood v. Baker, 172 U. S. 269.

¹⁴ City of Bloomington v. Latham, 142 Ill. 462, 32 N. E. Rep. 506. To same effect Scott v. City of Toledo, 36 Fed. Rep. 385.

¹⁵ Such a proceeding was sustained in Covington v. Worthington, 88 Ky. 206, 10 S. W. Rep. 790, 11 S. W. Rep. 1038. Contra Baker v. Norwood, 74 Fed. Rep. 997; and see cases in note 14.

ized to fix the district upon which the benefits should be assessed, it was held that it could not make the district so restricted as virtually to make those whose property was taken pay for their own property.¹⁶

§ 477. **Time with reference to which damages should be estimated.** —To be exactly just the compensation should be estimated as of the time of the taking. In those States in which it is held that compensation need not precede or be concurrent with the taking, the time of the taking is usually fixed upon as the date for estimating the damages. In those States the title is held to vest upon filing a certain instrument of location or appropriation, and the compensation is permitted to be adjusted afterwards. The title would probably be held to vest upon the condition of making compensation, and, when made, the title would be perfect from the date of the appropriation. Whenever the compensation is estimated, therefore, it should be estimated as of this date.¹⁷ In *Parks v. Boston*, the court say: "The defendants are not wrong-doers. They are withholding nothing from the plaintiff; not the estate taken, for that the public have acquired; not the compensation, for the city could not pay or tender that, till liquidated by the course of proceedings which is now going on. It is not strictly speaking an action for damages; but rather a valuation or appraisement of an incumbrance created on the plaintiff's estate, for the use of the public. It is the purchase of a public easement, the consideration for which is settled by such appraisement only because the parties are unable to agree upon it. The true rule would be, as in the case of

¹⁶ *City of Detroit v. Daly*, 68 Mich. 503, 37 N. W. Rep. 11. See also *Rhoades v. City of Toledo*, 6 Ohio C. C. 9; *Tyler v. St. Louis*, 56 Mo. 60.

¹⁷ *Logansport etc. Ry. Co. v. Buchanan*, 52 Ind. 163; *Lafayette etc. R. R. Co. v. Murdock*, 68 Ind. 137; *Parks v. Boston*, 15 Pick. 198; *Reed v. Hanover Branch R.*

Co., 105 Mass. 303; *Cobb v. Boston*, 109 Mass. 438; *Cobb v. Boston*, 112 Mass. 181; *Pitkin v. Springfield*, 112 Mass. 509; *Staford v. Providence*, 10 R. I. 567; *In re Condemnation of land for State House*, 19 R. I. 382, 33 Atl. Rep. 523. See *Shannahan v. Waterbury*, 63 Conn. 420, 28 Atl. Rep. 611.

other purchases, that the price is due and ought to be paid, at the moment the purchase is made, when credit is not especially agreed upon. And if a pie-powder court could be called on the instant and on the spot, the true rule of justice for the public would be, to pay the compensation with one hand, whilst they apply the ax with the other; and this rule is departed from only because some time is necessary, by the forms of law, to conduct the inquiry; and this delay must be compensated by interest. But in other respects the damages must be appraised upon the same rule as they would have been on the day of the taking. Besides, the alienation of the plaintiff's property, so far as it was alienated at all, for the public easement, was definitive, complete, and perpetual, on the day of taking; and what difference can it make to the plaintiff, that his particular estate would have been worth more or less, if he could have kept it to an after period? Besides, it would be extremely difficult to determine, where a great public improvement has been made in a street, how far the enhancement of the value of the estate has been occasioned by a change in the market value from general causes and how far by the improvement itself. On the whole, independently of the authorities applicable to the case of an action for damages for the unlawful detention of property, the jury were correctly instructed, that in the estimate of damages done to an estate partly taken for the public use, the value of the estate on the day of the taking was the true value to be taken by the jury, in their appraisement of the damages."¹⁸ If the property is entered upon before the instrument of appropriation is filed, nevertheless the compensation is to be estimated as of the date of filing the instrument of appropriation and not as of the date of entry.¹⁹

In those States in which it is held that an entry for the purposes of permanently appropriating the property may

¹⁸ *Parks v. Boston*, 15 Pick. 198, 208-209.

¹⁹ *Graham v. Connersville etc.*

R. R. Co., 36 Ind. 463; *Hampden Paint Co. v. Springfield etc. R. R.*

Co., 124 Mass. 118.

precede the making of compensation, though title does not vest until compensation is made, the date of entry would seem to be the proper time for estimating the value of the property, as the title relates back to that time when the compensation is paid over.

In the States which hold or in which the constitution provides that compensation must be made before the property is taken or entered upon, it becomes a matter of considerable practical difficulty to say with reference to what time the compensation should be estimated. The date of filing the petition or of commencing proceedings is fixed upon in some States.²⁰ A law to this effect was held valid in California.²¹ The reasons upon which these decisions are based are that the filing of the petition affords a convenient, definite and invariable point of time in every case to which

²⁰ *Cook v. South Park Comrs.*, 61 Ill. 115; *South Park Comrs. v. Dunlevy*, 91 Ill. 49; *Du Puis v. Chicago & North Wis. Ry. Co.*, 115 Ill. 97; *Chicago, Evanston & Lake Superior R. R. Co. v. Catholic Bishop of Chicago*, 119 Ill. 525; *Newgass v. St. Louis etc. R. R. Co.*, 54 Ark. 140, 15 S. W. Rep. 188, 4 Am. R. R. Corp. Rep. 44; *Lieberman v. Chicago etc. R. R. Co.*, 141 Ill. 140, 30 N. E. Rep. 544; *Sanitary District v. Loughran*, 160 Ill. 362; *Missouri Pac. R. R. Co. v. Wernway*, 35 Mo. App. 449; *Missouri Pac. R. R. Co. v. Hays*, 15 Neb. 224; *Northeastern Neb. R. R. Co. v. Frazier*, 25 Neb. 53, 40 N. W. Rep. 609; *Fremont etc. R. R. Co. v. Bates*, 40 Neb. 381, 58 N. W. Rep. 959; *Oregon & Cal. R. R. Co. v. Barlow*, 3 Or. 311 (Circ. Ct.); *West Chicago St. R. R. Co. v. Chicago*, 172 Ill. 198, 50 N. E. Rep. 185; *Rock Island etc. R. R. Co. v. Leisy Brewing Co.*, 174 Ill. 547; *Los Angeles v. Pomeroy*, 124 Cal.

597, 57 Pac. Rep. 585; *Burt v. Merchants' Ins. Co.*, 115 Mass. 1; *Same v. Wigglesworth*, 117 Mass. 302. The last two were suits on the part of an agent of the United States to condemn land in Berlin for a post office. They are not inconsistent with the cases heretofore cited in this section from the same State, as they were for the purpose of fixing the compensation for property not already taken but to be taken in the future.

²¹ *California Southern R. R. Co. v. Kimball*, 61 Cal. 90; *Tehama County v. Bryan*, 68 Cal. 57; *Arcata & Mad River R. R. Co. v. Murphy*, 71 Cal. 122; see *San Francisco & San Jose R. R. Co. v. Mahoney*, 29 Cal. 112; *Pacific Coast R. R. Co. v. Porter*, 74 Cal. 261; *San Jose & A. R. R. Co. v. Mayne*, 83 Cal. 566, 23 Pac. Rep. 522. And so in Utah. *Oregon etc. R. R. Co. v. Mitchell*, 7 Utah 505, 27 Pac. Rep. 693.

to refer the question of compensation, that the filing of the petition is a designation of the property and a declaration that it is desired for public use, that the petition is filed upon the basis of values as they then are, and that it would be unjust to one party or the other to estimate the value as of some subsequent time. The Supreme Court of Illinois reasons as follows:

“But, independent of the statute, the evident object and import of filing a petition where parties cannot agree, is to ascertain the just and true amount of compensation for property to be taken, not five years before the petition is filed, or three or five years thereafter, but at the time of filing the petition. Suppose the property in question was worth, at the time the petition was filed, \$100,000, and the commissioners, knowing that to be its true value, had provided themselves with money necessary to pay that amount of damages, and filed a petition to condemn the property, but owing to delays, which are sometimes incident to legal proceedings, over which the commissioners had no control, a trial was not had until three years after the petition was filed, and in the meantime the property had increased in value to \$200,000, would it be reasonable to hold that this increased valuation could be proven, and the commissioners compelled to take the property at double its value when they instituted proceedings to condemn and take it? We apprehend a rule of this character would neither be reasonable nor just, and yet the principle contended for by the commissioners would lead to this result.

“In an action for a breach of contract for a failure to deliver goods, the true measure of damages is the value of the goods at the time required by the contract for delivery, and in an action for a conversion of property, the evidence is confined to the value at the time of conversion, and in neither case can proof be introduced of the value of the property after suit commenced, as was aptly illustrated by counsel for the defendants. The same principle may be applied to a case of this character. The filing of the petition is the commencement of the action. Those interested in the land by that act are brought into court, and the

inquiry is, what amount shall be then allowed as a just compensation for the property described in the petition.”²²

Similar language is found in the Massachusetts cases: “But the compensation to be paid by the government and received by the owners of the land must be estimated according to the value of the land at the time of the filing of the petition. This affords a definite and invariable rule, which has relation to the time at which the property is designated and set apart for the public use, the owners ascertained who are entitled to be compensated, and the judicial proceedings instituted for the purpose of determining such compensation; and is not liable to be affected by the duration of these proceedings, or by increase or diminution in value, whether occasioned by the taking itself, or by acts of the owners, lapse of time, or other circumstances. In all these respects, it is a juster measure of compensation than a valuation of the estate at any subsequent point of time. And it accords with the rule as settled in this commonwealth in the analogous cases of lands taken for highways and railroads.”²³

Other cases fix upon the date of the award of commissioners as the time with reference to which to estimate the compensation, that is that the commissioners are to estimate the compensation as of the time of the hearing before them, and in case of any further trial on appeal the date of their award is the date taken for estimating the compensation.²⁴ If the compensation is assessed in the first instance

²² *South Park Comrs. v. Dunlevy*, 91 Ill. 49, 51, 53.

²³ *Burt v. Merchants' Ins. Co.*, 115 Mass. 1, 14.

²⁴ *St. Joseph & Denver City R. Co. v. Orr*, 8 Kan. 419; *Wirona & St. Peter R. R. Co. v. Denman*, 10 Minn. 267; *Carli v. Stillwater & St. Paul R. R. Co.*, 16 Minn. 260; *Warren v. First Division St. Paul & Pacific R. R. Co.*, 21 Minn. 424; *Knauff v. St. Paul etc. R. R. Co.*, 22 Minn.

173; *Conter v. St. Paul & Sioux City R. R. Co.*, 22 Minn. 342; *Whitacre v. Same*, 24 Minn. 311; *Mont Clair R. R. Co. v. Benson*, 36 N. J. L. 557; *Metler v. Easton & Amboy R. R. Co.*, 37 N. J. L. 222; *Chesapeake & Ohio Canal Co. v. Tyree*, 7 W. Va. 693; *Milwaukee & Miss. R. R. Co. v. Eble*, 4 Chand. 72; *Driver v. Western Union R. R. Co.*, 32 Wis. 569, 579; *Lyon v. Green Bay & Minn. Ry. Co.*, 42 Wis. 538; *West v. Mil-*

by a jury the time of trial would by the same rule be the proper time with reference to which to estimate it. These cases usually proceed upon the ground that as soon as the compensation is assessed the petitioner may pay or deposit it and at once be entitled to the property, and that this fixes the time of the taking. Some courts hold that, if the compensation awarded by the commissioners is not paid or deposited, but an appeal is taken and the case is tried *de novo*, then, as the property has not been taken, the compensation should be assessed as of the time of such trial on appeal.²⁵

Where property was wrongfully entered upon a railroad company, and years after the owner instituted proceedings for damages which the company converted into condemnation proceedings, it was held the compensation should be estimated as of the time of trial.²⁶ The same rule has been adopted in other cases, whether the entry was wrongful or by consent of the owner.²⁷ A law providing that, where property has been entered upon by a railroad without acquiring title, and proceedings are subsequently instituted,

waukee etc. Ry. Co., 56 Wis. 318; Uniacke v. Chicago, Mil. & St. Paul Ry. Co., 67 Wis. 108; Reed v. Chicago, Mil. & St. Paul Ry. Co., 25 Fed. Rep. 886; Ellsworth v. Chicago etc. R. R. Co., 91 Ia. 386, 59 N. W. Rep. 78; St. Louis etc. R. R. Co. v. Fowler, 113 Mo. 458, 20 S. W. Rep. 1069; Forsyth Boulevard v. Forsyth, 127 Mo. 417, 30 S. W. Rep. 188; Stribley v. Cincinnati, 9 Ohio C. C. 122. A statute to that effect in Colorado has been repeatedly sustained and applied. Twin Lakes H. G. M. S. v. Colorado M. R. R. Co., 16 Col. 1, 27 Pac. Rep. 258; Denver & R. G. R. R. Co. v. Griffith, 17 Col. 598, 31 Pac. Rep. 171; Lamborn v. Bell, 18 Col. 346, 32 Pac. Rep. 989, 7 Am. R. R. & Corp. Rep. 747.

²⁵ Galveston etc. Ry. Co. v. Lyons, 2 Tex. App. Civil Cases, 133; Arnold v. Covington & Cincinnati Bridge Co., 1 Duvall, (Ky.) 372; Georgia S. & F. R. R. Co. v. Small, 87 Ga. 355, 13 S. E. Rep. 515.

²⁶ County of Blue Earth v. St. Paul & Sioux City R. R. Co., 28 Minn. 503; Morin v. St. Paul etc. Ry. Co., 30 Minn. 100. To same effect, Lyon v. Green Bay & Minn. Ry. Co., 42 Wis. 538.

²⁷ Chicago etc. R. R. Co. v. Randolph Town Site Co., 103 Mo. 451, 15 S. W. Rep. 437; Doyle v. Kansas City & S. R. R. Co., 113 Mo. 280, 20 S. W. Rep. 970; Pittsburgh & W. R. R. Co. v. Perkins, 49 Ohio St. 326, 31 N. E. Rep. 350; Graham v. Pittsburgh etc. R. R. Co., 145 Pa. St. 504, 22 Atl. Rep.

the compensation shall be estimated as of the date of entry, was held valid in Wisconsin.²⁸ And this rule has been applied in some cases in the absence of a statute.²⁹ In New Jersey the following rule has been laid down: "When a railroad company, having power to condemn land, has been permitted by the landowner to enter and lay its tracks and make improvements without compensation first made, and afterwards the question of compensation arises in a suit in equity, the measure of compensation is the value of the land and damages at the time of entry, with interest. When, however, the company, under such conditions, takes a statutory proceeding to condemn such land, the measure of compensation is the value of the land and damages at the time of the appraisalment."³⁰ If there has been no change of value, the question of time would be immaterial.³¹

Where an act was passed describing certain lands and declaring them taken for park purposes, it was held to be a direct appropriation by the State and that compensation should be estimated as of the date of the passage of the act.³²

In proceedings to obtain damages to property by a dam³³

983; *Texas Western R. R. Co. v. Cave*, 80 Tex. 137, 15 S. W. Rep. 786; *San Antonio etc. R. R. Co. v. Ruby*, 80 Tex. 172, 15 S. W. Rep. 1040. See *Louisville etc. R. R. Co. v. Hopson*, 73 Miss. 773, 19 Atl. Rep. 718; *San Antonio etc. R. R. Co. v. Hunnicutt*, 18 Tex. Civ. App. 310, 44 S. W. Rep. 535.

²⁸ *Kennedy v. Milwaukee & St. Paul Ry. Co.*, 22 Wis. 581; *Aspinwall v. Chicago & Northwestern Ry. Co.*, 41 Wis. 474.

²⁹ *Wier v. St. Louis etc. R. R. Co.*, 40 Kan. 130, 19 Pac. Rep. 316; *Spokane & P. R. R. Co. v. Lieuallen*, 2 Idaho, 1101, 29 Pac. Rep. 854; *Ragan v. Kansas City etc. R. R. Co.*, 111 Mo. 456, 20 S. W. Rep. 234; *Duke of Beaufort v.*

Patrick, 17 Beav. 60; *Ragan v. Kansas City etc. R. R. Co.*, 144 Mo. 623.

³⁰ *Trimmer v. Pennsylvania etc. R. R. Co.*, 55 N. J. L. 46, 25 Atl. Rep. 932; *North Hudson County R. R. Co. v. Booraem*, 28 N. J. Eq. 450; *Leeds v. Camden & A. R. R. Co.*, 53 N. J. L. 229, 23 Atl. Rep. 168.

³¹ *Schuykill Riv. E. S. R. R. Co. v. Rees*, 135 Pa. St. 629, 20 Atl. Rep. 149.

³² *Matter of Department of Public Works*, 53 Hun 280, 25 N. Y. St. Rep. 9, 6 N. Y. Supp. 750; *State v. Collis*, 20 App. Div. 341; *Matter of New York*, 40 App. Div. N. Y. 281; *Matter of Riverside Park Extension*, 27 Misc. 373.

³³ *Zimmerman v. Union Canal*

or by a railroad in a street,³⁴ it has been held the damages should be assessed as of the date of the injury.

In all cases interest should be allowed from the time with reference to which the compensation is assessed, less the actual value of the use to the owner for so much of that time as he has had possession.³⁵

§ 478. **General principles in estimating value.** —In estimating the value of property taken for public use it is the market value of the property which is to be considered.³⁶ The market value of property is the price which it will bring when it is offered for sale by one who desires, but is not obliged to sell it, and is bought by one who is under no necessity of having it.³⁷ In estimating its value

Co., 1 W. & S. 346; Schuylkill Navigation Co. v. Thoburn, 7 S. & R. 411.

³⁴ Central Branch U. P. R. R. Co. v. Andrews, 26 Kan. 702.

³⁵ Reed v. Hanover Branch R. R. Co., 105 Mass. 303; Warren v. First Division of St. Paul & Pacific R. R. Co., 21 Minn. 424; Metler v. Eastern & Amboy R. R. Co., 37 N. J. L. 222; West v. Milwaukee etc. Ry. Co., 56 Wis. 318; State Park Comrs. v. Henry, 38 Minn. 266, 36 N. W. Rep. 874; Matter of New York, 40 N. Y. App. Div. 281.

³⁶ Everett v. Union Pacific Ry. Co., 59 Ia. 243; Central Branch U. P. R. R. Co. v. Andrews, 26 Kan. 702; Burt v. Wigglesworth, 117 Mass. 302; Mississippi River Bridge Co. v. Ring, 58 Mo. 491; Virginia & Truckee R. R. Co. v. Elliott, 5 Nev. 358; Shenango & Allegheny R. R. Co. v. Braham, 79 Pa. St. 447; Cummings v. Williamsport, 84 Pa. St. 472; Woodfolk v. Nashville & Chattanooga R. R. Co., 2 Swan. 422; San Diego Land & Town Co. v. Neale,

78 Cal. 63, 20 Pac. Rep. 372; City of Santa Ana v. Harlin, 99 Cal. 538, 34 Pac. Rep. 224; Brown v. Calumet Riv. R. R. Co., 125 Ill. 600, 18 N. E. Rep. 283; Reed v. Ohio & Miss. R. R. Co., 126 Ill. 48, 17 N. E. Rep. 807; Tedens v. Sanitary District, 149 Ill. 87, 36 N. E. Rep. 1033; Chicago etc. R. R. Co. v. Parsons, 51 Kan. 408, 32 Pac. Rep. 1083; Alloway v. City of Nashville, 88 Tenn. 510, 13 S. W. Rep. 123, 1 Am. R. R. & Corp. Rep. 671.

³⁷ Brown v. Calumet Riv. R. Co., 125 Ill. 600; Ligare v. Chicago etc. R. R. Co., 166 Ill. 249, 46 N. E. Rep. 803; Kansas City etc. R. R. Co. v. Fisher, 49 Kan. 17, 30 Pac. Rep. 111; Pittsburgh etc. R. R. Co. v. Vance, 115 Pa. St. 325; Alloway v. City of Nashville, 88 Tenn. 510, 13 S. W. Rep. 123, 1 Am. R. R. & Corp. Rep. 671; Esch v. Chicago etc. R. R. Co., 72 Wis. 229, 39 N. W. Rep. 129. "Market value" and "cash value" mean the same thing. Brown v. Calumet Riv. R. R. Co., 125 Ill. 600, 18 N. E.

all the capabilities of the property,³⁸ and all the uses to which it may be applied or for which it is adapted, are to be considered, and not merely the condition it is in at the time and the use to which it is then applied by the owner.³⁹ It is not a question of the value of the property to the

Rep. 233. "The market value of a thing is the highest price it will bring for any and all uses." *Lowe v. Omaha*, 33 Neb. 587, 50 N. W. Rep. 760; *Shreveport etc. R.R. Co. v. Hinds*, 50 La. An. 781, 24 So. Rep. 287; *Gregg v. Northern R. R. Co.*, 67 N. H. 452, 41 Atl. Rep. 271. "Market value means the fair value of the property as between one who wants to purchase and one who wants to sell an article, not what could be obtained for it under peculiar circumstances; not its speculative value; not a value obtained from the necessities of another. Nor on the other hand is it to be limited to that price which the property would bring when forced off at auction under the hammer. It is what it would bring at a fair public sale when one party wanted to sell and the other to buy." The above instruction was held correct in *Lawrence v. Boston*, 119 Mass. 126. See also *Little Rock Junction Ry. Co. v. Woodruff*, 49 Ark. 381; *Lehigh Coal Co. v. Wilkesbarre etc. R. R. Co.*, 187 Pa. St. 145.

³⁸ *Ellington v. Bennett*, 59 Ga. 286; *Central Branch U. P. R. R. Co. v. Andrews*, 26 Kan. 702; *Haslam v. Galena etc. R. R. Co.*, 64 Ill. 353; *Alloway v. City of Nashville*, 88 Tenn. 510, 13 S. W. Rep. 123, 1 Am. R. R. & Corp.

Rep. 671; *Daly v. Smith*, 18 App. Div. N. Y. 194; *San Antonio etc. R. R. Co. v. Hunnicutt*, 18 Tex. Civ. App. 310, 44 S. W. Rep. 535.

³⁹ "The correct rule to be applied relates to the value of the land to be appropriated, which is to be assessed with reference to what it is worth for sale, in view of the uses to which it may be put, and not simply in reference to its productiveness to the owner in the condition in which he has seen fit to leave it." *Mississippi Bridge Co. v. Ring*, 58 Mo. 491; also *Little Rock Junction Ry. Co. v. Woodruff*, 49 Ark. 381; *Matter of Firman St.*, 17 Wend. 649; *Webster v. Kansas City etc. R. R. Co.*, 116 Mo. 114, 22 S. W. Rep. 474; *Langdon v. New York*, 59 Hun 434, 37 N. Y. St. Rep. 99, 13 N. Y. Supp. 864; *Scott v. Manhattan R. R. Co.*, 60 N. Y. Supr. Ct. 233; *Hooker v. Montpelier R. R. Co.*, 62 Vt. 47, 19 Atl. Rep. 775; *Harwood v. Village of West Randolph*, 64 Vt. 41, 24 Atl. Rep. 97; *Seattle & M. R. R. Co. v. Murphine*, 4 Wash. 448, 30 Pac. Rep. 720; *District of Columbia v. Prospect Hill Cemetery*, 5 App. Cas. D. C. 497; *Los Angeles v. Pomeroy*, 124 Cal. 597, 57 Pac. Rep. 585; *Galesburg etc. R. R. Co. v. Milroy*, 181 Ill. 243; *Orleans etc. R. R. Co. v. Jefferson etc. R. R. Co.*, 51 La. An. 1605, 26 So. Rep. 278.

owner.⁴⁰ Nor can the damages be enhanced by his unwillingness to sell.⁴¹ On the other hand, the damages cannot be measured by the value of the property to the party condemning it, nor by its need of the particular property.⁴²

⁴⁰ In *Robb v. Maysville & Mt. Sterling Turnpike Road Co.*, 3 Met. (Ky.) 117, it appeared that the owner offered to prove the value of the property to himself. The trial court rejected this evidence and ruled that the fair market value of the property was the proper criterion for estimating the damages. The Supreme Court held this to be erroneous, and approved the rule laid down in *Henderson & Nashville R. R. v. Dickerson*, 17 B. Mon. 173, 179, in which the court say:

"The constitution secures to the owner of the land just compensation for his property before he can be deprived of it. Its value to him, considering its relative position to his other land, and the other circumstances which may diminish or enhance that value, can alone afford him a just compensation for its loss. To third persons, the same quantity of land of equal quality, on one of the boundaries of the farm might be of as much value as if it were situated in the middle of the farm, but at the same time its value, thus ascertained, might be a very inadequate compensation to the owner, if the land were taken out of the middle of his farm, so as to separate it into different parts, instead of being taken on one of its boundary lines. The real value of the land to the owner, as it is actually situated, and not merely its

value regarding it as a separate and independent piece of land he has a right to demand, and nothing less can secure him a just compensation for his property. In making such an estimate, however, the inquiry should not be what price would induce him to sell the ten acres of land thus situated, because he might not be willing to sell it at any price, but the inquiry should rather be, what would be its value to him, situated as it is, if he were not the owner of it, but owned the adjacent property on both sides of it, under the same circumstances precisely that now exist? Its actual value to him in that condition would be as much as he has a right to demand, and would afford him that just compensation for his property secured to him by the constitution."

It will be seen that this does not go to the extent that the former case would seem to imply, and the doctrine is contrary to the principles of nearly all of the cases upon damages. And see *Elizabethtown etc. R. R. Co. v. Helms' Heirs*, 8 Bush. 681; *In re Rugheimer*, 36 Fed. Rep. 376; *Providence & W. R. R. Co. v. Worcester*, 155 Mass. 35, 29 N. E. Rep. 256.

⁴¹ *Harrison v. Iowa Midland R. R. Co.*, 36 Ia. 323.

⁴² *Selma etc. R. R. Co. v. Keith*, 53 Ga. 178; *Molton v. Newbury*,

All the facts as to the condition of the property and its surroundings, its improvements and capabilities, may be shown and considered in estimating its value.⁴³ Of course circumstances and conditions tending to depreciate the property are as competent as those which are favorable.⁴⁴

port Water Co., 137 Mass. 163; Union Depot Street Ry. & Transfer Co. v. Brunswick, 31 Minn. 297; Virginia & Truckee R. R. Co. v. Elliott, 5 Nev. 358; Matter of Boston Hoosac Tunnel & W. R. R. Co., 22 Hun 176; Montgomery Co. v. Schuylkill Bridge Co., 110 Pa. St. 54; Esch v. Chicago etc. R. R. Co., 72 Wis. 229, 39 N. W. Rep. 129; Providence & W. R. R. Co. v. Worcester, 155 Mass. 35, 29 N. E. Rep. 256; Gibson v. Norwalk, 13 Ohio C. C. 428; Lehigh Coal Co. v. Wilkesbarre etc. R. R. Co., 187 Pa. St. 145.

⁴³ "Whatever in its location, surroundings, and appurtenances contributed to the availability of the land for valuable uses, was proper evidence to be considered by the jury in estimating its salable character, and ascertaining its market value." *Low v. Railroad*, 63 N. H. 557. To the same effect, *Hyde Park v. Washington Ice Co.*, 117 Ill. 233; *Dickenson v. Fitchburg*, 13 Gray, 546; *Louisville etc. R. R. Co. v. Ryan*, 64 Miss. 399; *Pittsburgh, Va. & C. Ry. Co. v. Vance*, 115 Pa. St. 325; *Weyer v. Chicago, Wis. & N. W. R. R. Co.*, 68 Wis. 180. *Muller v. Southern Pac. R. R. Co.*, 83 Cal. 240, 23 Pac. Rep. 265; *Spring Valley Water Works v. Drinkhouse*, 92 Cal. 528, 28 Pac. Rep. 681; *City of Santa Ana v. Harlin*, 99 Cal. 538, 34 Pac. Rep.

224; *Calumet Riv. R. R. Co. v. Moore*, 124 Ill. 329; *Reed v. Ohio & Miss. R. R. Co.*, 126 Ill. 48, 17 N. E. Rep. 807; *Kansas City etc. R. R. Co. v. Vickroy*, 46 Kan. 248, 26 Pac. Rep. 698; *Chicago etc. R. R. Co. v. Parsons*, 51 Kan. 408, 32 Pac. Rep. 1083; *West Virginia etc. R. R. Co. v. Gibson*, 94 Ky. 234, 21 S. W. Rep. 1055; *Webster v. Kansas City etc. R. R. Co.*, 116 Mo. 114, 22 S. W. Rep. 474; *Matter of Department of Public Works*, 53 Hun 280, 25 N. Y. St. Rep. 9, 6 N. Y. Supp. 750; *Pennsylvania S. V. R. R. Co. v. Clary*, 125 Pa. St. 442, 17 Atl. Rep. 468; *Alloway v. City of Nashville*, 88 Tenn. 510, 13 S. W. Rep. 123, 1 Am. R. R. & Corp. Rep. 671; *Wadham v. Northeastern R. R. Co.*, L. R. 16 Q. B. D. 227; *Maynard v. Northampton*, 157 Mass. 218, 31 N. E. Rep. 1062; *Cameron v. Chicago etc. R. R. Co.*, 51 Minn. 153, 53 N. W. Rep. 199; *Burlington etc. R. R. Co. v. White*, 28 Neb. 166, 41 N. W. Rep. 95; *Teele v. Boston*, 165 Mass. 88, 42 N. E. Rep. 506; *Manning v. Lowell*, 173 Mass. 100; *Bryant v. Pottsville Water Co.*, 190 Pa. St. 366, 42 Atl. Rep. 1117.

⁴⁴ *Harris v. Schuylkill Riv. E. S. R. R. Co.*, 141 Pa. St. 242, 21 Atl. Rep. 590; *Farwell v. Chicago etc. R. R. Co.*, 52 Neb. 614; *Thomson v. Sebasticoock & M. R. R. Co.*, 81 Me. 40, 16 Atl. Rep. 332; *Schuster v. Sanitary Dis-*

Facts affecting the value of the property may be shown, though they have become known since the taking or since the commencement of proceedings.⁴⁵ Where land was available for both mining and town lot purposes it was held error to compel the owner to elect whether he would prove its value for one or the other.⁴⁶ If property has no market value, then it is a question of real or actual value and every fact bearing upon such value may be shown, and those acquainted with the property and its surroundings may give their opinion of its value, though not experts in the strict sense.⁴⁷

§ 479. **Value for particular uses.**—The market value of property includes its value for any use to which it may be put. If, by reason of its surroundings, or its natural advantages, or its artificial improvements, or its intrinsic character, it is peculiarly adapted to some particular use, all the circumstances which make up this adaptability may be shown, and the fact of such adaptation may be taken into consideration in estimating the compensation.⁴⁸ Some of the cases hold that its value for a particular use may be proved,⁴⁹ but the proper inquiry is, what is its market value in view of any use to which it may be applied and of all the uses to which it is adapted?⁵⁰

In *Boom Co. v. Patterson*⁵¹ the defendant owned the greater part of three islands in the Mississippi river above

trict, 177 Ill. 626, 52 N. E. Rep. 855; *Morris etc. Co. v. Delaware etc. R. R. Co.*, 190 Pa. St. 448, 42 Atl. Rep. 883.

⁴⁵ *Los Angeles v. Pomeroy*, 124 Cal. 597, 57 Pac. Rep. 585.

⁴⁶ *Northern Pac. R. R. Co. v. Forbis*, 15 Mon. 452, 39 Pac. Rep. 571.

⁴⁷ *San Diego L. & T. Co. v. Neale*, 78 Cal. 63, 20 Pac. Rep. 372; *St. Louis etc. R. R. Co. v. Chapman*, 38 Kan. 307, 16 Pac. Rep. 695; *Montgomery County v. Schuylkill Bridge Co.*, 110 Pa. St. 54, 20 Atl. Rep. 407.

⁴⁸ *Boom Co. v. Patterson*, 98 U. S. 403; and see other cases cited in this section.

⁴⁹ *Chicago & Evanston R. R. Co. v. Jacobs*, 110 Ill. 414; *Johnson v. Freeport & Mississippi River Ry. Co.*, 111 Ill. 413; *Gardner v. Brookline*, 127 Mass. 358; *Trustees of College Point v. Dennett*, 5 N. Y. Supreme Ct. 217.

⁵⁰ *Goodwin v. Cincinnati & Whitewater Canal Co.*, 18 Ohio St. 169; *Alloway v. City of Nashville*, 88 Tenn. 510, 13 S. W. Rep. 123, 1 Am. R.R. & Corp. Rep. 671.

⁵¹ 98 U. S. 403.

the Falls of St. Anthony, which were so situated with reference to the west shore of the river as to be admirably adapted for boom purposes. In a proceeding to condemn these islands by a boom company the jury found a general verdict for \$9,358.33, and also found specially that the value of the land taken, aside from any consideration of its value for boom purposes, was \$300, and, in view of its adaptability for those purposes, was worth the further sum of \$9,058.33. The Supreme Court of the United States sustained the general verdict, and in giving their decision say:

“In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be, what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated.

“So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisalment in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future.

“The position of the three islands in the Mississippi fitting them to form, in connection with the west bank of the river, a boom of immense dimensions, capable of holding in safety over twenty millions of feet of logs, added largely to

the value of the lands. The boom company would greatly prefer them to more valuable agricultural lands, or to lands situated elsewhere on the river; as, by utilizing them in the manner proposed they would save heavy expenditures of money in constructing a boom of equal capacity. Their adaptability for boom purposes was a circumstance, therefore, which the owner had a right to insist upon as an element in estimating the value of his land."

So it is proper to show that property possesses a peculiar value for railroad purposes,⁵² for dock purposes,⁵³ for a mill site,⁵⁴ for a ferry,⁵⁵ for market gardening,⁵⁶ for raising cranberries,⁵⁷ for warehouse purposes,⁵⁸ or for a bridge site.⁵⁹ It is proper to show that the property is suitable for division into village lots and that it is valuable for that

⁵² *Johnson v. Freeport & Mississippi River Ry. Co.*, 111 Ill. 413; *Cohen v. St. Louis etc. R. R. Co.*, 34 Kan. 158; *Orleans etc. R. R. Co. v. Jefferson etc. R. R. Co.*, 51 La. An. 1605, 26 So. Rep. 278; *Webster v. Kansas City etc. R. R. Co.*, 116 Mo. 114, 22 S. W. Rep. 474; *Currie v. Waverly etc. R. R. Co.*, 52 N. J. L. 381, 20 Atl. Rep. 56; *Matter of New York, L. & W. R. R. Co.*, 27 Hun 116. The latter case was a proceeding to condemn a strip of land about thirty miles long, belonging to the Junction Canal and R. R. Co. which had formerly been used for a canal. It was especially valuable for railroad purposes and was held by the company with a view to its use for that purpose at some time. It was of little or no value for any use except a railroad. It was held proper to show its value for railroad purposes and an award of about \$60,000 was sustained. In *Stinson v. Chicago etc. Ry. Co.*, 27 Minn. 284, it was held to be

improper to ask a witness the value of property for railroad purposes. See *Union Depot, Street Ry. & Transfer Co. v. Brunswick*, 31 Minn. 297; *Matter of Boston etc. R. R. Co.*, 22 Hun 176.

⁵³ *Calumet Riv. R. R. Co. v. Moore*, 124 Ill. 329; *Harris v. Schuylkill Riv. E. S. R. R. Co.*, 141 Pa. St. 242, 21 Atl. Rep. 590; *Ligare v. Chicago etc. R. R. Co.*, 166 Ill. 249.

⁵⁴ *Fales v. Easthampton*, 162 Mass. 422, 38 N. E. Rep. 1123.

⁵⁵ *Little Rock etc. R. R. Co. v. McGehee*, 41 Ark. 202.

⁵⁶ *Chicago & Evanston R. R. Co. v. Jacobs*, 110 Ill. 414.

⁵⁷ *Gardner v. Brookline*, 127 Mass. 358.

⁵⁸ *Russell v. St. Paul, Minneapolis & Manitoba Ry. Co.*, 33 Minn. 210.

⁵⁹ *Young v. Harrison*, 17 Ga. 30; *Little Rock Junction Ry. Co. v. Woodruff*, 49 Ark. 381. But see *Sullivan v. La Fayette Co.*, 61 Miss. 271.

purpose,⁶⁰ but it is not proper to show the number and value of such lots.⁶¹

In a proceeding to condemn a pond for a water supply for a village it was held that the owner might show that there was no other pond within six miles suitable for the purpose, and he was held to be entitled to its value for any purpose, including its value for the purpose in question and not merely its value for a mill-pond or for ice.⁶² In a proceeding to condemn land on the bank of a stream, to be used for a reservoir in connection with works for supplying a village with water, it was held that evidence was inadmissible to show the value of the land for the purpose in question. The court say: "The damage must be measured by the market value of the land at the time it was taken; not its value to the petitioners, nor to the respondent; not the value which it might have under different circumstances from those then existing. The petitioners were not entitled to swell the damages beyond the actual fair market value of the land at the time, by any consideration of the chance

⁶⁰ South Park Commissioners v. Dunlevy, 91 Ill. 49; Sherman v. St. Paul etc. Ry. Co., 30 Minn. 227; Matter of New York etc. Ry. Co., 27 Hun 151; Cincinnati Railway Co. v. Longworth, 30 Ohio St. 108; Watson v. Milwaukee & Madison Ry. Co., 57 Wis. 332; Queen v. Brown, 2 L. R. Q. B. 630; Montana Ry. Co. v. Warren, 6 Mon. 275; Kansas City etc. R. Co. v. Vickroy, 46 Kan. 248, 26 Pac. Rep. 698; Chicago etc. R. Co. v. Davidson, 49 Kan. 589, 31 Pac. Rep. 131; Wilson v. Equitable Gas Co., 152 Pa. St. 566, 25 Atl. Rep. 635; Warden v. City of Philadelphia, 167 Pa. St. 523, 31 Atl. Rep. 928; Hooker v. Montpelier & W. R. R. Co., 62 Vt. 47, 19 Atl. Rep. 775; Alexian Bros. v. Oshkosh, 95 Wis. 221. Contra: Everett v. Union Pacific

Ry. Co., 59 Ia. 243. In Railway Co. v. Longworth, 30 Ohio St. 108, it was held that the owner might give in evidence a plat which he had made although not recorded, for the purpose of showing how the property might be subdivided. To same effect, Calumet Riv. R. R. Co. v. Moore, 124 Ill. 329; Chicago etc. R. R. Co. v. Davidson, 49 Kan. 589, 31 Pac. Rep. 131. But such plans were held not admissible in Myer v. Schuylkill Riv. R. R. Co., 17 Phila. 468, 5 Pa. Co. Ct. 634.

⁶¹ Kansas City etc. R. R. Co. v. Vickroy, 46 Kan. 248, 26 Pac. Rep. 698.

⁶² Trustees of College Point v. Dennett, 5 N. Y. Supreme Court, 217, 2 Hun 669; and see Bryant v. Pottsville Water Co., 190 Pa. St. 366, 42 Atl. Rep. 1117.

or probability that, in the future, authority might be acquired, by legislation or purchase, to carry the water in pipes to neighboring towns. Such chance or probability must need enter to some extent into the market value itself; and, so far as the market value might be enhanced thereby, the petitioners were entitled to the full benefit of it. If there were different customers who were ready to give more for the land on account of this chance, or if there were any other circumstances affecting the price which it would bring upon a fair sale in the market, these elements would necessarily be considered by the jury, or by a witness, in forming an opinion of the market value. Nevertheless the value for these especial and possible purposes is not the test, but the fair market value of the land in view of all the purposes to which it was naturally adapted."⁶³ But other cases have held that in such a proceeding the adaptation and availability of the land for a reservoir site may be considered.⁶⁴

The conclusion from the authorities and reason of the matter seems to be that witnesses should not be allowed to give their opinions as to the value of property for a particular purpose, but should state its market value in view of any purpose to which it is adapted. The condition of the property and all its surroundings may be shown, and its availability for any particular use. If it has a peculiar adaptation for certain uses, this may be shown, and if such peculiar adaptation adds to its value the owner is entitled to the benefit of it. But, when all the facts and circumstances have been shown, the question at last is, what is it worth in the market.

§ 479a. Some particular elements of value.—Structures placed upon the land by a prior company and abandoned

⁶³ Moulton v. Newburyport Water Co., 137 Mass. 163, 167; also Gibson v. Norwalk, 13 Ohio C. C. 428. To same effect, United States v. Seufert Bros. Co., 78 Fed. Rep. 520; United States v. Taffe, 78 Fed. Rep. 524.

⁶⁴ San Diego Land & Town Co. v. Neale, 78 Cal. 63, 20 Pac. Rep. 372; In re Gilroy, 85 Hun 424, 32 N. Y. Supp. 891; Alloway v. City of Nashville, 88 Tenn. 510, 13 S. W. Rep. 123, 1 Am. R. R. & Corp. Rep. 671.

are to be regarded as part of the land and included in its valuation.⁶⁵ Where shore lands are taken the value of the riparian rights appurtenant thereto must be considered.⁶⁶ [Where a land owner had laid out and graded a private road across his premises and the same was taken for a public road, it was held in California that he was entitled to the value of the improvement,⁶⁷ but the reverse has been held in Vermont.⁶⁸ The owner is entitled to the value of improvements on the property though he may have placed them there with a view of averting or preventing the taking.⁶⁹ The fact that provision has been made by law whereby the property may be brought within the limits of a city may be taken into consideration.⁷⁰ A and B owned adjoining tracts of land which extended from R avenue to S avenue. A desired B to join in subdividing the tracts so as to open a street from one avenue to the other. B refused. Thereupon A divided his land as proposed, but reserved one foot next to B's land and sold all the lots. Afterwards B did the same. In a proceeding to condemn the two feet so as to make a continuous street, it was held that A and B were entitled to only nominal damages.⁷¹

§ 480. **Speculative inquiries as to a possible use or improvement of the property are improper.**—Proof must be limited to showing the present condition of the property and the uses to which it is naturally adapted.⁷² It is not competent for the owner to show to what use he intended to put the property,⁷³ nor the probable future use of the

⁶⁵ *Trimmer v. Pennsylvania etc. R. R. Co.*, 55 N. J. L. 46, 25 Atl. Rep. 932.

⁶⁶ *Dana v. Craddock*, 66 N. H. 593, 32 Atl. Rep. 757; *Rock Island etc. R. R. Co. v. Leisey Brewing Co.*, 174 Ill. 547.

⁶⁷ *Colusa County v. Hudson*, 85 Cal. 633, 24 Pac. Rep. 791.

⁶⁸ *Prince v. Baintree*, 64 Vt. 540, 26 Atl. Rep. 1095.

⁶⁹ *Briggs v. Board of Comrs.* 39 Kan. 90, 17 Pac. Rep. 331.

⁷⁰ *Duluth & W. R. R. Co. v. West*, 51 Minn. 163, 53 N. W. Rep. 197.

⁷¹ *Re Harvey v. Parkdale*, 16 Ontario 372, affirmed in 17 Ontario App. 468; see post, § 486.

⁷² *Central Pacific R. R. Co. v. Pearson*, 35 Cal. 247; *City of Santa Ana v. Harlin*, 99 Cal. 538, 24 Pac. Rep. 224.

⁷³ *Pinkham v. Chelmsford*, 109 Mass. 225.

property.⁷⁴ If, for instance, the property has a water power on it, this fact may be shown, but it would be incompetent to go on and show what mills might be constructed and furnished with power therefrom and what profits could be made from the operation of such mills.⁷⁵ So it may be shown that land is suitable for raising cranberries, but it is not competent to go into the price of cranberries, the quantity which might be raised, and the like.⁷⁶ It has been held that it was incompetent to show the probable rental value of a lot with a suitable building on it,⁷⁷ or the cost of improving property in a certain way and its value as so improved,⁷⁸ but in another case the owner was allowed to exhibit a plan of proposed improvements on the property in question for the purpose merely of showing the capabilities of the property.⁷⁹ It is proper to show the business actually carried on upon the property but not to go into the profits of such business.⁸⁰ In a case in Wisconsin it was held proper to show that property was suitable for division into village lots and the probable value of such lots.⁸¹ But this is clearly going one step too far. The probable value of village lots which do not exist is too speculative.⁸² In a condemnation of shore property nothing should be allowed for the possibility that the legislature

⁷⁴ *Fairbanks v. Fitchburg*, 110 Mass. 224.

⁷⁵ *Dorlan v. East Brandywine etc. R. R. Co.*, 46 Pa. St. 520; *Tide Water Canal Co. v. Archer*, 9 Gill & J. 479; *Haslam v. Galena etc. R. R. Co.*, 64 Ill. 353.

⁷⁶ *Gardner v. Brookline*, 127 Mass. 358.

⁷⁷ *Burt v. Wigglesworth*, 117 Mass. 302.

⁷⁸ *Pennsylvania S. V. R. R. Co. v. Clary*, 125 Pa. St. 442, 17 Atl. Rep. 468.

⁷⁹ *Chicago & Evanston R. R. Co. v. Blake*, 116 Ill. 163. And see *Union Terminal R. R. Co. v. Peet Bros. Mfg. Co.*, 58 Kan. 197.

⁸⁰ *Dupuis v. Chicago & North Wis. Ry. Co.*, 115 Ill. 97; *Whitman v. Boston & Maine R. R. Co.*, 3 Allen, 133; *Pittsburgh & Western R. R. Co. v. Patterson*, 107 Pa. St. 461.

⁸¹ *Watson v. Milwaukee & Madison Ry. Co.*, 57 Wis. 332. See ante, § 479, notes 60 and 61.

⁸² *New Jersey R. R. etc. Co. v. Suydam*, 17 N. J. L. 25; *Sedalia, Warsaw & Southern Ry. Co. v. Abell*, 18 Mo. App. 632; *Kansas City etc. R. R. Co. v. Splitlog*, 45 Kan. 68, 25 Pac. Rep. 208; *Kansas City etc. R. R. Co. v. Vickroy*, 46 Kan. 248, 26 Pac. Rep. 698; *Pennsylvania S. V. R.*

may grant rights to shore owners below high tide.⁸³ And generally remote and speculative inquiries should be excluded.⁸⁴

In a proceeding to condemn the right of way for a railroad through a ravine it appeared that this ravine was the only available outlet for certain coal lands belonging to the defendants and others and that the defendants had a private railroad through the ravine over which they transported coal for themselves and others. It was held that evidence as to the probable extent of coal in the lands which had their outlet through this ravine and the probable rents which would be paid defendants for transportation was incompetent, as these matters were too speculative and contingent. The coal might not be mined, or it might find other outlets.⁸⁵ Part of a tract of land, mostly under water, was taken for railway purposes; \$4,000 damages were awarded, based upon the theory that the railroad would prevent building a canal or slip the length of the tract, whereby the same might be filled up and made available. But the slip could not be built unless the South Menominee Canal was extended, which depended upon the action of third parties and the public. The damages were held to be too remote and speculative.⁸⁶

R. Co. v. Clary, 125 Pa. St. 442, 17 Atl. Rep. 468.

⁸³ Bellingham Bay etc. R. R. Co. v. Strand, 4 Wash. 311, 30 Pac. Rep. 144.

⁸⁴ Chicago etc. R. R. Co. v. Hildebrand, 136 Ill. 467, 27 N. E. Rep. 69; Burke v. Sanitary District, 152 Ill. 125, 38 N. E. Rep. 670; La Mont v. St. Louis etc R. R. Co., 62 Ia. 193; Currie v. Waverly etc. R. R. Co., 52 N. J. L. 381, 20 Atl. Rep. 56; In re Widening Chestnut St., 18 Phil. 511; Shoemaker v. United States, 147 U. S. 282, 13 S. C. Rep. 361; Omaha Belt R. R. Co. v. McDermott, 25 Neb. 717, 41 N. W. Rep. 648;

Muller v. Southern Pac. R. R. Co., 83 Cal. 240, 23 Pac. Rep. 265; Wrightsville etc. R. R. Co. v. Holmes, 85 Ga. 668, 11 S. E. Rep. 658; Illinois Central R. R. Co. v. Chicago, 169 Ill. 329; Gregg v. Northern R. R. Co., 67 N. H. 452, 41 Atl. Rep. 271; United States v. Taffee, 86 Fed. Rep. 830.

⁸⁵ Powers v. Railway Co., 33 Ohio St. 429.

⁸⁶ Munkwitz v. Chicago, Mil. & St. Paul Ry. Co., 64 Wis. 403. For a peculiar case in which the measure of damages and mode of arriving at the amount was regulated in part by a contract between the parties, see Matter

§ 480a. **Damage from construction, use and operation.**—When part of a tract is taken the damages are not limited to such as result from the mere severance of title caused by the taking, but include damages caused by the use of the property for the purpose for which the condemnation is made.⁸⁷ Such use embraces the construction of the work or improvement and the maintenance, use and operation of the same. Thus in a railroad case it was held proper to consider “all incidental loss, inconvenience and damages, present and prospective, which may be known or may reason-

of New York L. & W. Ry. Co., 33 Hun 639; 98 N. Y. 447; 2 How. Pr. N. S. 225; 102 N. Y. 704.

⁸⁷ Little Rock etc. R. R. Co. v. Allen, 41 Ark. 431; Fayetteville etc. R. R. Co. v. Combs, 51 Ark. 324, 11 S. W. Rep. 418; Newgass v. St. Louis etc. R. R. Co., 54 Ark. 140, 15 S. W. Rep. 188, 4 Am. R. R. & Corp. Rep. 44; Orange Belt R. R. Co. v. Craver, 32 Fla. 28, 13 So. Rep. 444; Chicago etc. R. R. Co. v. Bowman, 122 Ill. 595; Wabash etc. R. R. Co. v. McDougall, 126 Ill. 111, 18 N. E. Rep. 291; Chicago etc. R. R. Co. v. Nix, 137 Ill. 141, 27 N. E. Rep. 81; Chicago etc. R. R. Co. v. Blume, 137 Ill. 448, 27 N. E. Rep. 601; Chicago etc. R. R. Co. v. Greiney, 137 Ill. 628, 25 N. E. Rep. 798; Chicago etc. R. R. Co. v. Leah, 152 Ill. 249, 38 N. E. Rep. 556; Chicago etc. R. R. Co. v. Moore, 63 Ill. App. 163; Missouri etc. R. R. Co. v. Haines, 10 Kan. 439; Fulton v. Short Route R. R. Trans. Co., 85 Ky. 640, 4 S. W. Rep. 332; Blakeley v. Chicago etc. R. R. Co., 25 Neb. 207, 40 N. W. Rep. 956; Omaha Southern R. R. Co. v. Todd, 39 Neb. 818, 58 N. W. Rep. 289; Chicago etc. R. R. Co. v. Wiebe, 25 Neb. 545,

41 N. W. Rep. 297; Fremont etc. R. R. Co. v. Bates, 40 Neb. 381, 58 N. W. Rep. 959; Sullivan v. North Hudson County R. R. Co., 51 N. J. L. 518, 18 Atl. Rep. 689; Railway Co. v. Gardner, 45 Ohio St. 309, 13 N. E. Rep. 69; Hoffman v. Bloomsburg etc. R. R. Co., 157 Pa. St. 174, 27 Atl. Rep. 564; Comstock v. Clearfield etc. R. R. Co., 169 Pa. St. 582, 32 Atl. Rep. 431; Gulf etc. R. R. Co. v. Necco (Tex.) 15 S. W. Rep. 1102; Caledonia R. R. Co. v. Lockhart, 3 Macqueen, 808; Essex v. Local Board, L. R. 14 H. L. 153; Davis v. Northwestern El. R. R. Co., 170 Ill. 595; Metropolitan West Side El. R. R. Co. v. Springer, 171 Ill. 170; Omaha etc. R. R. Co. v. Doney, 3 Kan. App. 515, 43 Pac. Rep. 831; Churchill v. Beethe, 48 Neb. 87, 46 N. W. Rep. 992; Chicago etc. R. R. Co. v. Shafer, 49 Neb. 25, 68 N. W. Rep. 342; Matter of Grade Crossing Comrs., 6 App. Div. 327, 40 N. Y. Supp. 520. Also numerous cases cited in sections 496, 497 and 498. But see Canandaigua etc. R. R. Co. v. Payne, 16 Barb. 273; Phillips v. Phila. etc. R. R. Co., 184 Pa. St. 537.

ably be expected to result from the construction and operation of the road in a legal and proper manner.”⁸⁸ “When land is taken, and must be used for a particular purpose, the reasonably probable consequences of a lawful use for that purpose must be taken into consideration.”⁸⁹ “Where land is required for public purposes, the injury to the owner’s adjoining property depends mainly on the character of the undertaking.”⁹⁰ Similar expressions will be found in the other cases cited and there would seem to be no doubt about the general proposition. The question of benefits depends entirely upon the use made of the property taken, for it is impossible to conceive that a tract could be benefited by the mere transfer of title to a part. If use may be considered for the purpose of benefits it follows that it may be also for the purpose of damages.⁹¹

§ 481. Whether it is proper to consider how the work is to be constructed.—It is apparent that, where part of a tract is taken, the damages to the remainder can never be satisfactorily estimated without knowing how the works on the part taken are to be constructed. Take the case of a railroad through a piece of property. It may make a great difference whether it is built at the natural grade or in a deep cut or on a high embankment or trestle. If the works have actually been constructed before the damages are assessed, it has been held proper to take into consideration the actual condition of the works as affecting the damages.¹

⁸⁸ *Missouri etc. R. R. Co. v. Haines*, 10 Kan. 439. In *Omaha Southern R. R. Co. v. Todd*, 39 Neb. 818, 58 N. W. Rep. 289, the syllabus prepared by the court is as follows: “The damages to which a landowner is entitled by reason of the construction of a railway across his farm are (1) the actual value of the land taken, at the time of the taking, without diminution on account of any benefit or other set-off whatsoever; (2) the depreciation

in value of the remainder of the farm, caused by the appropriation of a part thereof for railway purposes, and the construction and permanent operation and occupation of the railroad thereon, excluding general benefits.”

⁸⁹ *Lincoln v. Commonwealth*, 164 Mass. 368, 41 N. E. Rep. 489.

⁹⁰ *Essex v. Local Board*, 14 L. R. H. L. 153, 177.

⁹¹ Compare post § 503a.

¹ *Union Railroad, Transfer &*

Where a street has been ordered to be opened and graded, it has been held proper in proceedings to assess the damages for property taken for the street, to show how the street was to be graded and to estimate the damages accordingly.² So, when a street is widened, it has been held proper to include any damages which will be occasioned by bringing the new part to the grade of the old.³ In Illinois it has been repeatedly held in case of railroads that it is proper to show how the road is to be constructed through the property in question, that the company may be compelled by order of court to produce or file in the case a plan showing the manner of construction, and that the company cannot afterwards substantially deviate from the plan on the basis of which the compensation was estimated without being liable to the owner for any damage which results from such change.⁴ In a case in New Jersey a railroad was located over the plaintiff's land. Upon the assessment of damages the company represented that it would build a bridge over a certain lane which the road crossed. The damages were assessed on this basis and paid by the company. Afterwards the company changed its plan and was proceeding to construct a high embankment at the place in question. At the suit of plaintiff the company was enjoined until additional compensation was assessed and

Stock Yard Co. v. More, 80 Ind. 458; Cummins v. Des Moines & St. Louis Ry. Co., 63 Ia. 397; Thompson v. Milwaukee & St. Paul Ry. Co., 27 Wis. 93; Price v. Same, 27 Wis. 98; Missouri etc. R. R. Co. v. Humes, 10 Kan. 439; Wichita & W. R. R. Co. v. Kuhn, 38 Kan. 104, 16 Pac. Rep. 75; Denniston v. Philadelphia County, 1 Pa. Supr. Ct. 599; Chicago etc. R. R. Co. v. Cogswell, 44 Ill. App. 388; Joliet v. Blower, 155 Ill. 414, 40 N. E. Rep. 619; Barnes v. Mich. Air Line R. R. Co., 65 Mich. 251, 32 N. W. Rep. 426; Orth v. Milwaukee, 92 Wis.

230, 65 N. W. Rep. 1029; St. Louis etc. R. R. Co. v. Fowler, 142 Mo. 670; Rome etc. R. R. Co. v. Gleason, 42 N. Y. App. Div. 530; Stolse v. Manitowoc Terminal Co., 100 Wis. 208. See also Hayes v. Ottawa etc. R. R. Co., 54 Ill. 373; Van Blaricum v. State, 7 Blackf. 209.

² Portland v. Kamm, 10 Or. 383; Pusey v. Allegheny, 98 Pa. St. 522; contra: In re Ridge St., 29 Pa. St. 391.

³ Van Riper v. Essex Road Board, 38 N. J. L. 23.

⁴ Jacksonville etc. R. R. Co. v. Kidder, 21 Ill. 131; St. Louis etc.

paid.⁵ In an opinion of the Court of Appeals of New York by Gardiner, J., a similar view is announced as follows: "The plan of the road and the mode of its construction must always be before the appraisers, and enter into and modify the assessment of damages. If the grade is subsequently changed to the injury of the owners of the land, they of course would be entitled to an additional compensation for the damages thus incurred."⁶ But this expression was dictum, and we do not find that it has ever been applied in any subsequent case. In a New Hampshire case, it was held that it was proper to show by the engineer how the railroad was to be constructed, because the amount of the damages would depend upon the grade of the road, but that the jury should understand that the company would have a right to change the grade.⁷ In the absence of any statute, it may be doubted whether the condemnor can be compelled to limit itself to any particular plan of construction.⁸ But the authorities fully sustain the position that the condemnor may impose this limitation upon itself by stipulating to construct the work in a specified manner.⁹ That is, it may

R. R. Co. v. Mitchell, 47 Ill. 165; Peoria etc. R. R. Co. v. Birkett, 62 Ill. 332; Peoria etc. Ry. Co. v. Peoria & Farmington Ry. Co., 105 Ill. 110; Chicago & North Western Ry. Co. v. Chicago & Evanston R. R. Co., 112 Ill. 589; Illinois & St. Louis R. R. & Coal Co. v. Switzer, 117 Ill. 399; Wabash, St. Louis & Pacific Ry. Co. v. McDougall, 118 Ill. 229; Suver v. Chicago etc. R. R. Co., 123 Ill. 293; Wabash etc. R. R. Co. v. McDougall, 126 Ill. 111, 18 N. E. Rep. 291; Elgin etc. R. R. Co. v. Fletcher, 128 Ill. 619, 21 N. E. Rep. 577; Chicago etc. R. R. Co. v. Eaton, 136 Ill. 9, 26 N. E. Rep. 575; Lieberman v. Chicago etc. R. R. Co., 141 Ill. 140, 30 N. E. Rep. 544; Chicago etc. R. R. Co. v. Coggsell, 44 Ill. App. 388;

Chicago etc. R. R. Co. v. Brinkman, 47 Ill. App. 287; also, to same effect, Kansas City & Emporia R. R. Co. v. Kregelo, 32 Kan. 608.

⁵ Carpenter v. Easton & Amboy R. R. Co., 24 N. J. Eq. 249, S. C., *ibid.*, p. 408; S. C., 26 N. J. Eq. 168.

⁶ Hill v. Mohawk & Hudson R. R. Co., 7 N. Y. 152, 157.

⁷ March v. Portsmouth & Concord R. R. Co., 19 N. H. 372.

⁸ See Packard v. Bergen Neck R. R. Co., 54 N. J. L. 553, 25 Atl. Rep. 506; S. C. 54 N. J. L. 229, 23 Atl. Rep. 722.

⁹ In addition to the cases already cited in this section the following are in point: Ellsworth v. Chicago etc. R. R. Co., 91 Ia. 386, 59 N. W. Rep. 78; Chicago

condemn the right to improve and use generally according to the powers conferred or it may condemn the right to improve and use in a specified manner. Where a limited right is desired, the limitation should be made a part of the record, by being embodied in the petition or order of condem-

etc. *R. R. Co. v. Cooper*, 42 Kan. 561, 22 Pac. Rep. 634; *St. Louis etc. R. R. Co. v. Clark*, 121 Mo. 169, 25 S. W. Rep. 906; *Packard v. Bergen Neck R. R. Co.*, 54 N. J. L. 553, 25 Atl. Rep. 506, affirming *S. C.* 54 N. J. L. 229, 23 Atl. Rep. 722; *Shenandoah Valley R. R. Co. v. Robinson*, 82 Va. 542; *Oregon R. & N. Co. v. Owsley*, 3 Wash. Ter. 38, 13 Pac. Rep. 186. But see *Chicago etc. R. R. Co. v. Hunter*, 128 Ind. 213, 27 N. E. Rep. 477; *Joy v. Grindstone Neck Water Co.*, 85 Me. 109, 26 Atl. Rep. 1052; *Huston v. Cincinnati etc. R. R. Co.*, 21 Ohio St. 235; *Shenandoah Val. R. R. Co. v. Robinson*, 82 Va. 542; *Lyon v. Hammond etc. R. R. Co.*, 167 Ill. 527, 47 N. E. Rep. 775; *Indiana etc. R. R. Co. v. Rinehart*, 14 Ind. App. 588, 43 N. E. Rep. 238; *St. Louis etc. R. R. Co. v. Postal Tel. Co.*, 173 Ill. 508. In *Lieberman v. Chicago etc. R. R. Co.*, 141 Ill. 140, 30 N. E. Rep. 544, which was a proceeding to condemn for an elevated railroad upon and along an alley, the petitioner was permitted to read in evidence a stipulation authorized by its board of directors, to the effect that the railroad should be constructed and operated subject to the following conditions: “(1) That it should be used only for passenger traffic; (2) that no soft or bituminous coal should be used or

burned in the locomotives hauling trains upon said road, or in heating the cars running upon said road; and, (3) that the motive power should be fully equipped with the best modern devices calculated to render it noiseless and smokeless, and to prevent the discharge of cinders and sparks.” In approving this action of the trial court, the supreme court says: “Manifestly the damages to abutting property owners consequent upon the construction and operation of such railroad would to a very considerable degree depend upon the nature of the road, the purpose to which it was to be applied, the mode in which it was to be constructed, the character of its machinery and appliances, and the fuel to be used. So long as the petitioner retained the broad discretion conferred by its charter, property owners, whose property would be damaged by the construction and operation of the road, would have the right to have their damages estimated with reference to any use to which the petitioner, under its charter, would be at liberty to apply its railroad when built. But the petitioner is in fact proposing to build a road to be used for passenger traffic only, and with a view of making it as inoffensive as possible to adjoining property holders, it is willing to

nation or otherwise.¹⁰ Loose representations made by officers or agents as to how the works are to be constructed should not be regarded.¹¹ In many cases it would appear to have been deemed sufficient that the plan of construction was shown by the testimony of witnesses or by plans produced in evidence.¹² In this connection the chapter on "The damages presumed to be included in the award or judgment" should be consulted.¹³

§ 482. **Damages from improper construction or use to be excluded.**—Damages are to be assessed on the basis that the work will be constructed and operated in a skillful and proper manner.¹⁴ Thus in case of railroads it must be

abandon the right to burn bituminous coal, and to bind itself perpetually to provide and make use of the best modern appliances calculated to render its road noiseless and smokeless, and to prevent the escape of sparks and cinders; and it had, therefore, a right to limit and bind itself in these respects by the resolutions of its board of directors, and by a stipulation executed in pursuance of such resolutions. By the stipulation it abandons the exercise of its franchise contrary to the mode stipulated, and its scheme is thus narrowed and definitely limited. The rights which it seeks to obtain by condemnation can be used and exercised only in subordination to the terms of the stipulation. This being so, it had a right to lay before the jury the exact scheme in pursuance of which its railroad is to be built, and operated, and to have the facts thus presented taken into consideration in assessing the damages to the property not taken."

¹⁰ Wabash etc. R. R. Co. v. Mc-

Dougall, 126 Ill. 111, 18 N. E. Rep. 291; Washington Ice Co. v. Chicago, 147 Ill. 327, 35 N. E. Rep. 378. In the former case it was held that an attorney of the railroad company had no power, as such attorney, merely, to bind the company by stipulations as to the method of construction. To same effect in power of attorney. Wood v. Hamilton etc. R. R. Co., 25 Grant Ch. 135.

¹¹ City of Joliet v. Blower, 49 Ill. App. 464.

¹² Suver v. Chicago etc. R. R. Co. 123 Ill. 293; Elgin etc. R. R. Co. v. Fletcher, 128 Ill. 619, 21 N. E. Rep. 577; Chicago etc. R. R. Co. v. Eaton, 136 Ill. 9, 26 N. E. Rep. 575; Chicago etc. R. R. Co. v. Brinkman, 47 Ill. App. 287; Chicago etc. R. R. Co. v. Cooper, 42 Kan. 561, 22 Pac. Rep. 634; Shenandoah Valley R. R. Co. v. Robinson, 82 Va. 542; Oregon R. & N. Co. v. Owsley, 3 Wash. Ter. 38, 13 Pac. Rep. 186.

¹³ Post, chap. xxiv.

¹⁴ Jones v. Chicago etc. R. R. Co., 68 Ill. 380; Jackson v. Portland, 63 Me. 55; Fremont etc.

assumed that they will construct necessary and proper culverts,¹⁵ and that, in bridging streams, they will make waterways of sufficient capacity and so place the piers and abutments as not to do any unnecessary injury to the adjacent lands.¹⁶ All damages resulting from neglect in construction or from negligence in the use of the property or works may be recovered by appropriate actions by the parties damnified when such damages occur, and nothing should be allowed on the theory that such negligences may happen.¹⁷ The same rule is applied to past negligences, at least, if they relate to use and operation.¹⁸ If the works are built before the assessment of damages is had, the damages should be assessed on the basis of the works as constructed, even if improperly constructed,

R. R. Co. v. Whalen, 11 Neb. 585; Wheeler v. Rochester & Syracuse R. R. Co., 12 Barb. 227; Setzler v. Pennsylvania & Schuylkill Valley R. R. Co., 112 Pa. St. 56; Nason v. Woonsocket Union R. R. Co., 4 R. I. 377; Neilson v. Chicago, Mil. & N.W. Ry. Co., 58 Wis. 516; Miller v. Chicago etc. R. R. Co., 60 Ill. App. 51; Wichita & W. R. R. Co. v. Kuhn, 38 Kan. 104, 16 Pac. Rep. 75; Leavenworth etc. R. R. Co. v. Herley, 45 Kan. 535, 26 Pac. Rep. 23; Louisville & N. R. R. Co. v. Asher (Ky.), 15 S. W. Rep. 517; Blakeley v. Chicago etc. R. R. Co., 25 Neb. 207, 40 N. W. Rep. 956; Alloway v. City of Nashville, 88 Tenn. 510, 13 S. W. Rep. 123, 1 Am. R. R. & Corp. Rep. 671; Stewart v. Rutland, 58 Vt. 12. See also chap. xxiv. Compare Chicago etc. R. R. Co. v. Hunter, 128 Ind. 213, 27 N. E. Rep. 477.

¹⁵ March v. Portsmouth & Concord R. R. Co., 19 N. H. 372; Nason v. Woonsocket Union R. R. Co., 4 R. I. 377.

¹⁶ Spencer v. Hartford, Providence & Fishkill R. R. Co., 10 R. I. 14.

¹⁷ Union Springs v. Jones, 58 Ala. 654; North Vernon v. Voegler, 103 Ind. 314; Miller v. Keokuk & Des Moines Ry. Co., 63 Ia. 680; Spencer v. Hartford, Providence & Fishkill R. R. Co., 10 R. I. 14; Newgass v. St. Louis etc. R. R. Co., 54 Ark. 140, 15 S. W. Rep. 188, 4 Am. R. R. & Corp. Rep. 44; Denniston v. Philadelphia Co., 1 Pa. Supr. Ct. 599; Alloway v. City of Nashville, 88 Tenn. 510, 13 S. W. Rep. 123, 1 Am. R. R. & Corp. Rep. 671; McGregor v. Equitable Gas Co., 139 Pa. St. 230, 21 Atl. Rep. 13; Denniston v. Philadelphia Co., 161 Pa. St. 41, 28 Atl. Rep. 1007; Clark v. Washington, 11 Pa. Co. Ct. 433.

¹⁸ White v. Medford, 163 Mass. 164, 39 N. E. Rep. 997; Mundorf v. New York El. R. R. Co., 62 Hun 465, 42 N. Y. St. Rep. 439, 17 N. Y. Supp. 124.

for the condemnor should not be allowed to assert its own wrong.¹⁹ So damages should be assessed on the theory that the condemnor will comply with the law, as where railroad companies are obliged to provide suitable farm crossings.²⁰ Where the undertaking is of such a nature that negligence in the management or operation is inevitable and such fact actually depreciates the value of the property not taken there is some authority for holding that such effect may be taken into consideration.²¹

§ 482a. **Damages from trespass.**—In a proceeding to ascertain the damages for property taken, nothing can be allowed on account of trespasses committed by the condemnor or its agents outside the property sought to be taken, as by removing soil,²² injuring crops,²³ casting debris upon the land²⁴ or otherwise.²⁵ As to damages for a prior unlawful entry upon the property sought to be condemned, reference is made to a subsequent section.²⁶

§ 483. **When there are different interests or estates, such as life estates, leases, etc.**—When there are different interests or estates in the property, the proper course is to ascertain the entire compensation as though the property belonged to one person and then apportion this sum among

¹⁹ Ante, § 481. But where a railroad company had so built as to unlawfully obstruct a highway to the damage of adjacent land, it was held such damages should not be included in the assessment, since the payment of the damages would not confer any right, on the company, as it might still be indicted. *Gear v. C. C. & D. R. R. Co.*, 43 Ia. 83.

²⁰ *Bell v. C., B. & Q. R. R. Co.*, 74 Ia. 343, 37 N. W. Rep. 768; *Pingree v. Cherokee etc. R. R. Co.*, 78 Ia. 438, 43 N. W. Rep. 285.

²¹ *Essex v. Local Board, L. R.* 14 H. L. 153.

²² *Dowd v. Mason City etc. R. R. Co.*, 76 Ia. 438, 41 N. W. Rep. 65; *Leavenworth etc. R. R. Co. v. Usher*, 42 Kan. 637, 22 Pac. Rep. 734.

²³ *Springfield etc. R. R. Co. v. Henry*, 44 Ark. 360. But see *Haislip v. Wilmington & W. R. R. Co.*, 102 N. C. 376, 8 S. E. Rep. 926.

²⁴ *Whitehouse v. Androscoggin R. R. Co.*, 52 Me. 208.

²⁵ *Leavenworth etc. R. R. Co. v. Herley*, 45 Kan. 535, 26 Pac. Rep. 23; *Bridgers v. Dill*, 97 N. C. 222. Compare *Bastian v. Philadelphia*, 180 Pa. St. 227, 36 Atl. Rep. 746.

²⁶ Post, § 507.

the different parties according to their respective rights.²⁷ The value of property cannot be enhanced by any distribution of the title or estate among different persons or by any contract arrangements among the owners of different interests.²⁸ Whatever advantage is secured to one interest must be taken from another, and the sum of all the parts cannot exceed the whole.²⁹

In estimating the compensation to the owner of any particular interest or estate less than the whole, the same general rules apply as in estimating the compensation when the entire interest is in one person.³⁰ In those rules we have only to substitute in place of the premises or property such an estate or interest in the property as may be in question. The difficulty consists in applying the general rules to particular cases. In regard to a life estate it has been held that the net annual value of the premises multiplied by the years of the life tenant's expectancy of life and reduced by calculation to a present cash value was a correct mode of determining its value.³¹ In Massachusetts a statute which provided that, where there was an estate for years or for life, the entire damages should be assessed and paid to a trustee to be agreed upon by the parties or appointed by the court, who should invest the same and pay the income to the tenant for years or life, and upon the termination of such tenancy pay the principal to the reversioner, has been held valid and applied in various cases.³² In Missouri, in

²⁷ *Burt v. Merchants' Ins. Co.*, 109 Mass. 1; *Coutant v. Catlin*, 3 Sandf. 485; *Wiggin v. New York*, 9 Paige 16; *Matter of the New Reservoir*, 1 Sheldon (N. Y.) 408; *Matter of Opening 25th Street*, 18 Phil. 488, 521; *Matter of Water Comrs.*, 4 Edw. Ch. 545; *Burt v. Merchants' Ins. Co.*, 115, Mass. 1; *In re St. Nicholas Terrace*, 143 N. Y. 621, 37 N. E. Rep. 635; S. C., 76 Hun 209, 27 N. Y. Supp. 765.

²⁸ *Ibid.*

²⁹ No agreement or combination of the owners of different interests in lands condemned can increase or affect the value of their aggregate interests. *Burt v. Merchants' Ins. Co.*, 115 Mass. 1.

³⁰ *Chicago etc. R. R. Co. v. Hurst*, 41 Kan. 740, 21 Pac. Rep. 781.

³¹ *Pittsburg etc. Ry. Co. v. Bentley*, 88 Pa. St. 178; *Miller v. City of Asheville*, 112 N. C. 769, 16 S. E. Rep. 765.

³² *Boston v. Robbins*, 121 Mass.

the absence of any statute, it appears to be held that the life tenant is entitled to the use of the entire damages for life, instead of the present estimated value of his interest.³³

In apportioning the damages between landlord and tenant an important question arises as to the effect of the taking upon the covenant to pay rent. Some courts hold that the covenant remains in force even though the whole property is taken.³⁴ Other courts hold that where the whole property is taken the rent is extinguished.³⁵ Where a part of the demised premises is taken the authorities are likewise conflicting, some holding that the covenant to pay rent is not affected and that there can be no apportionment,³⁶ and others holding the reverse.³⁷

Undoubtedly the conclusion which is practically the most satisfactory and which can be applied with the least injury to the parties is that the taking operates to extinguish the obligation to pay rent, in whole or in part, as the case may

453; *Turner v. Robbins*, 133 Mass. 207.

³³ *Kansas City, Springfield & Memphis R. R. Co. v. Weaver*, 86 Mo. 473. And see further on assessing damages to life tenants; *City of Joliet v. Blower*, 155 Ill. 414, 40 N. E. Rep. 619; *In re Phillip Trusts*, L. R. 6 Eq. 250; *In re Pfleger*, L. R. 6 Eq. 426; *Craugh v. Harrisburg*, 1 Pa. St. 132.

³⁴ *Foote v. Cincinnati*, 11 Ohio 408; *Foltz v. Huntley*, 7 Wend. 210; *Chicago v. Garrity*, 7 Ill. App. 474.

³⁵ *Barclay v. Pickles*, 38 Mo. 143; *O'Brien v. Ball*, 119 Mass. 28; *Dyer v. Wightman*, 66 Pa. St. 425; *Taylor, Landlord & Tenant* § 519; *Matter of Opening 25th St.*, 18 Phil. 488; *Lodge v. Martin*, 31 App. Div. N. Y. 13.

³⁶ *Parks v. Boston*, 15 Pick. 198; *Patterson v. Boston*, 20

Pick. 159; *Workman v. Mifflin*, 30 Pa. St. 362; *Stebbins v. Village of Evanston*, 136 Ill. 37, 26 N. E. Rep. 577; *Corrigan v. Chicago*, 144 Ill. 537, 33 N. E. Rep. 746; *Gluck v. City of Baltimore*, 81 Md. 315, 32 Atl. Rep. 515.

³⁷ *Biddle v. Hussman*, 23 Mo. 579; *Same v. Same*, 23 Mo. 602; *Kingsland v. Clark*, 24 Mo. 24; *Cuthvert v. Kuhn*, 3 Whart. 357; *Voegtly v. Pittsburgh etc. R. R. Co.*, 2 Grant's Cas. 243; *Uhler v. Cowen*, 192 Pa. St. 443; *Board of Miss. Levee Comrs. v. Johnson*, 66 Miss. 248, 6 So. Rep. 199. And see *Taylor, Land & Ten.* §§ 386, 519; *Post v. Logan*, 1 N. Y. Leg. Obs. 59; *Gillespie v. Thomas*, 15 Wend. 464; *Matter of Daly*, 29 N. Y. App. Div. 286; *Rhode Island Hospital Trust Co. v. Hayden*, 20 R. I. 544, 40 Atl. Rep. 421.

be. Under the opposite rule there is handed over to the tenant a portion of the damages which is the equivalent of the rent to be paid, and the landlord may lose his rent by the insolvency of the tenant or otherwise, or be put to a suit in equity to have the fund impounded for his benefit.³⁸

It is a rule of law that if the demised premises are entirely destroyed, the lease is extinguished.³⁹ It is also a rule that an eviction by title paramount works an extinguishment or apportionment of the rent, as the case may be.⁴⁰ While the taking of the premises for public use is not a destruction of land in the literal sense, it is a destruction of the right and title of the parties in and to the land; while it is not an eviction by paramount title, it is an evic-

³⁸ To this objection the court, in *Stubbings v. Village of Evanston*, 136 Ill. 37, 26 N. E. Rep. 577, says: "In a proceeding to condemn a part of leased premises, the rule which we have adopted fixes the relative amount of damages to be received by each party interested in the premises; and if a case should arise where, upon the payment of the value of the leasehold interest to the tenant, the remedy of the landlord to collect his rent might be impaired or defeated on account of the insolvency of the tenant, or other cause, a court of equity might interpose to prevent the payment of the damages received into the hands of the tenant, and appropriate the fund, or so much thereof as might be necessary, to the payment of the rents due or to become due from the tenant to the landlord during such time as the lease might by its terms continue to run." But the court, in *Gluck v. City of Baltimore*, 81 Md. 315, 32 Atl. Rep. 515, says, to the same objection:

"At best, this is a mere suggestion of a possible hardship. As said by Rolfe, B., in *Winterbottom v. Wright*, 10 Mees. & W. 115: 'Hard cases, it has been frequently observed, are apt to introduce bad law.' And in *Abbott v. Gatch*, 13 Md. 314, and in *Taylor v. Turley*, 33 Md. 500, this court declined to permit considerations of great hardship to influence the rigid enforcement of established legal principles. Obviously a principle, if sound, ought to be applied wherever it logically leads, without reference to ulterior results. That it may, in consequence, operate in some instances with apparent, or even with real, harshness and severity, does not indicate that it is inherently erroneous. Its consequence in special cases can never impeach its accuracy."

³⁹ *Taylor, L. & T.* § 520 and cases cited.

⁴⁰ *Taylor, L. & T.* §§ 377, 378; *Blair v. Claxton*, 18 N. Y. 529; *Fillebrown v. Hoar*, 124 Mass. 580.

tion by paramount right. A very slight modification or extension of the rules referred to would be sufficient to make them embrace the case of a taking for public use.

The lessee is entitled to such compensation as will make him whole in respect to his interest in the land, irrespective of any general benefits conferred by the taking.⁴¹ Any covenants which give value to the lease, such as a covenant for renewal,⁴² are to be taken into consideration; also any conditions which might diminish its value.⁴³ The lessee is entitled to the value of buildings put on by him, although the lessor may elect to purchase them at the end of the term.⁴⁴ But where buildings, put on by the tenant, were to belong to the landlord at the expiration of the lease, it was held that the tenant was not entitled to the value of the buildings but only to the value of their use.⁴⁵ In *Schriber v. Chicago & Evanston R. R. Co.*,⁴⁶ a petition was filed to condemn certain property, March 1, 1883. The property was subject to a lease which expired December 15, 1883. The buildings on the premises belonged to the tenants. The tenants held till the end of their term and then held over and continued business, paying rent as before. Upon a trial of the case after the latter date, it was held that the tenants could recover nothing, that having held out their term they were deprived of nothing, and that they could not acquire any new interest in the property except subject to

⁴¹ *Renwick v. D. & N. R. R. Co.*, 49 Ia. 664; *Matter of Morgan R. R. etc. Co.*, 32 La. An. 371; *Corrigan v. Chicago*, 144 Ill. 537, 33 N. E. Rep. 746; *Seattle etc. R. R. Co. v. Scheike*, 3 Wash. 625, 29 Pac. Rep. 217.

⁴² *Matter of William & Anthony St.*, 19 Wend. 678; *North Pennsylvania R. R. Co. v. Davis*, 26 Pa. St. 238; *Bourne v. Liverpool*, 32 L. J. Q. B. 15. Even the probability of a renewal, if it gives value to the leasehold, may be considered. *City of Baltimore v. Rice*, 73 Md. 307, 21 Atl. Rep.

181; *Re Farlow*, 2 Barn. & Adol. 341, 22 E. C. L. R. 147; *King v. Hungerford Market Co.*, 4 Barn. & Adol. 592, 24 E. C. L. R. 261; *King v. Hungerford Market Co.*, 4 Barn. & Adol. 596, 24 E. C. L. R. 263.

⁴³ *Penny v. Penny*, L. R. 5 Eq. Cas. 227.

⁴⁴ *Matter of Morgan etc. Co.*, 32 La. An. 371; *Livingston v. Sulzer*, 19 Hun 375; *Muller v. Earle*, 35 N. Y. Supr. Ct. 461.

⁴⁵ *Corrigan v. Chicago*, 144 Ill. 537, 33 N. E. Rep. 746.

⁴⁶ 115 Ill. 340.

the petition for condemnation, and that, as to the buildings, they should have removed them before the term expired.⁴⁷ Where the front of a leased building was taken to widen a street whereby an elevator necessary to the use of the building was also destroyed, and the landlord was under no covenant to repair, it was held that the tenant should be allowed the cost of putting in a new front and elevator.⁴⁸ One who takes a lease and puts improvements upon the property after the petition to condemn the property is filed can recover no compensation.⁴⁹ Where the entire damages were assessed and paid to the landlord, it was held that the tenant might recover his equitable proportion less his ratable portion of the cost of prosecuting the claim, in an action for money had and received.⁵⁰ But in New York, where part of a leased building was taken and an item of \$500 was allowed to the landlord for putting in a new wall which the tenant was obliged to and did build, it was held that the tenant could not recover the cost from the landlord to the extent of the \$500, and that to allow this would be to impeach the award.⁵¹ The tenant's rights are not affected by proceedings to which he is not a party, nor by any arrangement between the landlord and condemnor.⁵² Where a tenant voluntarily terminates a lease, pursuant to a privilege contained in the lease, because of apprehended damage from public works, he cannot claim damages for the full term.⁵³ A lease provided that in case of a sale of the leased premises the tenant was to be paid the value of the

⁴⁷ See also *Lawrence & Other's Appeal*, 78 Pa. St. 365; *Ex parte Nadin*, 17 L. J. Ch. 421; *Queen v. London etc. R. R. Co.*, 10 A. & E. 2, 37 E. C. L. R. 27.

⁴⁸ *Gluck v. City of Baltimore*, 81 Md. 315, 32 Atl. Rep. 515.

⁴⁹ *Chicago, Evanston & L. S. R. Co. v. Catholic Bishop of Chicago*, 119 Ill. 525.

⁵⁰ *Harris v. Hawes*, 75 Me. 436; *McAllister v. Reed*, 53 Mo. App. 81.

⁵¹ *Turner v. Williams*, 10 Wend. 140.

⁵² *Rome etc. R. R. Co. v. Jennings*, 85 Ga. 444, 11 S. E. Rep. 839; *Chattanooga etc. R. R. Co. v. Brown*, 84 Ga. 256, 10 S. E. Rep. 730; *Lafferty v. Schuylkill Riv. etc. R. R. Co.*, 124 Pa. St. 297, 16 Atl. Rep. 869; *Ante*, § 326.

⁵³ *Queen v. Poulter*, 20 L. R. Q. B. D. 132.

improvements put thereon by him. It was held that a condemnation was not a sale within the lease.⁵⁴ But where a woman leased to her sons with a provision that if the premises should be sold, the balance over a specified sum should be divided between the lessor and her sons, a condemnation was held to be a sale.⁵⁵

The right of the tenant to recover for cost of removing goods, machinery, etc., from the premises taken, and for injury to business, is considered in subsequent sections.⁵⁶ The effect of the taking upon contracts, whether of lease or otherwise, is frequently regulated by statute. A statute of New York provided that "all leases and other contracts in regard to said lands so taken for said park or park-ways or any part thereof, and all covenants, contracts or agreements between landlord and tenant, or any other contracting parties, shall, upon the confirmation of such report, respectively cease and determine and be absolutely discharged according to law." This act was applied and held valid in *Matter of Application of the Mayor etc. of New York*.⁵⁷ Where the premises sought to be condemned had been leased by one defendant to another defendant for 999

⁵⁴ *McAlister v. Reed*, 59 Mo. App. 70.

⁵⁵ *Vandermulen v. Vandermulen*, 108 N. Y. 195, 15 N. E. Rep. 383.

⁵⁶ Post, §§ 487, 488. And see *Brooks v. Boston*, 19 Pick. 174; *Patterson v. Boston*, 20 Pick. 159; *S. C.*, 23 Pick. 425; *Getz v. Philadelphia & Reading R. R. Co.*, 105 Pa. St. 547; *S. C.*, Second Appeal, 113 Pa. St. 214; *Atchison etc. R. R. Co. v. Schneider*, 127 Ill. 144, 20 N. E. Rep. 41; *Raulet v. Concord R. R. Co.*, 62 N. H. 561; *Ehret v. Schuylkill Riv. E. S. R. R. Co.*, 151 Pa. St. 158, 24 Atl. Rep. 1068; *Ouimet v. City of Montreal*, 7 Ontario 193. See also a number of miscellaneous cases touching on the subject.

Burbridge v. New Albany & Salem R. R. Co., 9 Ind. 546; *Blythe v. Pratt*, 62 Miss. 707; *Detmold v. Drake*, 46 N. Y. 318; *Strang v. New York Rubber Co.*, 1 Sweetney 78; *Frost v. Earnest*, 4 Whart. 86; *Green v. Eales*, 2 A. & E. N. S. 225, 42 E. C. L. R. 648; *Wainwright v. Ramsden*, 5 M. & W. 602; *Slipper v. Tottenham & Hampstead Junction Ry. Co.*, 36 L. J. Eq. 841; *Queen v. Vaughan*, 38 L. J. Q. B. 71; *Regina v. Stone*, L. R. 1 Q. B. 529; *Penny v. Penny*, L. R. 5 Eq. Cas. 227; *In re King's Leasehold Estates*, L. R. 16 Eq. Cas. 521.

⁵⁷ 34 Hun 441; *affd.* in 99 N. Y. 569. See also *Gillespie v. Thomas*, 15 Wend. 464.

years, and there was no evidence as to the value of the reversion, a failure to award nominal damages, was held no error.⁵⁸ As respects mortgagees there is much diversity of opinion and practice. Whether they are necessary parties to the proceedings, is a question which has already been considered.⁵⁹ As to their treatment in the assessment of damages, no general rules can be deduced from the authorities. Whether parties or not, their interests are usually protected by the court.⁶⁰

§ 484. When there are franchises, easements or privileges appurtenant to property.—In a proceeding to take a toll bridge, the measure of damages cannot be confined to the mere value of the bridge in its then condition, but the value of the franchise to take tolls must be considered.⁶¹ So when the lock and dam of a navigation company is taken.⁶² Plaintiff owned a strip of land extending for

⁵⁸ Chicago etc. R. R. Co. v. Metropolitan W. S. El. R. R. Co., 152 Ill. 519, 38 N. E. Rep. 736.

⁵⁹ Ante, § 324.

⁶⁰ See generally: Trogden v. Winona etc. R. R. Co., 22 Minn. 198; Bennett v. Minneapolis etc. R. R. Co., 42 Minn. 245, 44 N. W. Rep. 10; Thompson v. Chicago etc. R. R. Co., 110 Mo. 147, 19 S. W. Rep. 77; Johnson v. Baltimore etc. R. R. Co., 45 N. J. Eq. 454, 17 Atl. Rep. 574; Devlin v. New York, 131 N. Y. 123, 30 N. E. Rep. 123; Woolsey v. New York El. R. R. Co., 134 N. Y. 323, 30 N. E. Rep. 387; Hughes v. Metropolitan El. R. R. Co., 57 N. Y. Supr. Ct. 378, 8 N. Y. Supp. 535, affirmed in 130 N. Y. 14; Philadelphia v. Dyer, 41 Pa. St. 463.

⁶¹ Montgomery County v. Schuylkill Bridge Co., 110 Pa. St. 54, 20 Atl. Rep. 407; Riverton Ferry Co. v. McKeesport etc.

Bridge Co., 179 Pa. St. 466, 36 Atl. Rep. 186; Little Nestucca Road Co. v. Tillamook County, 31 Or. 1; so of a water works franchise: Newburyport Water Co. v. Newburyport, 85 Fed. Rep. 723. And see Newburyport Water Co. v. Newburyport, 168 Mass. 541, 47 N. E. Rep. 533. In estimating the value of a franchise, it is proper to consider that it is subject to forfeiture if such is the fact. West Chester etc. Plank Road Co. v. County of Chester, 182 Pa. St. 40.

⁶² Monongahela Nav. Co. v. United States, 148 U. S. 312, 13 S. C. Rep. 622. As to the manner of estimating the value of such a franchise see Montgomery County v. Schuylkill Bridge Co., 110 Pa. St. 54, 20 Atl. Rep. 407; Central Bridge Co. v. City of Lowell, 15 Gray 106; Salem etc. R. R. Co. v. County Comrs., 9 Allen 563.

twelve hundred feet along a river bank which he used for wharf purposes, and as a landing for a ferry which he operated. Twenty-six feet of this strip was taken for a bridge pier. The bridge was three hundred and seventy-five feet from the ferry, and would in no way interfere with the operation of the ferry, but would destroy its value. It was held that the plaintiff was not entitled to recover for damages to the ferry franchise.⁶³ The same doctrine is held in a Kentucky case.⁶⁴ But if the taking interfered with the exercise of the franchise the rule would doubtless be otherwise. Where a lot was condemned, to which a right of way and other privileges over an adjoining tract were appurtenant, it was held that the owner was entitled to the value of the lot with its appurtenances.⁶⁵ Nothing can be allowed on account of the loss or impairment of a gratuitous privilege which the owner has been enjoying by the sufferance of another,⁶⁶ or contrary to law or public right.⁶⁷ But if an easement appurtenant to property is taken, destroyed or impaired the owner is entitled to compensation.⁶⁸ Where water is diverted from a stream to the damage of a mill, the measure of damages is the difference in value of the mill property before and after the taking.⁶⁹

§ 485. When the title is subject to restrictions, conditions, easements, etc.—It was held in Massachusetts that

⁶³ *Moses v. Stanford*, 11 Lea 731.

⁶⁴ *Richmond & Lexington Turnpike Road Co. v. Rogers*, 1 Duvall, 135. See also *Mills v. County Comrs.*, 3 Scam. 53; *Pittsburgh & Lake Erie R. R. Co. v. Jones*, 111 Pa. St. 204.

⁶⁵ *Chicago etc. R. R. Co. v. Ward*, 128 Ill. 349, 18 N. E. Rep. 828, 21 N. E. Rep. 562. And see *Cornwall v. Louisville & N. R. R. Co.*, 87 Ky. 72, 7 S. W. Rep. 553.

⁶⁶ *Raulet v. Concord R. R. Co.*, 62 N. H. 561; *Gorgas v. Philadelphia etc. R. R. Co.*, 144 Pa. St.

1, 22 Atl. Rep. 715; *Mahaffey v. Beech Creek R. R. Co.*, 163 Pa. St. 158, 29 Atl. Rep. 881; *Sanitary District v. Loughran*, 160 Ill. 362, 43 N. E. Rep. 359.

⁶⁷ *Philadelphia etc. R. R. Co. v. Railroad Co.*, 12 Pa. Co. Ct. 513; *Kingsland v. New York*, 110 N. Y. 569, 18 N. E. Rep. 435.

⁶⁸ *Baker v. Rochester*, 24 N. Y. App. Div. 383; *Watts v. Norfolk etc. R. R. Co.*, 39 W. Va. 196, 19 S. E. Rep. 521.

⁶⁹ *Sparks Mfg. Co. v. Newton (Ct. of E. & A., N. J.)*, 45 Atl. Rep. 596; *Sparks Mfg. Co. v. Newton*,

the owner of a base or determinable fee was entitled to the same damages as though his estate was subject to no qualification.⁷⁰ But in another case in the same State, where an early deed of the property in question provided that it should only be used for a three-story brick dwelling, it was held proper to take this fact into consideration in fixing the damages.⁷¹ Where the property can be used only for a particular purpose, the damages to the remainder are measured by the extent to which it is rendered less valuable for the uses to which it is devoted.⁷² So where a highway was laid over the right of way of a railroad which could only be used for railroad purposes, though the company owned the fee, it was held that the company was only entitled to decrease in value for railroad purposes caused by its use as a

57 N. J. Eq. 367; *Butler Hard Rubber Co. v. Newark*, 61 N. J. L. 32, 40 Atl. Rep. 224.

⁷⁰ *Chandler v. Jamaica Pond Aqueduct Co.*, 125 Mass. 544.

⁷¹ *Allen v. Boston*, 137 Mass. 319.

⁷² *First Parish in Woburn v. County of Middlesex*, 7 Gray 106; see also *Matter of Albany Street*, 11 Wend. 149; *Chicago, Evans-ton & Lake Superior R. R. Co. v. Catholic Bishop of Chicago*, 119 Ill. 525; *Matter of Ninth Avenue*, 45 N. Y. 729.

"The nature and quantity of the estate of the owner unwilling to treat, necessarily enters into the estimation of the damages sustained. The owner may be a tenant in dower, by the curtesy, for years, or for some other limited estate, and the owner of the reversion may be willing to release all claim for compensation for the injury to his estate. The title may be clogged by conditions or restrictions in the mode of user which

will materially affect the extent of the injury, or the strip appropriated may have been previously impressed with a public use, and the beneficial use by the owner may be by sufferance merely of the public authorities. The lands may be within the lines of an ancient highway on which the adjacent owner has encroached, and from which his building may be removed by indictment or by proceedings to remove encroachments, notwithstanding the lapse of time. *Cross v. Morristown*, 3 C. E. Green 305; *Tainter v. Same*, 4 Ib. 46. The market value of land so circumstanced is a very different thing from its value if unencumbered by public rights. In all such cases an appraisement of the actual injury to the owner can be made only with reference to the value of the estate or right of which he is deprived." *Miller v. Newark*, 35 N. J. L. 462, 463. And see generally: *Tufts v. City of Charlestown*, 2 Gray 271; Con-

street.⁷³ If land is subject to an easement this may be shown in reduction of value.⁷⁴

§ 486. Value of trees, crops, minerals, buildings, etc.—The compensation should be estimated for the land *as land*, and not for the materials which compose it.⁷⁵ But it is proper to show the value of crops on the land,⁷⁶ though it is not competent to go into the question of the profits which might have been made therefrom but for the taking.⁷⁷ So it is proper to consider the value of trees,⁷⁸ or peat on the land,⁷⁹ or of a spring of water.⁸⁰ It may be shown that land is underlaid by coal, as affecting its value,⁸¹ but it is not competent to go into the value of coal claimed to be underneath the surface, no mine having been opened and the existence and extent of coal in the land being wholly a matter of opinion.⁸² Buildings and other structures are to be valued as part of the realty and not merely for the materials they contain or what they are worth for removal.⁸³ Noth-

cordia Cem. Assn. v. Minnesota etc. R. R. Co., 121 Ill. 199; Hilcoat v. Archbishop, 19 L. J. C. P. 376; Central Land Co. v. Providence, 15 R. I. 246, 2 Atl. Rep. 553.

⁷³ Chicago etc. R. R. Co. v. Chicago, 149 Ill. 457, 37 N. E. Rep. 78; Chicago etc. R. R. Co. v. Chicago, 166 U. S. 226, 17 S. C. Rep. 581. And see generally § 500 post.

⁷⁴ Forbes v. Commonwealth, 172 Mass. 289, 52 N. E. Rep. 511.

⁷⁵ Matter of Water Commissioners, 3 Edwards Ch. 552; Texas & St. Louis R. R. Co. v. Matthews, 60 Tex. 215.

⁷⁶ Lance v. Chicago, Mil. & St. P. Ry. Co., 57 Ia. 636; Gilmore v. Pittsburgh, Va. & C. R. R. Co., 104 Pa. St. 275; Fort Worth & Denver City Ry. Co. v. Scott, 2 Tex. App. Civil Cas. p. 137; Telephone Telegraph Co. v. Forke, 2 Ibid., p. 318.

⁷⁷ Schuylkill Navigation Co. v. Freedley, 6 Whart. 109.

⁷⁸ St. Louis etc. R. R. Co. v. Mollett, 59 Ill. 235.

⁷⁹ Gile, Admr. v. Stevens, 13 Gray 146.

⁸⁰ Harwood v. West Randolph, 64 Vt. 41, 24 Atl. Rep. 97.

⁸¹ Doud v. Mason City etc. R. R. Co., 76 Ia. 438, 41 N. W. Rep. 65; Brown v. Commissioners, L. R. 15, I. L. 240.

⁸² Searle v. Lackawanna etc. R. R. Co., 33 Pa. St. 57; Doud v. Mason City etc. R. R. Co., 76 Ia. 438, 41 N. W. Rep. 65. It has been held proper to show the presence of building sand and the demand therefor and the price of the same in the market. Manning v. Lowell, 173 Mass. 100.

⁸³ Lafayette etc. R. R. Co. v. Winslow, 66 Ill. 219; City of Kansas v. Morse, 105 Mo. 510, 16 S. W. Rep. 893; Forney v. Fremont etc. R. R. Co., 23 Neb. 465,

ing can be recovered for buildings placed on the property after the commencement of proceedings.⁸⁴

§ 487. **Injury to business, loss of profits, etc.**—While it is proper to show how the property is used, it is incompetent to go into the profits of the business carried on upon the property. No damages can be allowed for injury to business.⁸⁵ The reason is that the owner is entitled only to the

36 N. W. Rep. 806; Chicago etc. R. R. Co. v. Eaton, 136 Ill. 9, 26 N. E. Rep. 575; Warden v. Philadelphia, 167 Pa. St. 523, 31 Atl. Rep. 928; Blaine Co. v. Brewster, 32 Neb. 264, 49 N. W. Rep. 183.

⁸⁴ Lloyd v. Fair Haven, 67 Vt. 167, 31 Atl. Rep. 164.

⁸⁵ Central Pacific R. R. Co. v. Pearson, 35 Cal. 247; Jacksonville & S. E. Ry. Co. v. Walsh, 106 Ill. 253; Chicago & Evanston R. R. Co. v. Dressel, 110 Ill. 89; DeBuol v. Freeport & Mississippi River Ry. Co., 111 Ill. 499; Whitman v. Boston & Maine R. R. Co., 3 Allen 133; Cobb v. Boston, 109 Mass. 438; Petition of Mt. Washington Road Co., 35 N. H. 134; Schuylkill Navigation Co. v. Farr, 4 W. & S. 362; Same v. Thoburn, 7 S. & R. 411; Pittsburgh & Western R. R. Co. v. Patterson, 107 Pa. St. 461; Fuller v. Edings, 11 Rich. 239; Eddings v. Seabrook, 12 Rich. 504; Studler v. Milwaukee, 34 Wis. 98; Queen v. Vaughn, 4 L. R. Q. B. 190; Raulet v. Concord R. R. Co., 62 N. H. 561; Matter of Department of Public Works, 53 Hun 280, 25 N. Y. St. Rep. 9, 6 N. Y. Supp. 750; Esch v. Chicago etc. R. R. Co., 72 Wis. 229, 39 N. W. Rep. 129; Union Steamboat Co., 39 Fed. Rep. 723; Bigg v. Corporation of London, L. R. 15

Eq. Cas. 376; Van Buren v. Fishkill Water Works Co., 50 Hun 448, 21 N. Y. St. Rep. 448, 3 N. Y. Supp. 336; Cook & R. Co. v. Sanitary District, 177 Ill. 599, 52 N. E. Rep. 870; Marshall v. Chicago, 77 Ill. App. 351; Sanitary District v. McGuirl, 81 Ill. App. 392; Matter of Gilroy, 26 App. Div. N. Y. 314; Hamilton v. Pittsburgh etc. R. R. Co., 190 Pa. St. 51, 42 Atl. Rep. 369; Braun v. Metropolitan W. S. El. R. R. Co., 166 Ill. 434, 46 N. E. Rep. 974; Matter of Grade Crossing Comrs., 17 App. Div. N. Y. 54; Pause v. Atlanta, 98 Ga. 92. In the last case cited it is said: "The measure of her damages is the injury to her property which is injuriously affected by the public improvement; in arriving at that damage, neither the profits in the business conducted on the premises, nor the cost to the tenant of the fixtures and improvements placed therein nor the articles purchased for the purpose of enabling the lessee to conduct the business, nor the diminution in value of fixtures, improvements or articles such as are removed by the lessee, can be recovered as damages; but the increased value of the premises for rent in consequence of the putting in of such

value of the property taken and damages to the remainder, if any.⁸⁶ The owner can remove his business or continue it on the property which remains. Any incidental loss or inconvenience in business, which may result from a removal or change consequent upon the taking, must be borne by the owner for the sake of the general good in which he participates.⁸⁷ The profits of a business do not tend to prove the value of the property upon which it is conducted. The profits of a business depend upon its extent and character and the manner in which it is conducted. One man will get rich while another will become bankrupt in conducting the same business upon the same property. It is proper, however, to show how the taking will interfere with the use of the property, either for the purpose to which it is actually devoted or for any purpose to which it is adapted.⁸⁸

The cases, however, are not harmonious on the question of injury to business. In a case in Massachusetts the tenant of a store, part of which was taken for widening a street, was allowed to recover the reasonable cost of removing his goods to another store and back again, loss of profits

fixtures and improvements may properly be considered in computing the damages to the leasehold estate."

⁸⁶ This is the scope of the constitutional provision. Compensation must be made for the property taken. That is all. In a recent case in the Supreme Court of the United States, it is said: "And this just compensation, it will be noticed, is for the property and not to the owner. Every other clause in this Fifth Amendment is personal. 'No person shall be held to answer for a capital, or otherwise infamous, crime,' etc. Instead of continuing that form of statement, and saying that no person shall be deprived of his property without just compensation, the personal

element is left out, and the just compensation is to be a full equivalent for the property taken." *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 326, 13 S. C. Rep. 622.

⁸⁷ See cases cited in note 85. In *Raulet v. Concord R. R. Co.*, 62 N. H. 561, 564, the court says: "As the title to all property is held subject to the implied condition that it must be surrendered whenever the public interest requires it, the inconvenience and expense incident to the surrender of the possession are not elements to be considered in determining the damages to which the owner is entitled."

⁸⁸ *Boston & Maine R. R. Co. v. Old Colony & Fall River R. R. Co.*, 3 Allen 142; *Schuykill Nav-*

while making such removals and reasonable rent of the new store during such time as necessary to put the premises in a tenable condition.⁸⁹ And a number of cases hold that cost of removal and interruption and damage to business may be recovered, whether the whole or a part of a property is taken.⁹⁰

The profits derived from the use of the property itself may be shown, whenever such profits would be an indica-

igation Co. v. Farr, 4 W. & S. 362; Driver v. Western Union R. Co., 32 Wis. 569.

⁸⁹ Patterson v. Boston, 20 Pick. 159; S. C., 23 Pick. 425; but see Brooks v. Boston, 19 Pick. 174; and see also *In re Barbadoes Street*, 8 Phila. 498.

⁹⁰ Chicago etc. R. R. Co. v. Hock, 118 Ill. 587; Atchison etc. R. R. Co. v. Schneider, 127 Ill. 144, 20 N. E. Rep. 41; Covington etc. R. R. Co. v. Piel, 87 Ky. 267, 8 S. W. Rep. 449; Grand Rapids etc. R. R. Co. v. Weiden, 70 Mich. 390, 38 N. W. Rep. 294; Commissioners v. Moesta, 91 Mich. 149, 51 N. W. Rep. 903; City of Detroit v. Brennan, 93 Mich. 338, 53 N. W. Rep. 525; Ehert v. Schuylkill Riv. E. S. R. R. Co., 151 Pa. St. 158, 24 Atl. Rep. 1068; Jabb v. Hull Dock Co., 9 A. & E. N. S. 443, 58 E. C. L. R. 441; Ouimet v. City of Montreal, 7 Ontario 193; Metropolitan W. S. El. R. R. Co. v. Siegel, 161 Ill. 638, 44 N. E. Rep. 276. And see Hohman v. Chicago, 140 Ill. 226, 29 N. E. Rep. 671; S. C., 41 Ill. App. 41; Glennon v. Chicago etc. R. R. Co., 79 Ill. 501.

In Covington etc. R. R. Co. v. Piel, 89 Ky. 267, 276, 277, 8 S. W. Rep. 449, where the whole of a property used for residence and

business was taken, the court says: "The appellee owned no property adjacent to the property condemned, and the damages he sustained, if any, in addition to the value of the property taken, was the inconvenience and loss resulting from his being deprived of his home and place of business, and to say that no such facts should enter into the estimate of value would be unjust to the owner, and place him in a condition where he had sustained actual injury other than the mere market value of the property, without affording him any remedy for the wrong. * * * Here the owner and his family have been deprived of their homestead, and his place of business taken from him, and to allow him simply what such property is worth, or would bring in the market, would not compensate him for the injury sustained. * * * The appellee was allowed to show that, in addition to the market value proven, he had sustained other loss, in having to abandon his place of business to the extent of two or three thousand dollars. We perceive no objection to this testimony."

tion of value.⁹¹ If a valuable city lot is devoted to gardening purposes, the profits derived from it may be no indication of its value. But if it is improved to correspond with its locality and surroundings, the rents derived from it, after deducting taxes and expenses, will be a very important factor in determining what it is worth. Where a toll-bridge was taken, it was held proper to show the income from it during a series of years preceding the taking.⁹² So the profits derived from farming afford a criterion of the value of the farm.⁹³

If the particular use to which the property is devoted has continued for a long time and has imparted to the property a peculiar value for that use, as for a hotel, it is proper to show the fact and to take it into consideration in fixing the damages.⁹⁴ But nothing can be allowed for the good

⁹¹ *Dupuis v. Chicago & North Wisconsin Ry. Co.*, 115 Ill. 97; *Pittsburgh & Western R. R. Co. v. Patterson*, 107 Pa. St. 461.

⁹² *Montgomery County v. Schuylkill Bridge Co.*, 110 Pa. St. 54.

⁹³ But see *Stockton etc. R. R. Co. v. Galgiani*, 49 Cal. 139.

⁹⁴ In the following case the entire property, which had been in use for fourteen years, was taken. Upon the point in question the court say: "The evidence minutely described the situation of the premises, the size of the buildings, the nature and character of the machinery, and the uses to which it was adapted. Witnesses were also called to prove the value of the respondent's leasehold interest, including the buildings and machinery. While the exceptions to the admission of evidence as well as to the charge of the court vary somewhat in form, and present the matter in differ-

ent shapes, yet the general question raised by all of them really is whether it was proper, in determining the value of this property, to take into account the fact that there was a manufacturing business established and in operation upon the premises. That this was allowed is really the alleged error here urged, and which we have to consider. We think it may be stated as elementary that a person is entitled to the fair value of his property for any use to which it is adapted and for which it is available, and for which it may be sold. He is entitled to the value of his property for any use to which it may be applied, and for which it would ordinarily sell in the market, whether that use be the one to which it is presently applied, or some other to which it is adapted. It is, we think, equally true that any evidence is competent and any fact is proper to be considered which legiti-

will of a business carried on upon the property taken.⁹⁵

§ 488. **Personal property: Fixtures: Cost of removal.**—Fixtures upon the property taken must be valued and paid for as part of the real estate,⁹⁶ and any depreciation in the value of fixtures upon the part not taken is to be taken into consideration, the same as damage to the soil

mately bears upon the question^a of the marketable value of the property. In this case evidence was introduced tending to prove that the fact of a business having been established and carried on on the premises for so long a time, materially increased the market value of this property. If this was the fact, it was competent to prove it; and, if proved, we cannot see why it was not proper to take it into consideration in estimating the value. Who can say that this circumstance would not affect its value; that is, what a purchaser would ordinarily be willing to pay? When we speak of the market value of property as being what purchasers generally would pay for it, we do not mean what men would pay who had no particular object in view in purchasing, and no definite plan as to the use to which to put it. The owner has a right to its value for the use for which it would bring the most in the market. This property was expressly built for a plow factory, and was especially suited for such a use. And it is not unreasonable to suppose that a purchaser would give more for it than he would if the business had been suspended for a time or had never been established there. Take, for example, a hotel built ex-

pressly as a public house, and not capable for advantageous use for anything else; might it not be worth more, that is, bring more in the market, by reason of the fact that it had been for years run as a hotel? So with a stand long used for some branch of mercantile business. From that very fact it might be worth more for that kind of business than any other, and a man who wished to buy might give more for it than he otherwise would. If so, why is not that a proper element to take into account in determining its value? To do so is not, as counsel seems to argue, to pay the owner for his loss of business or loss of future profits, but simply to give him the marketable value of his property for the use for which it is best adapted, and for which it would bring the most." *King v. Minneapolis Union Railway Co.*, 32 Minn. 224, 225-6.

⁹⁵ *Raulet v. Concord R. R. Co.*, 62 N. H. 561.

⁹⁶ *Edmunds v. Boston*, 108 Mass. 535, 549; *Gibson v. Hammersmith & City Ry. Co.*, 2 Drewry & Smale, 603. In determining what are fixtures, the same rule applies as between vendor and vendee. *Matter of New York*, 39 N. Y. App. Div. 589.

itself. Where a railroad was laid through premises which had been fitted up for a water cure, so as to render it unsuitable for that purpose, it was held that the owner was entitled to the difference between what the fixtures and appurtenances were worth in connection with the property as a water cure (not exceeding their reasonable cost) and what they were worth to be removed from the premises and applied to other purposes.⁹⁷ In a case in Pennsylvania it was held proper to show the expense of removal of machinery and fixtures as bearing upon the value of the property as it stood.⁹⁸

But the damages to personal property, or the expense of removing it from the premises, cannot be considered in estimating the compensation to be paid.⁹⁹

⁹⁷ Price v. Milwaukee & St. Paul Ry. Co., 27 Wis. 98.

⁹⁸ Philadelphia & Reading R. Co. v. Getz, 113 Pa. St. 214; S. C., 105 Pa. St. 547. In the latter decision the court say: "If the location of the railroad so affected the property as to compel the removal of the business conducted by the tenants to another place, and there was some evidence to that effect, and the machinery, fixtures, etc., were in consequence depreciated as they stood, it is clear, as was said when the case was here before (9 Out. 547), that the difference between the value of the machinery in connection with the business conducted on the property, and its value to be removed and applied to the same or other use, was a proper element of damage to be considered by the jury."

⁹⁹ Central Pacific R. R. Co. v. Pearson, 35 Cal. 247; Matter of New York Central & Hudson River R. R. Co., 35 Hun 306; Matter of New York, West Shore

& Buffalo Ry. Co., 35 Hun 633; Raulet v. Concord R. R. Co., 62 N. H. 561; Matter of Department of Public Works, 53 Hun 280, 25 N. Y. St. Rep. 9, 6 N. Y. Supp. 750; Stone v. New York, 25 Wend. 157; Missouri Pac. R. Co. v. Porter, 112 Mo. 361, 20 S. W. Rep. 568; American Bank Note Co. v. Met. El. R. R. Co., 63 Hun 506, 45 N. Y. St. Rep. 322, 18 So. Rep. 532; Williams v. Commonwealth, 168 Mass. 364, 47 N. E. Rep. 115; Becker v. Phila. etc. R. R. Co., 177 Pa. St. 252, 35 Atl. Rep. 617. But in Illinois it has been held that the cost of removing goods may be recovered. Chicago etc. R. R. Co. v. Hock, 118 Ill. 587; Atchison etc. R. R. Co. v. Schneider, 127 Ill. 144, 20 N. E. Rep. 41. In Pennsylvania, where part of a store building was taken for widening a street, it was held that the occupants could recover for actual injury to their goods from dirt and grime, necessarily encountered in doing the

§ 489. **When one railroad crosses another.**—The question of what is just compensation where one railroad condemns the right to cross another presents many points of difficulty. In Massachusetts the rule of damages is laid down as follows: "A railroad corporation, across whose road another railroad or a highway is laid out, has the like right as all individuals or bodies politic and corporate, owning lands or easements, to recover damages for the injury occasioned to its title or right in the land occupied by its road, taking into consideration any fences or structures upon the land, or changes in its surface, absolutely required by law, or in fact necessary to be made by the corporation injured, in order to accommodate its own land to the new condition. But it is not entitled to damages for the interruption and inconvenience occasioned to its business, nor for the increased liability to damages from accidents, nor for increased expense for ringing bell, nor for the risk of being ordered by the county commissioners, when in their judgment the safety and convenience of the public may require it, to provide additional safeguards for travelers crossing its railroad."¹ In the case in question the new road crossed on a bridge twenty feet above the grade of the old road. The abutments of the bridge obscured the view of the old road at a highway crossing, and the old road had been required to keep a flagman at this crossing. It was held that the expense of maintaining this flagman was not a proper element of damages.

A statute of Ohio provided that when two railroads crossed each other at grade the crossing should be made, kept up and a watchman maintained, at the joint expense of the two companies owning the tracks. In *Railway v. Railway*² the plaintiff company instituted proceedings to obtain the privilege of crossing the tracks of the defendant company at grade. The defendant company claimed the right

work. *Shaw v. Philadelphia*, 169 Pa. St. 506, 32 Atl. Rep. 593. And see *Waddy v. Johnson*, 5 Ired. L. 333.

¹ *Massachusetts Central R. R. Co. v. Boston, Clinton & Fitch-*

burg R. R. Co., 121 Mass. 124, 126. And see *Grand Junction R. R. & Depot Co. v. County Comrs.*, 14 Gray 553.

² 30 Ohio St. 604.

to recover the cost of maintaining the crossing and such a sum as would cover the annual expense to it for watchman, lights, watch-house, etc., in order to comply with the statute, and also any injury to their property and franchises by reason of the increased expense of operating its road. In a very elaborate opinion the Supreme Court ruled that these claims could not be allowed, and virtually ruled that only nominal damages could be recovered. It is held that the first road took nothing by its priority, and that the legislature, by virtue of the police power and of the fact that the property and franchises of the first company were held for public use, had a right to impose upon it one-half the burden of building and maintaining the crossing, and of providing for the safety of the public thereat, without compensation. The only intimation as to the damages which the first company would be entitled to receive is contained in the following language: "If, in any given case, there are other consequential injuries, not provided for by the act of 1860, incident to the appropriation, they may be considered if they are the cause of present and direct damages to the remaining property."

A series of cases in Illinois establish a more liberal rule of compensation. Where a railroad crossed another by cutting an embankment and going underneath the tracks of the first, it was held that the first road was entitled to such a sum as would enable it to build and maintain a suitable and safe bridge with necessary abutments, etc.³ Where the crossing is at the same grade, the rule of damages is laid down as follows: "The defendant companies were the owners of this right of way, and although the right is limited to the use of the land for the construction, maintenance and operation of a railroad upon it, this limited use is property, and as much so as if the use were an absolute one. This use was exclusive in the defendants, and had the petitioner entered upon the right of way and placed any obstruction upon it, it would have been a trespasser.

³ *Chicago etc. R. R. Co. v. Springfield etc. R. R. Co.*, 67 Ill. 142; S. C., 96 Ill. 274.

By the present proceeding the petitioner acquires the right to enter upon the premises described, and construct and operate thereon four main tracks of a railway. Property is thereby taken from the defendants, and they must have just compensation. Their use, which was before exclusive, is now reduced, it only being a right to use the premises when petitioner is not using them; so the use is impaired. The record discloses that all evidence as to damage to any of the right of way, or railroad property, beyond the boundaries of blocks 34 and 35, was excluded, and the damages allowed restricted to these blocks. The right of way is a right of user extending the whole length of the railroad, and any interference with it at any point, we think, may be considered in connection with and as affecting it as an entirety. We think it was competent to show, as was attempted, and to recover for, damages to which the companies would be subjected by placing obstructions upon their right of way, whereby access to different parts of their lines would be interfered with, and their capacity for the transaction of business impaired or destroyed. We do not see why it may not be admitted as well as in a case of a farm, where a railroad interferes with access between its different portions.

“Some of the rulings of the court are attempted to be justified on the ground that the subject matter involved the business of the roads. Evidence as to the amount of traffic was legitimate, to show the extent of the use to which this strip of land would be subjected in the operation of the road, and to what extent it would injure the adaptability of the blocks for transfer uses, as affecting the questions of depreciation of their value, and damage to the other railroad property. There evidently was no claim for or purpose to show mere damages to business, but damage to the capacity of the property for the use. The franchise in these blocks is a property right held with regard to them, and the volume of the use of the franchise is material in ascertaining its value, and the damage which interference with it will cause.”⁴ If the petitioner stipulates in the proceedings

⁴ Lake Shore & Michigan Western Indiana R. R. Co., 100 Southern Ry. Co. v. Chicago & Ill. 21, 31. Same principles af-

to construct and maintain the crossing at its own expense, the same court holds that this is binding upon itself and its successors and assigns, and precludes any allowance for this purpose to the first company.⁵ In New Jersey it is held that the condemning corporation may petition for a right to cross in a specified manner or for the right of crossing generally. In the former case the company will be limited to the mode specified, and compensation must be assessed on that basis, and for damages by any change in the mode of crossing, further compensation must be made. In the latter case, compensation must be allowed once for all for any lawful manner of crossing, including the right to change without further compensation.⁶ In Michigan the rule laid down is that compensation must be made for the value of the land taken and that "any additional expense created in the use of respondent's road, or any other injury or damage to its tracks, right of way or franchises occasioned by the crossing, and which may properly be considered as the natural, necessary and approximate cause thereof, should be allowed the respondent in cases of this kind."⁷ The authorities generally favor the giving of substantial damages but vary somewhat as to the elements

firmed in *Chicago & Alton R. R. Co. v. Joliet, L. & A. Ry. Co.*, 105 Ill. 388, and *Chicago & Western Indiana R. R. Co. v. Englewood Connecting Ry. Co.*, 115 Ill. 375. See also *Matter of Lockport & Buffalo R. R. Co.*, 19 Hun 38; *Lake Shore etc. R. R. Co. v. Baltimore etc. R. R. Co.*, 149 Ill. 272, 37 N. E. Rep. 91.

⁵ *Chicago & Alton R. R. Co. v. Joliet L. & A. R. R. Co.*, 105 Ill. 388; *Chicago & Western Indiana R. R. Co. v. Englewood Connecting Ry. Co.*, 115 Ill. 375.

⁶ *National Docks etc. R. R. Co. v. United N. J. R. R. Co.*, 53 N. J. L. 217, 21 Atl. Rep. 570, reversing 52 N. J. L. 90, 18 Atl. Rep.

574. See *National Docks etc. R. R. Co. v. Penn. R. R. Co.*, 57 N. J. L. 265, 31 Atl. Rep. 462; *National Docks etc. R. R. Co. v. Penn. Co.*, 54 N. J. Eq. 142, 33 Atl. Rep. 860. The probable future demands of the first company upon its right of way are to be taken into account in assessing the damages. *National Docks etc. R. R. Co. v. Pennsylvania R. R. Co.*, 57 N. J. L. 637, 32 Atl. Rep. 274.

⁷ *Toledo etc. R. R. Co. v. Detroit etc. R. R. Co.*, 62 Mich. 564, 29 N. W. Rep. 500; also *Flint etc. R. R. Co. v. Detroit etc. R. R. Co.*, 64 Mich. 350, 31 N. W. Rep. 281.

which may be considered in estimating such damages.⁸ No damages can be allowed because the defendant will have to stop its trains at the crossing in obedience to the statute.⁹ If no evidence is given as to actual damages, an award of nominal damages will be sustained.¹⁰

When a street railroad is extended over an ordinary steam or commercial railroad, the authorities hold that there is no taking, and that no compensation need be made.¹¹ And the same ruling has been made in Missouri, where a commercial railroad was laid along a street and across another railroad.¹²

§ 490. When one railroad takes the use of another's tracks.—One railroad company cannot take the use of another's tracks without making compensation therefor.¹³ The right to condemn the joint use of tracks has seldom been granted by the legislature and there are but few decisions bearing upon the question of compensation in such cases. If the first company has no exclusive franchise, nothing need be allowed for the impairment of its fran-

⁸ St. Louis etc. R. R. Co. v. P. O. & G. R. R. Co., 42 Ark. 249; Memphis etc. R. R. Co. v. Birmingham etc. R. R. Co., 96 Ala. 571, 11 So. Rep. 642; Georgia Midland & G. R. Co. v. Columbus S. R. R. Co., 89 Ga. 205, 15 S. E. Rep. 305; Chicago etc. R. R. Co. v. Cedar Rapids etc. R. R. Co., 86 Ia. 500, 53 N. W. Rep. 305; Chicago R. R. Co. v. Chicago etc. R. R. Co., 91 Ia. 16, 58 N. W. Rep. 918; Kansas City etc. R. R. Co. v. Kansas City etc. R. R. Co., 118 Mo. 599, 24 S. W. Rep. 478.

⁹ Kansas City etc. R. R. Co. v. Kansas City etc. R. R. Co., 118 Mo. 599, 24 S. W. Rep. 478; Chicago & Alton R. R. Co. v. Joliet L. & A. R. R. Co., 105 Ill. 388.

¹⁰ Matter of Cortland & Homer Horse R. R. Co., 98 N. Y. 336.

¹¹ Chicago etc. R. R. Co. v. Whiting etc. R. R. Co., 139 Ind. 297, 38 N. E. Rep. 604, 11 Am. R. R. Corp. Rep. 507; Chicago etc. R. R. Co. v. West Chicago etc. R. R. Co., 156 Ill. 270, 40 N. E. Rep. 1008, 12 Am. R. R. & Corp. Rep. 522; New York etc. R. R. Co. v. Bridgeport Traction Co., 65 Conn. 410, 32 Atl. Rep. 953; Buffalo etc. R. R. Co. v. New York etc. R. R. Co., 72 Hun 587, 25 N. Y. Supp. 265; Delaware etc. R. R. Co. v. Wilkes-Barre etc. R. R. Co., 6 Luzerne Leg. Reg. Rep. 342.

¹² Kansas City etc. R. R. Co. v. St. Joseph Terminal R. R. Co., 97 Mo. 457, 10 S. W. Rep. 826.

¹³ Ante, § 141b and cases there cited.

chise.¹⁴ It has been held that the compensation should be based upon the value of the track and materials in place, the cost of street improvements which the first company has been obliged to make and the cost of maintenance.¹⁵ Where the right to repeal, alter or amend the charter of a railroad company is reserved it has been held that the legislature could authorize another company to use a portion of its tracks without any compensation for the diminution of profits or of the value of the franchise, and that the terms and conditions of making such use and the compensation to be paid could be left entirely to the discretion of commissioners.¹⁶ Where the right to lay tracks in a street is granted upon condition that the right to use them by another company may be granted upon compensation to be fixed by the council in case the companies cannot agree, or in some other specified manner, the condition is binding.¹⁷

¹⁴ Louisville City R. R. Co. v. Central Pass. R. R. Co., 87 Ky. 223, 8 S. W. Rep. 229; Metropolitan R. R. Co. v. Highland R. R. Co., 118 Mass. 290; Toledo Consolidated St. R. R. Co. v. Toledo Electric St. R. R. Co., 6 Ohio C. C. 362; Grand Ave. R. R. Co. v. People's R. R. Co., 132 Mo. 34, 33 S. W. Rep. 472, 12 Am. R. R. & Corp. Rep. 594; Grand Ave. R. R. Co. v. Citizens' R. R. Co., 148 Mo. 665, 50 S. W. Rep. 305.

¹⁵ Toledo Consol. St. R. R. Co. v. Toledo Electric St. R. R. Co., 6 Ohio C. C. 362; S. C., 50 Ohio St. 603, 36 N. E. Rep. 312. The question of compensation is elaborately considered in the opinion of the circuit court, but is not considered in the supreme court.

¹⁶ Metropolitan R. R. Co. v. Highland Street R. R. Co., 118 Mass. 290; see also Same v. Quincy R. R. Co., 12 Allen 262.

¹⁷ Pacific R. R. Co. v. Wade,

91 Cal. 449, 27 Pac. Rep. 768; Louisville City R. R. Co. v. Central Pass. R. R. Co., 87 Ky. 223, 8 S. W. Rep. 329; Canal etc. St. R. R. Co. v. Crescent City R. R. Co., 41 La. An. 561, 6 So. Rep. 849; Canal etc. R. R. Co. v. Orleans R. R. Co., 44 La. Ann. 54, 10 So. Rep. 389; Canal etc. R. R. Co. v. St. Charles R. R. Co., 44 La. An. 1009, 11 So. Rep. 702; Canal etc. R. R. Co. v. Crescent City R. R. Co., 44 La. An. 485, 10 So. Rep. 888; New Orleans etc. R. R. Co. v. Canal etc. R. R. Co., 47 La. An. 1476, 17 So. Rep. 834, 12 Am. R. R. & Corp. Rep. 590; North Baltimore Pass. R. R. Co. v. North Am. R. R. Co., 75 Md. 233, 23 Atl. Rep. 466; Union Depot R. R. Co. v. Southern R. R. Co., 105 Mo. 562, 16 S. W. Rep. 920, 4 Am. R. R. & Corp. Rep. 622; Jersey City etc. R. R. Co. v. Jersey City etc. R. R. Co., 20 N. J. Eq. 61; Jersey City etc. R.

In arriving at the compensation in such cases the same principles would probably apply as in proceedings under the power of eminent domain, except as controlled by the grant or conditions.¹⁸ The charter of St. Louis contained a provision that, "Any street railway company shall have the right to run its cars over the tracks of any other railroad company, in whole or in part, upon the payment of just compensation for the use thereof, under such rules and regulations as may be prescribed by ordinance." Under this an ordinance was passed fixing a mode of ascertaining the compensation by commissioners with an appeal to a court. It was held that "just compensation" as used in the charter and ordinances, meant the same as in the constitution; also that in estimating the compensation which an electric railway company should pay a cable company for the use of the latter's tracks, the cost of building the cable conduit should be considered, though it could not be used by the electric company.¹⁹ But where the use of the cable has been abandoned a different rule will be applied.²⁰ In any case it is the value when the use is taken and not the original cost, which should form the basis of estimating the compensation.²¹

R. Co. v. Jersey City etc. R. R. Co., 21 N. J. Eq. 550; Kinsman St. R. R. Co. v. Broadway & N. St. R. R. Co., 36 Ohio St. 239; Toledo Consol. St. R. R. Co. v. Toledo Electric St. R. R. Co., 50 Ohio St. 603, 36 N. E. Rep. 312; S. C., 6 Ohio C. C. 362; Second & Third Sts. Pass. R. R. Co. v. Green etc. Pass. R. R. Co., 3 Phil. 430.

¹⁸ The following cases involve questions of compensation: Louisville City R. R. Co. v. Central Pass. R. R. Co., 87 Ky. 223, 8 S. W. Rep. 329; Metropolitan R. R. Co. v. Quincy R. R. Co., 12 Allen 262; Metropolitan R. R. Co. v. Broadway R. R. Co.,

99 Mass. 238; Metropolitan R. R. Co. v. Highland St. R. R. Co., 118 Mass. 290; Cambridge R. R. Co. v. Charles Riv. St. R. R. Co., 139 Mass. 454.

¹⁹ Grand Ave. R. R. Co. v. People's R. R. Co., 132 Mo. 34, 33 S. W. Rep. 474, 12 Am. R. R. & Corp. Rep. 594.

²⁰ Grand Ave. R. R. Co. v. Citizens' R. R. Co., 148 Mo. 665, 50 S. W. Rep. 305. A decree covering many particulars and fixing compensation to be paid was approved in this case.

²¹ Grand Ave. R. R. Co. v. Lindell R. R. Co., 148 Mo. 637, 50 S. W. Rep. 302.

§ 490a. **Telegraph on railroad right of way.**—A railroad right of way can only be used for railroad purposes, and a telegraph line along the right of way which does not interfere with the operation of the road does not take anything of value from the railroad company. Verdicts for nominal damages in such cases have accordingly been approved.²²

§ 491. **When a highway is laid out across a railroad.**—In New York a statute has been held valid which authorizes the laying out of highways over the tracks of a railroad without compensation and although it compelled the railroad company to make the necessary excavations or embankments to take the highway across.²³ This is put upon the reserved power to repeal, alter or amend the incorporation acts. The act in question only provided for crossing the "track" of any railroad, and it was held not to apply to grounds taken for a station house, etc., or to tracks used simply for storing cars.²⁴ Substantially the same ruling has been made in Maine, though the right to repeal, alter or amend the charter was not reserved.²⁵ So in Connecticut.²⁶ An act of Illinois, passed in 1874, required that thereafter at all railroad crossings of highways and streets the railroad companies should construct and maintain such crossings and the approaches thereto so that they should at all times be safe for travel. In a number of recent cases this statute has been held to be a valid police regulation and applicable to crossings thereafter established and to companies chartered before its enactment. The suits referred to were proceedings to condemn street crossings over railroad rights of way. The measure of compensation was

²² *Mobile etc. R. R. Co. v. Postal Tel. Cable Co.*, 120 Ala. 21; *Railroad Co. v. Telegraph Co.*, 101 Tenn. 62, 46 S. W. Rep. 571; *St. Louis etc. R. R. Co. v. Postal Tel. Co.*, 173 Ill. 508.

²³ *Albany Northern R. R. Co. v. Brownell*, 24 N. Y. 345; *Boston & Albany R. R. Co. v. Greenbush*, 52 N. Y. 510; *People v.*

Delaware etc. R. R. Co., 11 App. Div. 280, 42 N. Y. Supp. 1011.

²⁴ *Ibid.*

²⁵ *Boston & Maine R. R. Co. v. County Comrs.*, 79 Me. 386. See also cases cited in last section.

²⁶ *New York etc. R. R. Co. v. Waterbury*, 60 Conn. 1, 22 Atl. Rep. 439. And see *Gulf etc. R. R. Co. v. Milam County*, 90 Tex. 355,

held to be "the amount of the decrease in the value of the use for railroad purposes caused by the use for the purposes of a street, such use for the purposes of a street being exercised jointly with the use of the companies for railroad purposes," disregarding the expense of constructing and maintaining the crossing and providing safety appliances in accordance with the law.²⁷ Nor does it make any difference in the rule that the railroad company owns the fee of the land taken by private purchase, since it can only use it for railroad purposes.²⁸ These rulings have been fully approved by the Supreme Court of the United States on appeal from the State court.²⁹ In many of these cases, including the one which went to the Supreme Court of the United States, a judgment for nominal damages was sustained. Where the right of way was 200 feet wide and only 60 feet were occupied by tracks it was held that the company might show the value of the unoccupied portion for the erection of permanent structures for railroad purposes, which use would be prevented by the taking for

²⁷ Chicago & N. W. R. R. Co. v. Chicago, 140 Ill. 309, 29 N. E. Rep. 1109, 4 Am. R. R. & Corp. Rep. 697; Illinois Central R. R. Co. v. Chicago, 141 Ill. 586, 30 N. E. Rep. 1044; Lake Shore & M. S. R. R. Co. v. Chicago, 148 Ill. 509, 37 N. E. Rep. 88; Chicago, B. & Q. R. R. Co. v. Chicago, 149 Ill. 457, 37 N. E. Rep. 78; Chicago & N. W. R. R. Co. v. Chicago, 149 Ill. 495, 36 N. E. Rep. 1006; Chicago & A. R. R. Co. v. Chicago, 150 Ill. 597, 37 N. E. Rep. 1029; Lake Shore & M. S. R. R. Co. v. Chicago, 151 Ill. 359, 37 N. E. Rep. 880; Chicago & N. W. R. R. Co. v. Town of Cicero, 154 Ill. 656, 39 N. E. Rep. 574; Chicago & N. W. R. R. Co. v. Town of Cicero, 155 Ill. 51, 39 N. E. Rep. 577; Chicago etc.

R. R. Co. v. Cicero, 157 Ill. 48, 41 N. E. Rep. 640; Same v. Same, 157 Ill. 89, 41 N. E. Rep. 642; Chicago etc. R. R. Co. v. Naperville, 166 Ill. 87, 47 N. E. Rep. 734; Chicago etc. R. R. Co. v. Pontiac, 169 Ill. 155; Illinois Central R. R. Co. v. Chicago, 169 Ill. 329. Though the damages may be nominal, a street cannot be established across a railroad track without a condemnation or agreement. Illinois Central R. R. Co. v. Comrs., 161 Ill. 247, 43 N. E. Rep. 1100.

²⁸ Chicago, B. & Q. R. R. Co. v. Chicago, 149 Ill. 457, 37 N. E. Rep. 78.

²⁹ Chicago, B. & Q. R. R. Co. v. Chicago, 166 U. S. 226, 17 S. C. Rep. 581.

street uses.³⁰ Where the crossing is over or near a switch yard, the company will be entitled to damages, if any, to its adjoining property.³¹

In Minnesota it is held that the company is entitled to compensation for the expense of fitting the crossing for travel but not for cattle guards, sign boards and the like.³² In other States it is held that, in such cases, the railroad company is entitled to compensation for taking its land for a highway subject to its right to use the same for railroad purposes, and to such a sum as will enable it to make and maintain the crossing with suitable signs, cattle-guards, planking, etc.³³ Nothing can be allowed on account of the possibility of the company being compelled to pay damages for accidents at the crossing, and evidence of what the company has paid for accidents at other crossings is incompetent.³⁴ Nor can anything be allowed for the expense of ringing a bell at the crossing nor in view of the contin-

³⁰ *Illinois Central R. R. Co. v. Chicago*, 156 Ill. 98, 41 N. E. Rep. 45.

³¹ *Lake Shore etc. R. R. Co. v. Chicago*, 151 Ill. 359, 37 N. E. Rep. 880; *Chicago & N. W. R. R. Co. v. Town of Cicero*, 154 Ill. 656, 39 N. E. Rep. 574.

³² *State v. District Court*, 42 Minn. 247, 44 N. W. Rep. 7; *State v. Shardlow*, 43 Minn. 524, 46 N. W. Rep. 74. So in *Wisconsin. Chicago etc. R. R. Co. v. Milwaukee*, 97 Wis. 418.

³³ *Kansas Cent. R. R. Co. v. Board of County Comrs.*, 45 Kan. 716, 26 Pac. Rep. 394; *Board of County Comrs. v. Kansas City etc. R. R. Co.*, 46 Kan. 104, 26 Pac. Rep. 397; *Atchison etc. R. R. Co. v. Board of Comrs.*, 48 Kan. 576, 29 Pac. Rep. 1084; *Chicago etc. R. R. Co. v. Board of Comrs.*, 49 Kan. 763, 31 Pac. Rep. 736; *Southern Kansas R. R. Co.*

v. Board of Comrs., 52 Kan. 138, 34 Pac. Rep. 396; *Old Colony & Fall River R. R. Co. v. County of Plymouth*, 14 Gray 155; *Boston & Maine R. R. Co. v. County of Middlesex*, 1 Allen 324; *Boston & A. R. R. Co. v. Cambridge*, 159 Mass. 283, 34 N. E. Rep. 382; *Grand Rapids v. Grand Rapids & Indiana R. R. Co.*, 58 Mich. 641; *Chicago & Grand Trunk Ry. Co. v. Hough*, 61 Mich. 507; *Matter of Opening First St.*, 66 Mich. 42, 33 N. W. Rep. 15; *Commissioners of Parks etc. v. Mich. Cent. R. R. Co.*, 90 Mich. 385, 51 N. W. Rep. 447; *Commissioners of Parks etc. v. Detroit etc. R. R. Co.*, 91 Mich. 291, 51 N. W. Rep. 934; *Detroit v. Detroit etc. R. R. Co.*, 112 Mich. 304; *Grand Rapids v. Bennett*, 106 Mich. 523, 64 N. W. 585; *Toledo etc. R. R. Co. v. Fostoria*, 7 Ohio C. C. 293.

³⁴ *Old Colony & Fall River R.*

gency of its having to build a bridge,³⁵ nor for the cost of operating gates.³⁶

§ 492. **When a railroad is laid across or along a turnpike.**—The same principles apply as in the preceding cases. It is held that nothing can be allowed for injury to the franchise or business of the turnpike company by reason of the competition of the railroad.³⁷ If the railroad company is required to restore the turnpike to its former condition, or so as not to impair its usefulness, it is error to make an allowance to the turnpike company on this account.³⁸ Where a railroad was laid along a turnpike which still continued to be used as a turnpike with but a slight diminution of tolls, it was held the turnpike company was only entitled to its actual damages, not to the value of the land or road occupied.³⁹

§ 493. **Railroads in streets: Measure of damages.**—A great deal of litigation has arisen from the laying of railroads in the public streets. The cases have already been examined in former chapters with reference to the questions there discussed. In considering these cases with reference to the measure and elements of damages, great care must be taken to observe the circumstances of each case, the nature of the action, the statutory or constitutional provisions which may be involved and the principles upon which a recovery is based. The right of abutting owners to recover

R. Co. v. County of Plymouth, 14 Gray 155; *Boston & Maine R. R. Co. v. County Comrs.*, 79 Me. 386.

³⁵ *Ibid*: and *Portland and Rochester R. R. Co. v. Deering*, 78 Me. 61.

³⁶ *Boston A. R. R. Co. v. Cambridge*, 159 Mass. 283, 34 N. E. Rep. 382. See generally on the subject of the section. *People v. Detroit etc. R. R. Co.*, 79 Mich. 471, 44 N. W. Rep. 934, 2 Am. R. R. & Corp. Rep. 215; *Birmingham Mineral R. R. Co. v. City*

of Bessemer, 98 Ala. 274, 13 So. Rep. 487; *City of Chester v. Philadelphia etc. R. R. Co.*, 3 Walker's Pa. Supm. Ct. 368.

³⁷ *Troy & Boston R. R. Co. v. Northern Turnpike Co.*, 16 Barb. 100; *Cincinnati & Indiana R. R. Co. v. Zinn*, 18 Ohio St. 417; *Albentown etc. Turnpike Co. v. Lehigh Val. Traction Co.*, 174 Pa. St. 273, 34 Atl. Rep. 365.

³⁸ *Troy & Boston R. R. Co. v. Northern Turnpike Co.*, 16 Barb. 100.

³⁹ *Stockton & Linden Gravel*

compensation for damages occasioned by laying a railroad in front of their property has already been considered.⁴⁰ By reference to the sections cited it will be seen that there is great diversity of opinion as to the right of recovery. In different cases the right of recovery is made to depend upon special statutory or constitutional provisions, upon the ownership of the fee of the street, the sort of railroad involved or the extent of the interference with the use of the street by the abutting owner. In many cases the right to recover is denied altogether. Under such circumstances a good deal of diversity as to the elements and measure of damages in such cases is to be expected. If the fee of the street is in the adjacent owner, the measure of damages is precisely the same as in other cases of partial taking; that is, the value of the land taken, subject to the easement for a public street, and damages to the remainder of the tract by reason of taking a part for railroad purposes.⁴¹ Where the compensation is assessed under a statute providing for the payment of compensation or damages in such cases, the measure of damages is such a sum as will make the owner whole and embraces the depreciation of his property by reason of the construction and operation of the road.⁴² The

Co. v. Stodden & Copperopolis R. Co., 53 Cal. 11.

⁴⁰ Ante, §§ 110-125.

⁴¹ Imlay v. Union Branch R. Co., 26 Conn. 249; Kucheman v. C. C. & D. Ry. Co., 46 Ia. 366; Jeffersonville etc. R. R. Co. v. Esterle, 13 Bush, 667; Matter of Prospect Park & Coney Island R. R. Co., 13 Hun 345; S. C., 16 Hun 261; Matter of New York Central & Hudson River R. R. Co., 15 Hun 63; Henderson v. New York Central R. R. Co., 78 N. Y. 423; Hegar v. Chicago & North Western Ry. Co., 26 Wis. 624; Muller v. Southern Pac. R. Co., 83 Cal. 240, 23 Pac. Rep. 265; Jacksonville etc. R. R. Co.

v. Lockwood, 33 Fla. 573, 15 So. Rep. 327; Laing v. United N. J. R. R. Co., 54 N. J. L. 576, 25 Atl. Rep. 409.

⁴² McClean v. Chicago, Iowa & Dakota Ry. Co., 67 Ia. 568; Grand Rapids & Indiana R. R. Co. v. Heisel, 47 Mich. 393; Grafton v. Baltimore & Ohio R. R. Co., 21 Fed. Rep. 309; Eslich v. Mason City etc. R. R. Co., 75 Ia. 443, 39 N. W. Rep. 700; Cook v. Chicago etc. R. R. Co., 83 Ia. 278, 49 N. W. Rep. 92; Nicks v. Chicago etc. R. R. Co., 84 Ia. 27, 50 N. W. Rep. 222; Lake Roland El. R. Co. v. Webster, 81 Md. 529, 32 Atl. Rep. 186; Railway Co. v. Gardner, 45 Ohio St. 309, 13 N. E.

same rule obtains where a recovery is based upon the recent constitutional provisions providing that property shall not be damaged or injured without just compensation.⁴³ Where the right of recovery is based upon an excessive use of the street or an unreasonable interference with the abutting owner's rights of access, light and air, the measure of damages is held to be the diminution in value caused by such excessive or unreasonable use.⁴⁴ Where the fee of the

Rep. 69; New Mexican R. R. Co. v. Hendricks (N. M.), 30 Pac. Rep. 901; Wolff v. Georgia Southern etc. R. R. Co., 94 Ga. 555, 20 S. E. Rep. 484; May v. Carbondale Traction Co., 167 Pa. St. 343, 31 Atl. Rep. 667; Lake Roland El. R. R. Co. v. Frick, 86 Md. 259; Baltimore etc. R. R. Co. v. Lersch, 58 Ohio St. 639.

⁴³ Denver v. Bayer, 7 Col. 113; Guess v. Stone Mountain Granite etc. Co., 72 Ga. 320; Galveston etc. Ry. Co. v. Fuller, 63 Tex. 467; Same v. Bock, 63 Tex. 245; Same v. Eddins, 60 Tex. 656; Belt Line Street Ry. Co. v. Crabtree, 2 Tex. App. Civil Cas. p. 579; Spencer v. Point Pleasant & Ohio R. R. Co., 23 W. Va. 406; Smith v. Same, *ibid.* 451; Hale v. Same, *ibid.* 454; Campbell v. Metropolitan St. R. R. Co., 82 Ga. 320, 9 S. E. Rep. 1078; Streyer v. Georgia etc. R. R. Co., 90 Ga. 56, 15 S. E. Rep. 637; Chicago etc. R. R. Co. v. Leah, 41 Ill. App. 584; Hermann v. East St. Louis, 58 Ill. App. 166; Chicago etc. R. R. Co. v. Moore, 63 Ill. App. 163; Griffin v. Shreveport etc. R. R. Co., 41 La. An. 808, 6 So. Rep. 624; McMahon v. St. Louis etc. R. R. Co., 41 La. An. 827, 6 So. Rep. 640; Brady v. Kansas City Cable R. R. Co., 111 Mo. 329, 19

S. W. Rep. 953; Omaha Belt R. Co. v. McDermott, 25 Neb. 717, 41 N. W. Rep. 648; Omaha etc. R. R. Co. v. Janecek, 30 Neb. 276, 46 N. W. Rep. 478; Chicago etc. R. R. Co. v. O'Connor, 42 Neb. 90, 60 N. W. Rep. 326; Rosenthal v. Taylor etc. R. R. Co., 79 Tex. 325, 15 S. W. Rep. 268; Morrow v. St. Louis etc. R. R. Co., 81 Tex. 405, 17 S. W. Rep. 44; Kaufman v. Tacoma etc. R. R. Co., 11 Wash. 632, 40 Pac. Rep. 137; Stewart v. Ohio Riv. R. R. Co., 38 W. Va. 438, 18 S. E. Rep. 604; Thompson v. Citizens' Traction Co., (Mo.) 31 S. W. Rep. 793; Chicago etc. R. R. Co. v. Sturey, 55 Neb. 137, 75 N. W. Rep. 557. But see Chicago & Western Indiana R. R. Co. v. Berg, 10 Ill. App. 607; Same v. George, *ibid.* 646; Same v. Phillips, *ibid.* 648; Union Pac. R. R. Co. v. Foley, 19 Col. 280, 35 Pac. Rep. 542; Union Pac. R. R. Co. v. Benson, 19 Col. 285, 35 Pac. Rep. 544.

⁴⁴ Florida Southern R. R. Co. v. Brown, 23 Fla. 104; Central Branch U. P. R. R. Co. v. Andrews, 41 Kan. 370, 21 Pac. Rep. 276; Chicago etc. R. R. Co. v. Union Ins. Co., 51 Kan. 600, 33 Pac. Rep. 378; Ottawa etc. R. R. Co. v. Peterson, 51 Kan. 604, 33 Pac. Rep. 606; Leavenworth etc.

street is in the public and the right to recover is worked out on the basis of an interference with the rights of access and of light and air which amounts to a taking, the authorities generally hold that the damages should be limited to the injury caused by such interference and should not include the total depreciation caused by having the railroad in the street.⁴⁵ The cases, however, are not very accurate upon the question of damages, and no general rule can be drawn from them. The New York elevated railroad cases belong to this class. The right to recover is based upon the existence of an easement of access, light and air in the street, which is appurtenant to the adjacent lot, and is property within the meaning of the constitution. When this easement is interfered with, it is a taking, and the owner is entitled to compensation to the extent of the taking, that is to the extent that the interference with the easements in question depreciates the value of the property. Of the early cases, some limit the recovery to such depreciation, and deny the right to recover the entire depreciation due to the railroad in the street.⁴⁶ Other cases permit a recovery to the extent of the difference in value before and after the

R. R. Co. v. Curtan, 51 Kan. 432, 33 Pac. Rep. 297; Chesapeake etc. R. R. Co. v. Kobs, (Ky.) 30 S. W. Rep. 6; Marysville etc. R. R. Co. v. Ingram, (Ky.) 30 S. W. Rep. 8; Fulton v. Short Route R. R. Trans. Co., 85 Ky. 640, 4 S. W. Rep. 332; see Stevenson v. Missouri Pac. R. R. Co., (Mo.) 31 S. W. Rep. 793.

⁴⁵ South Carolina R. R. Co. v. Steiner, 44 Ga. 546; Central Branch Union Pacific R. R. Co. v. Andrews, 30 Kan. 590; Elizabethtown etc. R. R. Co. v. Combs, 10 Bush, 382; Randle v. Pacific R. R. Co., 65 Mo. 325; Parrott v. Cincinnati etc. R. R. Co., 10 Ohio St. 624; and see Mix v. La Fayette etc. Ry. Co., 67 Ill. 319. In

Minnesota it has been held that the recovery must be limited to the damages caused by that portion of the railroad in front of the plaintiff's lot. Adams v. Chicago etc. R. R. Co., 39 Minn. 286, 39 N. W. Rep. 629; Demules v. St. Paul etc. R. R. Co., 44 Minn. 436, 46 N. W. Rep. 912; Lakkie v. Chicago etc. R. R. Co., 44 Minn. 438, 46 N. W. Rep. 912; and see Union Pac. R. R. Co. v. Foley, 19 Col. 280, 35 Pac. Rep. 542; Union Pac. R. R. Co. v. Benson, 19 Col. 285, 35 Pac. Rep. 544.

⁴⁶ Matter of the New York Elevated R. R. Co., 36 Hun 427; Matter of New York El. R. R. Co., 41 Hun 502; Fifth National Bank v. Same, 28 Fed. Rep. 231.

construction of the railroad as affected by the railroad.⁴⁷ The rule as settled by the Court of Appeals is that the damages are measured by the diminution in value caused by the interference with the easements of light, air and access.⁴⁸ "It is these easements only," says the court,

⁴⁷ *Matter of Gilbert Elevated Ry. Co.*, 38 Hun 438; *Pond v. Metropolitan El. Ry. Co.*, 42 Hun 567; *Drucker v. Manhattan R. R. Co.*, 51 N. Y. Supr. Ct. 429; *Ireland v. Metropolitan El. R. R. Co.*, 52 N. Y. Supr. Ct. 450; *Falker v. New York, West Shore & Buffalo Ry. Co.*, 17 Abb. New Cas. 279; *Peyser v. Metropolitan El. R. R. Co.*, 13 N. Y. C. P. 122; *Kenkele v. Manhattan R. R. Co.*, 55 Hun 398, 29 N. Y. St. Rep. 95, 8 N. Y. Supp. 707 (criticised in 128 N. Y. 471); *Matter of Brooklyn El. R. R. Co.*, 55 Hun 165, 28 N. Y. St. Rep. 627, 8 N. Y. Supp. 78.

⁴⁸ *Lahr v. Metropolitan El. R. R. Co.*, 104 N. Y. 268; *Drucker v. Manhattan Ry. Co.*, 106 N. Y. 157; *American Bank Note Co. v. New York El. R. R. Co.*, 129 N. Y. 252, 29 N. E. Rep. 302, 5 Am. R. R. & Corp. Rep. 583; *Bohm v. Metropolitan El. R. R. Co.*, 129 N. Y. 576, 29 N. E. Rep. 802, 5 Am. R. R. & Corp. Rep. 416; *Becker v. Metropolitan El. R. R. Co.*, 131 N. Y. 509, 30 N. E. Rep. 499; *Storck v. Metropolitan El. R. R. Co.*, 131 N. Y. 514, 30 N. E. Rep. 497; *Sperb v. Metropolitan El. R. R. Co.*, 137 N. Y. 155, 32 N. E. Rep. 1050, 7 Am. R. R. & Corp. Rep. 554; *Sixth Ave. R. R. Co. v. Metropolitan El. R. R. Co.*, 138 N. Y. 548, 34 N. E. Rep. 400. We have selected the foregoing as the leading cases on

the subject, but the following are also in point: *Newman v. Metropolitan El. R. R. Co.*, 118 N. Y. 618, 23 N. E. Rep. 901, 2 Am. R. R. & Corp. Rep. 318; *Abendroth v. Manhattan R. R. Co.*, 122 N. Y. 71, 25 N. E. Rep. 496, 3 Am. R. R. & Corp. Rep. 309; *Kane v. New York El. R. R. Co.*, 125 N. Y. 164, 26 N. E. Rep. 278, 3 Am. R. R. & Corp. Rep. 744; *Kearney v. Metropolitan El. R. R. Co.*, 129 N. Y. 76, 29 N. E. Rep. 70; *Messenger v. Manhattan R. R. Co.*, 129 N. Y. 502, 29 N. E. Rep. 955; *Moore v. New York El. R. R. Co.*, 130 N. Y. 523, 29 N. E. Rep. 937; *Odell v. New York El. R. R. Co.*, 130 N. Y. 690, 29 N. E. Rep. 998; *Sutro v. Metropolitan El. R. R. Co.*, 137 N. Y. 592, 33 N. E. Rep. 334; *Sperb v. Metropolitan El. R. R. Co.*, 137 N. Y. 596, 33 N. E. Rep. 319; *Bischoff v. New York El. R. R. Co.*, 138 N. Y. 257, 33 N. E. Rep. 1073; *Saxton v. New York El. R. R. Co.*, 139 N. Y. 320, 34 N. E. Rep. 728; *Bookman v. New York El. R. R. Co.*, 147 N. Y. 298, 41 N. E. Rep. 705; *Malcolm v. New York El. R. R. Co.*, 147 N. Y. 308, 41 N. E. Rep. 790; *O'Reilly v. New York El. R. R. Co.*, 148 N. Y. 347, 42 N. E. Rep. 1063; *Matter of New York El. R. R. Co.*, 36 Hun 427; *S. C.*, 35 Hun 414; *Buck v. Metropolitan El. R. R. Co.*, 73 Hun 251, 25 N. Y. Supp. 1048; *Hadden v. Metro-*

"which are taken by the railroad, and it is only for the injury consequent upon their taking that a recovery can be had."⁴⁹

The later cases throughout the United States disclose a strong tendency to disregard distinctions based upon the ownership of the fee of streets and to adopt a uniform rule of liability in case of railroads laid thereon, and, consequently, a uniform measure of damages in such cases.⁵⁰ The rule applied, except where the fee of the street is in the public, is that the abutting owner is entitled to recover the depreciation in value of his property caused by the construction and operation of the road. This same rule of damages may readily be applied when the fee of the streets is in the public, for an interference with an easement appurtenant to property, whereby the same is impaired or destroyed, may be treated like any other case of partial taking, and, therefore, as entitling the owner of the property to which the easement is appurtenant, and of which it is parcel, to recover not only the value of the easement to the property but damages to the property by reason of the taking or interfering with the easement for the purpose proposed.⁵¹

politan El. R. R. Co., 75 Hun 63, 26 N. Y. Supp. 995; O'Reilly v. New York El. R. R. Co., 76 Hun 283, 27 N. Y. Supp. 758; Wagner v. New York El. R. R. Co., 79 Hun 445, 29 N. Y. Supp. 990; Beck v. Brooklyn El. R. R. Co., 87 Hun 30, 20 N. Y. Supp. 764; Cunard v. Manhattan R. R. Co., 1 Misc. 151, 20 N. Y. Supp. 724; Hoffman v. Manhattan El. R. R. Co., 1 Misc. 155, 20 N. Y. Supp. 625; Matilage v. New York El. R. R. Co., 1 Misc. 339, 20 N. Y. Supp. 624; Struthers v. New York El. R. R. Co., 5 Misc. 239, 25 N. Y. Supp. 81; Krumweide v. Manhattan R. R. Co., 9 Misc. 552, 30 N. Y. Supp. 400; Sillcocks

v. Manhattan R. R. Co., 10 Misc. 259, 31 N. Y. Supp. 428; Israel v. Metropolitan El. R. R. Co., 10 Misc. 722, 31 N. Y. Supp. 816.

⁴⁹ Sixth Ave. R. R. Co. v. Metropolitan El. R. R. Co., 138 N. Y. 548, 34 N. E. Rep. 400.

⁵⁰ Ante, § 911.

⁵¹ It is proper to say that this view has been distinctly repudiated by the New York Court of Appeals. American Bank Note Co. v. New York El. R. R. Co., 129 N. Y. 252, 29 N. E. Rep. 302, 5 Am. R. R. & Corp. Rep. 583 (end of opinion). But see Newman v. Metropolitan El. R. R. Co., 118 N. Y. 618, 23 N. E. Rep. 901, 2 Am. R. R. & Corp. Rep. 318.

There is a class of common law suits for damages by reason of railroads in streets in which the recovery is limited to the damages which have accrued up to the time of bringing suit.⁵² The measure of damages in these cases is held to be the difference in the rental value of the property up to the commencement of the suit. It is to be borne in mind that these cases are not for the just compensation guaranteed by the constitution, but simply for the wrong in the nature of a trespass by laying the railroad in the street, and consequently are not applicable to that measure of damages which is now under consideration. The principles of these and similar actions are discussed in a subsequent chapter.⁵³

In Iowa it has been held that, where the right to recover was based upon the ownership of the fee of the street, and the track was only partly on the plaintiff's land, the plaintiff could recover only such a proportion of the total damage

⁵² *Ford v. Santa Cruz R. R. Co.*, 59 Cal. 290; *Drady v. Des Moines etc. R. R. Co.*, 57 Ia. 393; *Stange v. Dubuque*, 62 Ia. 303; *Wilson v. Des Moines etc. Ry. Co.*, 67 Ia. 509; *Adams v. Hastings & Dakota R. R. Co.*, 18 Minn. 260; *Hartz v. St. Paul & Sioux City R. R. Co.*, 21 Minn. 358; *Brakken v. Minneapolis & St. Louis Ry. Co.*, 32 Minn. 425; S. C., 31 Minn. 45 and 29 Minn. 41; *Carli v. Union Depot, Street Ry. & Transfer Co.*, 32 Minn. 101; *Taylor v. Metropolitan Elevated Ry. Co.*, 50 N. Y. Supr. Ct. 311; *Uline v. New York Central & Hudson River R. R. Co.*, 101 N. Y. 98; *Blesch v. Chicago & Northwestern Ry. Co.*, 43 Wis. 183; S. C. 48 Wis. 168; *Carl v. Sheboygan & Fond du Lac R. R. Co.*, 46 Wis. 625; *Neitsey v. Baltimore & O. R. R. Co.*, 5 Mackey 34; *Davis v. East Tenn. etc. R. R. Co.*, 87 Ga. 605, 13 S. E. Rep.

567; *Haus v. Jeffersonville etc. R. R. Co.*, 138 Ind. 307, 37 N. E. Rep. 805; *Hussner v. Brooklyn El. R. R. Co.*, 114 N. Y. 433, 21 N. E. Rep. 1002; *Tailman v. Metropolitan El. R. R. Co.*, 121 N. Y. 119, 23 N. E. Rep. 1134; *Williams v. Brooklyn El. R. R. Co.*, 126 N. Y. 96, 26 N. E. Rep. 1048; *Kernochan v. New York El. R. R. Co.*, 128 N. Y. 559, 29 N. E. Rep. 65, 5 Am. R. R. & Corp. Rep. 407; *Moore v. New York El. R. R. Co.*, 130 N. Y. 523, 29 N. E. Rep. 997; *Ode v. Manhattan R. R. Co.*, 56 Hun 199, 31 N. Y. St. Rep. 106, 9 N. Y. Supp. 338; *Flood v. Brooklyn El. R. R. Co.*, 75 Hun 601, 27 N. Y. Supp. 662; *Taylor v. Metropolitan El. R. R. Co.*, 55 N. Y. Supr. Ct. 555; *New York El. R. R. Co. v. Fifth Nat. Bank*, 135 U. S. 432, 10 S. C. Rep. 743; *Jackson v. Chicago etc. R. R. Co.*, 41 Fed. Rep. 656.

⁵³ Post, chap. xxviii.

to his property by reason of the railroad in the street as the part of the track on his land bore to the entire track.⁵⁴ This decision has been severely criticised by other courts which hold that there can be no such division of the damages.⁵⁵ When the proceeding is for damages caused by an additional track, the recovery must be limited to the damages caused by such track.⁵⁶ Where the track is on the further half of the street, the abutter's remedy is the same as when the fee of the whole street is in the public.⁵⁷

§493a. **Railroads in streets: Elements of damage: Benefits.**—The measure of damages being, as shown in the last section, the depreciation in value caused by the railroad or by its interference with the easements appurtenant to the abutting property, it follows as a general rule that if there has been no depreciation from such cause, there has been no damage and can be no recovery.⁵⁸ The rule in regard to benefits would be the same as where part of a tract is taken, and as this varies greatly in the different States, no general rule can be laid down.⁵⁹ The prevailing doctrine is that benefits may be set off against the damages

⁵⁴ *Kucheman v. C. C. & D. Ry. Co.*, 46 Ia. 366.

⁵⁵ *Blesch v. Chicago & Northwestern Ry. Co.*, 48 Wis. 168; *S. C.* 43 Wis. 183; *Spencer v. Point Pleasant & Ohio R. R. Co.*, 23 W. Va. 406.

⁵⁶ *Denver etc. R. R. Co. v. Costes*, 1 Col. App. 336, 28 Pac. Rep. 1129.

⁵⁷ *Stewart v. Ohio Riv. R. R. Co.*, 38 W. Va. 438, 18 S. E. Rep. 604.

⁵⁸ *Ante*, § 115; *Brady v. Kansas City Cable R. R. Co.*, 111 Mo. 329, 19 S. W. Rep. 953; *Odell v. New York El. R. R. Co.*, 130 N. Y. 690, 29 N. E. Rep. 998; *Bookman v. New York El. R. R. Co.*, 147 N. Y. 298, 41 N. E. Rep. 705; *Malcolm v. New York El. R. R. Co.*,

147 N. Y. 308, 41 N. E. Rep. 790; *O'Reilly v. New York El. R. R. Co.*, 148 N. Y. 347, 42 N. E. Rep. 1063; *Buck v. Metropolitan R. R. Co.*, 73 Hun 251, 25 N. Y. Supp. 1048; *O'Reilly v. New York El. R. R. Co.*, 76 Hun 283, 27 N. Y. Supp. 758; *McCreedy v. Metropolitan El. R. R. Co.*, 76 Hun 531, 28 N. Y. Supp. 94; *Wright v. New York El. R. R. Co.*, 78 Hun 450, 29 N. Y. Supp. 223; *Market v. Manhattan R. R. Co.*, 87 Hun 213, 33 N. Y. Supp. 842; *Beck v. Brooklyn El. R. R. Co.*, 87 Hun 30, 33 N. Y. Supp. 764; *Israel v. Metropolitan El. R. R. Co.*, 10 Misc. 722, 31 N. Y. Supp. 816; *Sillcocks v. Manhattan R. R. Co.*, 10 Misc. 259, 31 N. Y. Supp. 428.

⁵⁹ *Ante*, §§ 465-471.

and, if the benefits equal or exceed the damages, there can be no recovery.⁶⁰ Benefits to a distinct, though adjoining tract, cannot be considered.⁶¹ In New York it is held that the easements of light, air and access have only a nominal value in and of themselves and apart from the property to which they are appurtenant and, consequently, that, if the property is not damaged, nothing, or only nominal damages, can be allowed for the interference with the easements.⁶² It is difficult to conceive of the easements as dis-

⁶⁰ Omaha Belt R. R. Co. v. McDermott, 25 Neb. 717, 41 N. W. Rep. 648; Newman v. Metropolitan El. R. R. Co., 118 N. Y. 618, 23 N. E. Rep. 901; Odell v. New York El. R. R. Co., 130 N. Y. 690, 29 N. E. Rep. 998; Sperb v. Metropolitan El. R. R. Co., 137 N. Y. 596, 33 N. E. Rep. 319; Sutro v. Metropolitan El. R. R. Co., 137 N. Y. 592, 33 N. E. Rep. 334; Bischoff v. New York El. R. R. Co., 130 N. Y. 257, 33 N. E. Rep. 1073; Saxton v. New York El. R. R. Co., 139 N. Y. 320, 34 N. E. Rep. 728; Sloan v. New York El. R. R. Co., 63 Hun 300, 44 N. Y. St. Rep. 583, 17 N. Y. Supp. 769; Buck v. Metropolitan El. R. R. Co., 73 Hun 251, 25 N. Y. Supp. 1048; McCready v. Metropolitan El. R. R. Co., 76 Hun 531, 28 N. Y. Supp. 94; In re New York El. R. R. Co., 76 Hun 384, 28 N. Y. Supp. 110; Welsh v. New York El. R. R. Co., 16 Daly 515, 12 N. Y. Supp. 545; Nette v. New York El. R. R. Co., 1 Misc. 342, 20 N. Y. Supp. 627; S. C. 2 Misc. 62, 20 N. Y. Supp. 844; Purdy v. Manhattan R. R. Co., 3 Misc. 50, 22 N. Y. Supp. 943; Krumweide v. Manhattan R. R. Co., 9 Misc. 552, 30 N. Y. Supp. 400; Kaufman v. Tacoma etc. R. R. Co., 11

Wash. 632, 40 Pac. Rep. 137. In Iowa benefits are excluded by statute. Hicks v. Chicago etc. R. R. Co., 84 Ia. 27, 50 N. W. Rep. 222.

⁶¹ Missionary Society v. New York El. R. R. Co., 12 Misc. 359, 33 N. Y. Supp. 648.

⁶² Sperb v. Metropolitan El. R. R. Co., 137 N. Y. 596, 33 N. E. Rep. 319; Bookman v. New York El. R. R. Co., 137 N. Y. 302, 33 N. E. Rep. 333; Sixth Ave. R. R. Co. v. Metropolitan El. R. R. Co., 138 N. Y. 548, 34 N. E. Rep. 400; Steubing v. New York El. R. R. Co., 138 N. Y. 658, 34 N. E. Rep. 369; Saxton v. New York El. R. R. Co., 139 N. Y. 320, 34 N. E. Rep. 728; Lazarus v. Metropolitan El. R. R. Co., 69 Hun 190; Drucker v. Metropolitan El. R. R. Co., 73 Hun 102, 25 N. Y. Supp. 922; Reilly v. Manhattan R. R. Co., 33 N. Y. Supp. 391; Cunard v. Manhattan R. R. Co., 1 Misc. 151, 20 N. Y. Supp. 724; Cook v. New York El. R. R. Co., 3 Misc. 248, 22 N. Y. Supp. 790; Kuhn v. New York El. R. R. Co., 7 Misc. 53, 27 N. Y. Supp. 339; Phyfe v. Metropolitan El. R. R. Co., 11 Misc. 70, 31 N. Y. Supp. 1018.

inct from the property, since they have no separate existence. The true theory of the matter would seem to be as stated by the Supreme Court of Georgia: "In determining the question of damages and assessing the amount, the physical property (land and buildings) and the easement of access thereto from the street are not to be considered as having separate values, as if they were two different parcels of property, but are to be treated as parts of one and the same estate. Whether damage has been or will be done by the construction and use of the railroad depends upon whether the market value of the whole estate as one object of ownership has been or will be diminished by reason of devoting the street to this new use."⁶³

If the property has in fact depreciated in value since the construction of the road, that fact is evidence of damage by the road.⁶⁴ The fact that the property has not depreciated in value or that it has actually increased in value, is not conclusive that it has not been damaged. If the increase in value of the property from other causes than the railroad has been prevented or retarded by the presence of the road, the property has been damaged thereby and a recovery may be had.⁶⁵ If the property has increased in value be-

⁶³ *Streyer v. Georgia etc. R. R. Co.*, 90 Ga. 56, 15 S. E. Rep. 637.

⁶⁴ *Becker v. Metropolitan El. R. R. Co.*, 131 N. Y. 509, 30 N. E. Rep. 499. But see *Ryder v. Brooklyn El. R. R. Co.*, 89 Hun 29, 35 N. Y. Supp. 42; *Powers v. Brooklyn El. R. R. Co.*, 89 Hun 288, 35 N. Y. Supp. 43.

⁶⁵ *Becker v. Metropolitan El. R. R. Co.*, 131 N. Y. 509, 30 N. E. Rep. 499; *Storck v. Metropolitan El. R. R. Co.*, 131 N. Y. 514, 30 N. E. Rep. 497; *Herold v. Manhattan R. R. Co.*, 59 N. Y. Supr. Ct. 564, 13 N. Y. Supp. 610; *S. C. affirmed* 129 N. Y. 636; *Sloan v. New York El. R. R.*

Co., 63 Hun 300, 44 N. Y. St. Rep. 583, 17 N. Y. Supp. 769; *Beck v. Brooklyn El. R. R. Co.*, 87 Hun 30, 33 N. Y. Supp. 764; *Hoffman v. Manhattan El. R. R. Co.*, 1 Misc. 155, 20 N. Y. Supp. 625; *Mattlage v. New York El. R. R. Co.*, 1 Misc. 339, 20 N. Y. Supp. 624; *Cook v. New York El. R. R. Co.*, 3 Misc. 248, 22 N. Y. Supp. 790; *Struthers v. New York El. R. R. Co.*, 5 Misc. 239, 25 N. Y. Supp. 81; *Skelly v. New York El. R. R. Co.*, 7 Misc. 88, 27 N. Y. Supp. 304; *Johnson v. New York El. R. R. Co.*, 10 Misc. 136, 30 N. Y. Supp. 920; *Schmidt v. Manhattan R. R. Co.*, 11 Misc. 18, 31 N. Y. Supp. 832; *Hermann v.*

cause of the road, there can be no recovery because property on side streets has been benefited more by the same cause.⁶⁶ In other words it is not an element of damage that the plaintiff's property has not been increased in value by the road as much as some other property. All facts which tend to show damage or benefit to the property by reason of the railroad, may be proved and taken into consideration in fixing the compensation.⁶⁷ The course of

East St. Louis, 58 Ill. App. 166. And see *Clinical Instruction Co. v. New York El. R. R. Co.*, 81 Hun 608, 30 N. Y. Supp. 1006; *Sutro v. Metropolitan El. R. R. Co.*, 137 N. Y. 592, 33 N. E. Rep. 334; *Otten v. Manhattan R. R. Co.*, 150 N. Y. 395, 44 N. E. Rep. 1033; S. C. 2 App. Div. 396, 37 N. Y. Supp. 982; *Lazarus v. Metropolitan El. R. R. Co.*, 5 App. Div. 398, 39 N. Y. Supp. 294; *McElroy v. Manhattan R. R. Co.*, 6 App. Div. 367, 39 N. Y. Supp. 497; *Stacey v. Metropolitan El. R. R. Co.*, 15 App. Div. 534.

⁶⁶ *Bohm v. Metropolitan El. R. R. Co.*, 129 N. Y. 576, 29 N. E. Rep. 802, 5 Am. R. R. & Corp. Rep. 416; *Becker v. Metropolitan El. R. R. Co.*, 131 N. Y. 509, 30 N. E. Rep. 499.

⁶⁷ *Campbell v. Metropolitan St. R. R. Co.*, 82 Ga. 320, 9 S. E. Rep. 1078; *Chicago etc. R. R. Co. v. Moore*, 63 Ill. App. 163.

The following miscellaneous cases on the subject of the assessment of damages and the elements and considerations which may be taken into account in fixing the amount are also referred to: *Abbott v. Southern Pac. R. R. Co.*, 109 Cal. 282, 41 Pac. Rep. 1099; *Cook v. Chicago etc. R. R. Co.*, 83 Ia. 278, 49 N.

W. Rep. 92; *Nicks v. Chicago etc. R. R. Co.*, 84 Ia. 27, 50 N. W. Rep. 222; *Chicago etc. R. R. Co. v. Union Ins. Co.*, 51 Kan. 600, 33 Pac. Rep. 378; *Gulf etc. R. R. Co. v. Fink*, (Tex.) 18 S. W. Rep. 492; *Lawrence v. Metropolitan El. R. R. Co.*, 126 N. Y. 483, 27 N. E. Rep. 765; *Jamieson v. Kings County El. R. R. Co.*, 147 N. Y. 322, 41 N. E. Rep. 693; *Sixth Ave. R. R. Co. v. Metropolitan El. R. R. Co.*, 56 Hun 182, 30 N. Y. St. Rep. 521, 9 N. Y. Supp. 207; *Leale v. Metropolitan El. R. R. Co.*, 61 Hun 613, 41 N. Y. St. Rep. 904, 16 N. Y. Supp. 419; *Peyton v. New York El. R. R. Co.*, 62 Hun 536, 42 N. Y. St. Rep. 843, 17 N. Y. Supp. 244; *Frohmann v. Manhattan R. R. Co.*, 86 Hun 262, 33 N. Y. Supp. 1128; *Plath v. Manhattan R. R. Co.*, 86 Hun 263, 33 N. Y. Supp. 1133; *Doyle v. Manhattan R. R. Co.*, 15 Daly 473, 8 N. Y. Supp. 323; *Hamilton v. Manhattan R. R. Co.*, 58 N. Y. Supr. Ct. 17, 9 N. Y. Supp. 313; *Saxton v. New York El. R. R. Co.*, 60 N. Y. Supr. Ct. 421; *Tabor v. New York El. R. R. Co.*, 8 Misc. 17, 28 N. Y. Supp. 68; *Matter of Brooklyn El. R. R. Co.*, 6 App. Div. 53, 39 N. Y. Supp. 474; *Lazarus v. Metropolitan El. R. R. Co.*, 14 App.

rents and values of the property in question and of neighboring property may be shown, and how the property is affected by the construction and operation of the road.⁶⁸ The noise, smoke, cinders, gases and vibrations caused by the operation of the road, may be taken into consideration in so far as they affect the value of the property.⁶⁹ In New York it is held that nothing can be considered but what affects the easements of light, air and access, that smoke, cinders and gases affect the easements of light and air and damages therefrom may be considered, that noise and vibration do not affect light, air or access and, therefore, cannot be considered.⁷⁰ But the same cases hold that, when the

Div. 438, 43 N. Y. Supp. 873; Church of the Holy Apostles, 21 App. Div. N. Y. 47.

⁶⁸ Cook v. New York El. R. R. Co., 144 N. Y. 115, 39 N. E. Rep. 2; Gerber v. Metropolitan El. R. R. Co., 3 Misc. 427, 23 N. Y. Supp. 166; Hitchings v. Brooklyn El. R. R. Co., 6 Misc. 430, 27 N. Y. Supp. 132; Fox v. Baltimore & O. R. R. Co., 34 W. Va. 466, 12 S. E. Rep. 757; and cases cited in note 65.

⁶⁹ Omaha etc. R. R. Co. v. Jan-
ecek, 30 Neb. 276, 46 N. W. Rep.
478; Chicago etc. R. R. Co. v.
O'Connor, 42 Neb. 90, 60 N. W.
Rep. 326; Railway Co. v. Gard-
ner, 45 Ohio St. 309, 13 N. E.
Rep. 69; Chicago etc. R. R. Co.
v. Leah, 152 Ill. 249, 38 N. E.
Rep. 556; S. C. 41 Ill. App.
584; Chicago etc. R. R. Co. v.
Moore, 63 Ill. App. 163; Fulton
v. Short Route R. R. Trans. Co.,
85 Ky. 640, 4 S. W. Rep. 332;
Louisville & N. R. R. Co. v. Orr,
91 Ky. 109; 15 S. W. Rep. 8;
Maysville etc. R. R. Co. v. In-
gram, (Ky.) 30 S. W. Rep. 8;
Elizabethtown etc. R. R. Co. v.

Combs, 10 Bush. 382; G. C. &
S. F. R. R. Co. v. Eddins, 60
Tex. 656; South Carolina R. R.
Co. v. Steiner, 44 Ga. 546; Den-
ver etc. R. R. Co. v. Schmitt,
11 Col. 56; Denver etc. R. R. Co.
v. Bourne, 11 Col. 59; Laing v.
United New Jersey R. R. Co., 54
N. J. L. 576, 25 Atl. Rep. 409.

Contra: Werges v. St. Louis
etc. R. R. Co., 35 La. An. 641;
McMahon v. St. Louis etc. R. R.
Co., 41 La. An. 827, 6 So. Rep.
640. And see generally: Mix
v. La Fayette etc. Ry. Co., 67 Ill.
319; Wilson v. Des Moines etc.
Ry. Co., 67 Ia. 509; Randle v. Pa-
cific R. R. Co., 65 Mo. 325; Mat-
ter of New York Elevated R.
R. Co., 36 Hun 427; Parrott v.
Cincinnati & C. R. R. Co., 10
Ohio St. 624.

⁷⁰ American Bank Note Co. v.
New York El. R. R. Co., 129 N.
Y. 252, 29 N. E. Rep. 302, 5 Am.
R. R. & Corp. Rep. 583; Mes-
senger v. Manhattan R. R. Co.,
129 N. Y. 502, 29 N. E. Rep. 955;
Sperb v. Metropolitan R. R. Co.,
137 N. Y. 155, 32 N. E. Rep.
1050, 7 Am. R. R. & Corp. Rep.

action is at law for past damages by the wrongful occupation of the street, all sources of damage may be considered, including noise and vibration, loss of privacy, obstruction of view, etc.⁷¹

When the abutting property extends under the same ownership to another street or streets, it is sometimes a question whether the effect of the road upon the whole can be taken into consideration. The same general rules would, doubtless, apply here as when part of a lot or tract is taken.⁷² So much as is used and improved for a common purpose may be considered in estimating damages and benefits, and no more.⁷³ If the property extends through to another street or is on a corner and there are distinct buildings or tenements on the other or side street, damages or benefits to these cannot be considered,⁷⁴ even though there is unity of architecture.⁷⁵

554; *Sixth Ave. R. R. Co. v. Metropolitan El. R. R. Co.*, 138 N. Y. 548, 34 N. E. Rep. 400; *Mat-ter of New York El. R. R. Co.*, 36 Hun 427; *Sperb v. Metropolitan El. R. R. Co.*, 61 Hun 539, 41 N. Y. St. Rep. 155, 16 N. Y. Supp. 392; *Sloan v. New York El. R. R. Co.*, 63 Hun 300, 44 N. Y. St. Rep. 583, 17 N. Y. Supp. 769; *Flood v. Brooklyn El. R. R. Co.*, 75 Hun 601, 27 N. Y. Supp. 662; *Seaside & B. El. R. R. Co. v. Dutch Church*, 83 Hun 143, 31 N. Y. Supp. 630; *Taylor v. Metropolitan El. R. R. Co.*, 55 N. Y. Supr. Ct. 555; *Jordan v. Metropolitan El. R. R. Co.*, 60 N. Y. Supr. Ct. 385; *Golden v. Metropolitan El. R. R. Co.*, 1 Misc. 142, 20 N. Y. Supp. 630; *Purdy v. Manhattan R. R. Co.*, 3 Misc. 50, 22 N. Y. Supp. 943; *Diehl v. Metropolitan El. R. R. Co.*, 11 Misc. 14, 31 N. Y. Supp. 839; *Diehl v. Metropolitan El. R. R. Co.*, 11 Misc. 23, 31 N. Y.

Supp. 839; *Steinert v. Metropolitan El. R. R. Co.*, 12 Misc. 370, 33 N. Y. Supp. 560; *Kopetzky v. Metropolitan El. R. R. Co.*, 14 Misc. 311, 35 N. Y. Supp. 766.

⁷¹ *American Bank Note Co. v. New York El. R. R. Co.*, 129 N. Y. 252, 29 N. E. Rep. 302, 5 Am. R. R. & Corp. Rep. 583; *Messenger v. Manhattan R. R. Co.*, 129 N. Y. 502, 29 N. E. Rep. 955; and many other cases cited in last note.

⁷² Ante, § 475.

⁷³ *Stevens v. New York El. R. R. Co.*, 130 N. Y. 95, 28 N. E. Rep. 667, affirming S. C. in 57 N. Y. Supr. Ct. 416, 8 N. Y. Supp. 313; *Bischoff v. New York El. R. R. Co.*, 138 N. Y. 257, 33 N. E. Rep. 1073; *Rannow v. Hazard*, 61 N. Y. Supr. Ct. 211.

⁷⁴ *Mooney v. New York El. R. R. Co.*, 16 Daly 145, 9 N. Y. Supp. 522; *Brooklyn El. R. R. Co. v. Flynn*, 87 Hun 104, 33 N. Y. Supp. 974; *Evansville etc. R. R.*

§ 494. **Change of grade.**—Many statutes give damages to abutting owners in case of change of grade in front of their property.⁷⁶ As this is a right conferred by statute, it is necessary to consult the particular statute in order to determine the extent of the recovery. The right, however, is usually given in general terms requiring compensation to be made for damages caused by such change. Under the recent constitutional provisions which prohibit the damaging or injuring of property without compensation, there may be a recovery in such cases.⁷⁷ The correct measure of damages, in all such cases, is undoubtedly the diminution in value of the property by reason of the change.⁷⁸ The

Co. v. Charlton, 6 Ind. App. 56, 33 N. E. Rep. 129.

But where a corner lot was improved by a building on the street having the railroad and by another on the side street, but the buildings were inadequate for the value of the lot, and the same could be improved and used to better advantage by a single building covering the entire lot, it was held that damages to the entire lot could be awarded. *Cooper v. Manhattan R. R. Co.*, 85 Hun 217, 32 N. Y. Supp. 1054.

⁷⁵ *Keene v. Metropolitan El. R. R. Co.*, 79 Hun 451, 29 N. Y. Supp. 971.

⁷⁶ Ante, §§ 206a-218.

⁷⁷ Ante, § 223.

⁷⁸ *Montgomery v. Townsend*, 80 Ala. 489; *Moore v. Atlanta*, 70 Ga. 611; *Hempstead v. Des Moines*, 52 Ia. 303; *Meyer v. Burlington*, 52 Ia. 560; *Thompson v. Keokuk*, 61 Ia. 187; *Karst v. St. Paul etc. R. R. Co.*, 22 Minn. 118; *S. C.* 23 Minn. 401; *Stowell v. Milwaukee*, 31 Wis. 523; *Church*

v. Same, 31 Wis. 512; *Tyson v. Same*, 50 Wis. 78.

City Council of Montgomery v. Maddox, 89 Ala. 181, 7 So. Rep. 433, 2 Am. R. R. & Corp. Rep. 426; *Platt v. Milford*, 66 Conn. 320, 34 Atl. Rep. 82; *Smith v. Floyd County*, 85 Ga. 422, 11 S. E. Rep. 850; *City Council of Augusta v. Schrameck*, 96 Ga. 426, 23 S. E. Rep. 400; *Osgood v. City of Chicago*, 154 Ill. 194, 41 N. E. Rep. 40; *City of Elgin v. McCallum*, 23 Ill. App. 186; *City of Bloomington v. Pollock*, 38 Ill. App. 133; *Osgood v. Chicago*, 44 Ill. App. 532; *City of Springfield v. Griffith*, 46 Ill. App. 246; *City of Savanna v. Loop*, 47 Ill. App. 214; *Hopkins v. City of Ottawa*, 59 Ill. App. 288; *North Alton v. Dorsett*, 59 Ill. App. 612; *McCash v. Burlington*, 72 Ia. 26; *Stewart v. Council Bluffs*, 84 Ia. 61, 50 N. W. Rep. 219; *Parker v. City of Atchison*, 46 Kan. 14, 26 Pac. Rep. 435; *Nelson v. West Duluth*, 55 Minn. 497, 57 N. W. Rep. 149; *City of Vicksburg v. Herman*, 72 Miss. 211, 16 So. Rep.

owner should receive such a sum as will make him whole. It is proper to consider the expense of adjusting the property to the new grade,⁷⁹ the cost of filling⁸⁰ and the cost of a retaining wall, if necessary.⁸¹ But these items cannot be recovered specifically. They are only elements tending to show damages.⁸² In Wisconsin it is held that the cost of filling, grading and paving the street itself, which is made a charge upon the lot, may also be recovered.⁸³ It is held

434; *Markowitz v. Kansas City*, 125 Mo. 485, 28 S. W. Rep. 642; *Smith v. Kansas City*, 128 Mo. 23, 30 S. W. Rep. 314; *Carson v. City of Springfield*, 53 Mo. App. 289; *Dale v. City of St. Joseph*, 59 Mo. App. 566; *City of Omaha v. Kramer*, 25 Neb. 492, 41 N. W. Rep. 295; *Lowe v. City of Omaha*, 33 Neb. 587, 50 N. W. Rep. 760; *Chambers v. South Chester*, 140 Pa. St. 510, 21 Atl. Rep. 409; *Dawson v. City of Pittsburgh*, 159 Pa. St. 317, 28 Atl. Rep. 171; *City of Ft. Worth v. Howard*, 3 Tex. Civ. App. 537, 22 S. W. Rep. 1059; *West v. Parkdale*, 15 Ont. 319; *Panse v. Atlanta*, 98 Ga. 92; *Preston v. Cedar Rapids*, 95 Ia. 71, 63 N. W. Rep. 577; *Grover v. Cornet*, 135 Mo. 21, 35 S. W. Rep. 1143; *Howard v. Crouch*, 47 Neb. 133, 66 N. W. Rep. 276; *Philadelphia Ball Club v. Phila.*, 192 Pa. St. 632; *Harper v. Detroit*, 110 Mich. 427; *Kent v. St. Joseph*, 72 Mo. App. 42.

⁷⁹ *Thompson v. Keokuk*, 61 Ia. 187; *Plympton v. Woburn*, 11 Gray, 415; *Hartshorn v. Worcester*, 113 Mass. 111; *Buell v. Same*, 119 Mass. 372; *McCarthy v. St. Paul*, 22 Minn. 527; *Church v. Milwaukee*, 31 Wis. 512; *French v. Same*, 49 Wis. 584; *Tyson v. Same*, 50 Wis. 78; *City Council*

of Augusta v. Schrameck, 96 Ga. 426, 23 S. E. Rep. 400; *City of Springfield v. Griffith*, 46 Ill. App. 246; *City of Topeka v. Martineau*, 42 Kan. 387, 22 Pac. Rep. 417; *Smith v. City of Kansas City*, 128 Mo. 23, 30 S. W. Rep. 314; *Dawson v. City of Pittsburgh*, 159 Pa. St. 317, 28 Atl. Rep. 171.

⁸⁰ *French v. Milwaukee*, 49 Wis. 584; *Tyson v. Milwaukee*, 50 Wis. 78; and other cases cited in last note.

⁸¹ *McCarthy v. St. Paul*, 22 Minn. 527; *Thompson v. Milwaukee & St. Paul Ry. Co.*, 27 Wis. 93, 98.

⁸² *Springfield v. Griffith*, 21 Ill. App. 93; *City Council of Augusta v. Schrameck*, 96 Ga. 426, 23 S. E. Rep. 400; *Chambers v. South Chester*, 140 Pa. St. 510, 21 Atl. Rep. 409; *Dawson v. Pittsburgh*, 159 Pa. St. 317, 28 Atl. Rep. 171. And see *Nelson v. West Duluth*, 55 Minn. 497, 57 N. W. Rep. 149; *City of Vicksburg v. Herman*, 72 Miss. 211, 16 So. Rep. 434.

⁸³ *Stowell v. Milwaukee*, 31 Wis. 523; *French v. Same*, 49 Wis. 584; *Tyson v. Same*, 50 Wis. 78. In Connecticut it has been held that the cost of a sidewalk destroyed might be considered. *Shelton v. Birmingham*, 62 Conn.

that the destruction of shade trees may be taken into account,⁸⁴ but not injury to business or loss of rents during the process of making the change or afterwards.⁸⁵ Nothing can be allowed for damage to improvements put upon the property after the new grade was established.⁸⁶ Any special benefits to the property by reason of the change may be considered in reduction of damages,⁸⁷ and, if such benefits equal the damages, no recovery can be had, although the owner may have to incur expense in order to use his property.⁸⁸ In determining the relative amount of damages and benefits the whole tract must be considered and not merely the part which borders on the street.⁸⁹ So the effect of the

456, 26 Atl. Rep. 348; *Cook v. City of Ansonia*, 66 Conn. 413, 34 Atl. Rep. 183.

⁸⁴ *Cook v. City of Ansonia*, 66 Conn. 413, 34 Atl. Rep. 183; *Seaman v. Bor. of Washington*, 172 Pa. St. 467, 33 Atl. Rep. 756; *Walker v. Sedalia*, 74 Mo. App. 70.

⁸⁵ *Osgood v. Chicago*, 154 Ill. 194, 41 N. E. Rep. 40; S. C. 44 Ill. App. 532; *Chambers v. South Chester*, 140 Pa. St. 510, 21 Atl. Rep. 409; *Philadelphia Ball Club v. Phila.*, 192 Pa. St. 632.

⁸⁶ *Davis v. Missouri Pac. R. Co.*, 119 Mo. 180, 24 S. W. Rep. 777, 9 Am. R. R. & Corp. Rep. 117; *Clinkingbeard v. St. Joseph*, 122 Mo. 641, 27 S. W. Rep. 521; *Axford v. Philadelphia*, 19 Phila. 483.

⁸⁷ *Chattanooga v. Geiler*, 13 Lea 611; *Church v. Milwaukee*, 31 Wis. 512; *Geneva v. Patterson*, 21 Ill. App. 454; *City of Bloomington v. Pollock*, 38 Ill. App. 133; *City of Savanna v. Loop*, 47 Ill. App. 214; *Lowe v. City of Omaha*, 33 Neb. 587, 50 N. W.

Rep. 760; *Stewart v. Council Bluffs*, 84 Ia. 61, 50 N. W. Rep. 219; *City of Omaha v. Schaller*, 26 Neb. 522, 42 N. W. Rep. 721; *Kirkendall v. Omaha*, 39 Neb. 1, 57 N. W. Rep. 752; *Barr v. Omaha*, 42 Neb. 342, 60 N. W. Rep. 591; *Chase v. Portland*, 86 Me. 367, 29 Atl. Rep. 1104; *In re Wyandotte & Central Sts.*, 117 Mo. 446, 23 S. W. Rep. 127; *Smith v. St. Joseph*, 122 Mo. 643, 27 S. W. Rep. 344; *Philadelphia v. Rudderow*, 166 Pa. St. 241, 31 Atl. Rep. 53; *Cole v. St. Louis*, 132 Mo. 633, 34 S. W. Rep. 469; *Aswell v. Scranton*, 175 Pa. St. 173, 34 Atl. Rep. 656.

⁸⁸ *Tyson v. Milwaukee*, 50 Wis. 78; *City of Elgin v. McCallum*, 23 Ill. App. 186; *Parker v. City of Atchison*, 46 Kan. 14, 26 Pac. Rep. 435; *Osgood v. Chicago*, 44 Ill. App. 532; *Philadelphia Ball Club v. Philadelphia*, 182 Pa. St. 362. But see *Estes v. Macon*, 103 Ga. 780, 30 S. E. Rep. 246.

⁸⁹ *Shawneetown v. Mason*, 82 Ill. 337; *Savanna v. Loop*, 47 Ill. App. 214.

whole improvement and not merely some features of it.⁹⁰ The damages should be estimated with reference to the time when the change was actually made.⁹¹

§ 495. **In case of viaducts, causeways and the like in streets.**—These cases are governed by precisely the same principles as those in the preceding section, both as to the right of recovery and the measure of damages,⁹² and any further consideration of them is unnecessary.

§ 496. **Various elements of damages when part of a tract is taken.**—It would be difficult to enumerate the various elements of damages proper to be considered when part of a tract is taken. The shape and size of the parcel or parcels which remain,¹ the difficulty of access and of communica-

The following cases are also referred to on the general subject of the measure and elements of damages for a change of grade: *Eachus v. Los Angeles Consol. Electric R. R. Co.*, 103 Cal. 614, 37 Pac. Rep. 750; *Carson v. City of Springfield*, 53 Mo. App. 289; *Wilson v. Beaver Borough*, 13 Pa. Co. Ct. 75; *In re Petition of New Castle*, 16 Pa. Co. Ct. 478; *Cooper v. City of Dallas*, 83 Tex. 239, 18 S. W. Rep. 565; *Koch v. Sackman-Phillips Inv. Co.*, 9 Wash. 405, 37 Pac. Rep. 703; *West v. Parkdale*, 15 Ontario 319; *Hubbard v. Webster*, 118 Mass. 599; *J. G. Brill Co. v. Philadelphia*, 167 Pa. St. 1, 31 Atl. Rep. 348; *Parke v. Seattle*, 5 Wash. 1, 31 Pac. Rep. 310; *Dixon v. Baker*, 65 Ill. 518; *Ryan v. Boston*, 118 Mass. 248; *Greggs v. Baltimore*, 56 Md. 256; *Winchester v. Stevens' Point*, 58 Wis. 350.

⁹⁰ *Boyd v. Wilkinsburg*, 183 Pa. St. 199.

⁹¹ *Bancroft v. San Diego*, 120 Cal. 432; and see § 667.

⁹² *Chouteau v. St. Louis*, 8 Mo. App. 48; *Chicago v. McDonough*, 112 Ill. 85; *East St. Louis v. Wiggins Ferry Co.*, 11 Ill. App. 254; *Lehigh Valley Coal Co. v. Chicago*, 26 Fed. Rep. 415; *Osgood v. Chicago*, 154 Ill. 194, 41 N. E. Rep. 40; *Slattery v. St. Louis*, 120 Mo. 183, 25 S. W. Rep. 521.

¹ *St. Louis etc. R. R. Co. v. Anderson*, 39 Ark. 167; *Springfield & Memphis Ry. Co. v. Rhea*, 44 Ark. 258; *North Pacific R. R. Co. v. Reynolds*, 50 Cal. 90; *Tonica etc. R. R. Co. v. Unsicker*, 22 Ill. 221; *Keithsburg & East R. R. Co. v. Henry*, 79 Ill. 290; *White Water Valley R. R. Co. v. McClure*, 29 Ind. 536; *Baltimore & Ohio R. R. Co. v. Lansing*, 52 Ind. 229; *Hagaman v. Moore*, 84 Ind. 496; *Brooks v. Davenport & St. Paul R. R. Co.*, 37 Ia. 99; *Missouri Pacific Ry. Co. v. Hays*, 15 Neb. 224; *Plank Road Co. v. Ramage*, 20 Pa. St. 95; *Selma etc. R. R. Co. v. Redewine*, 51 Ga. 470; *Montmorency Gravel R. R. Co. v. Stockton*, 43 Ind. 328.

tion between the different parts,² inconvenience and disfigurement caused by the taking,³ any interference with the drainage of the land or with the flow of surface water,⁴ or with the water supply,⁵ are recognized by all authorities as

² *Ibid.*, and *Brunswick & Albany R. R. Co. v. McLaren*, 47 Ga. 546; *Galena etc. R. R. Co. v. Birkbeck*, 70 Ill. 208; *Peoria etc. R. R. Co. v. Sawyer*, 71 Ill. 361; *Chicago & Iowa Ry. Co. v. Hopkins*, 90 Ill. 316; *Hagaman v. Moore*, 84 Ind. 496; *Dreher v. Iowa etc. R. R. Co.*, 59 Ia. 599; *Hardin v. Funk*, 8 Kan. 315; *Vicksburg, Shreveport & Pacific R. R. Co. v. Dillard*, 35 La. An. 1045; *New Orleans Pacific Ry. Co. v. Murrell*, 36 La. An. 344; *Bates v. Ray*, 102 Mass. 458; *St. Paul & Sioux City R. R. Co. v. Murphy*, 19 Minn. 500; *Hatch v. Cincinnati & Indiana R. R. Co.*, 18 Ohio St. 92; *East Pennsylvania R. R. Co. v. Hiester*, 40 Pa. St. 53; *Texas & P. Ry. Co. v. Durett*, 57 Tex. 48; *Snyder v. Western Union R. R. Co.*, 25 Wis. 60; *Chicago etc. R. R. Co. v. Graney*, 137 Ill. 628, 25 N. E. Rep. 798; *Grand Rapids etc. R. R. Co. v. Chesebro*, 74 Mich. 466, 42 N. W. Rep. 66.

³ *San Bernadino & E. R. R. Co. v. Haven*, 94 Cal. 489, 29 Pac. Rep. 875; *Chicago etc. R. R. Co. v. Nix*, 137 Ill. 141, 27 N. E. Rep. 81; *Chicago etc. R. R. Co. v. Blume*, 137 Ill. 448, 27 N. E. Rep. 601; *Hartshorn v. B. C. R. & N. R. R. Co.*, 52 Ia. 613; *Missouri Pac. R. R. Co. v. Dulaney*, 38 Kan. 246, 16 Pac. Rep. 343; *Board of Comrs. v. Hogan*, 39 Kan. 606, 18 Pac. Rep. 611; *St.*

Louis etc. R. R. Co. v. McAuliff, 43 Kan. 185, 23 Pac. Rep. 102; *Kansas City etc. R. R. Co. v. Dawley*, 50 Mo. App. 480; *Freemont etc. R. R. Co. v. Meeker*, 28 Neb. 94, 44 N. W. Rep. 79; *Port v. Huntington etc. R. R. Co.*, 168 Pa. St. 19, 31 Atl. Rep. 950; *Gainesworth etc. R. R. Co. v. Waples*, 3 Tex. Ct. of App. p. 482, § 409; *Wilkey v. Philadelphia*, 180 Pa. St. 146, 36 Atl. Rep. 1131.

⁴ *Springfield & Memphis Ry. Co. v. Rhea*, 44 Ark. 258; *Bentonville R. R. Co. v. Baker*, 45 Ark. 252; *Vicksburg, Shreveport & Pacific R. R. Co. v. Dillard*, 35 La. An. 1045; *New Orleans & Pacific Ry. Co. v. Murrell*, 36 La. An. 344; *Walker v. Old Colony & Newport R. R. Co.*, 103 Mass. 10; *Levee Comrs. v. Harkle-roads*, 62 Miss. 807; *Pflegar v. Hastings & Dakota Ry. Co.*, 28 Minn. 510; *Steele v. Western Inland Lock Nav. Co.*, 2 Johns. 283; *Matter of Boston, Hoosac Tunnel & Western Ry. Co.*, 31 Hun 461; *Bloomfield v. Calkins*, 1 N. Y. Supreme Ct. Rep. 549; *G. C. & S. F. Ry. Co. v. Donahoo*, 59 Tex. 128; *Seattle & M. R. Co. v. Gilchrist*, 4 Wash. 509, 30 Pac. Rep. 738.

⁵ *Peoria etc. R. R. Co. v. Sawyer*, 71 Ill. 361; *Keithsburg & East R. R. Co. v. Henry*, 79 Ill. 290; *Peoria etc. Ry. Co. v. Bryant*, 57 Ill. 473; *White Water Valley R. R. Co. v. McClure*, 29

proper items to be taken into account in assessing the damages. Where a railroad is laid through a farm, it is proper to consider the expense of constructing necessary farm crossings,⁶ unless it is made the duty of the company to build such crossings;⁷ also the danger to which the occupants of the farm and the stock thereon will be exposed, so far as the same affects the value of the farm.⁸ Injury to

Ind. 536; Baltimore & Ohio R. Co. v. Lansing, 52 Ind. 229; McDough v. Clark, 7 B. Mon. 448; St. Paul & Sioux City R. R. Co. v. Murphy, 19 Minn. 500; Readington v. Dilley, 24 N. J. L. 209; Matter of Boston, Hoosac Tunnel & Western Ry. Co., 31 Hun 461; Lehigh Valley R. R. Co. v. Trone, 28 Pa. St. 206; Chicago etc. R. R. Co. v. Greiney, 137 Ill. 628, 25 N. E. Rep. 798; Montmorency Gravel Road Co. v. Stockton, 43 Ind. 328; Chicago etc. R. R. Co. v. Bowman, 122 Ill. 595.

⁶ Atchison & Nebraska R. R. Co. v. Gough, 29 Kan. 94; Mason v. Kennebec & Portland R. R. Co., 31 Me. 215; Silver Creek etc. Co. v. Mangum, 64 Miss. 682; Marsh v. Portsmouth & Concord R. R. Co., 19 N. H. 372; Kansas City etc. R. R. Co. v. Baird, 41 Kan. 69, 21 Pac. Rep. 227; Port v. Huntington etc. R. R. Co., 168 Pa. St. 19, 31 Atl. Rep. 950; Schmidt v. Minneapolis etc. R. R. Co., 38 Minn. 491, 38 N. W. Rep. 487; Gulf etc. R. R. Co. v. Rowland, 70 Tex. 298, 7 S. W. Rep. 718; Gulf etc. R. R. Co. v. Ellis, 70 Tex. 307, 7 S. W. Rep. 722; Seattle & M. R. R. Co. v. Murphine, 4 Wash. 448, 30 Pac. Rep. 720. But see Atchison etc. R. R. Co. v. Lyon, 24 Kan. 745.

⁷ St. Paul & Sioux City R. R. Co. v. Murphy, 19 Minn. 500; Philadelphia etc. R. R. Co. v. Trimble, 4 Wharton, 47; Bell v. C., B. & Q. R. R. Co., 74 Ia. 343, 37 N. W. Rep. 768; Pingree v. Cherokee & D. R. R. Co., 78 Ia. 438, 43 N. W. Rep. 285; St. Louis etc. R. R. Co. v. North, 31 Mo. App. 345.

⁸ St. Louis etc. Ry. Co. v. Teters, 68 Ill. 144; Peoria etc. R. R. Co. v. Sawyer, 71 Ill. 361; Curtis v. St. Paul etc. R. R. Co., 20 Minn. 28; Weyer v. Chicago, Wis. & N. R. R. Co., 68 Wis. 180; County of Blue Earth v. St. Paul & Sioux City R. R. Co., 28 Minn. 503; Price v. Milwaukee & St. Paul Ry. Co., 27 Wis. 98; Somerville etc. R. R. Co. v. Doughty, 22 N. J. L. 495; Leroy & W. R. R. Co. v. Ross, 40 Kan. 598, 20 Pac. Rep. 197; Little Rock etc. R. R. Co. v. Allen, 41 Ark. 431; Fayetteville etc. R. R. Co. v. Combs, 51 Ark. 324, 11 S. W. Rep. 418; Chicago etc. R. R. Co. v. Aldrich, 134 Ill. 9, 24 N. E. Rep. 763; Kansas City etc. R. R. Co. v. Dawley, 50 Mo. App. 480. But see Chicago etc. R. R. Co. v. Palmer, 44 Kan. 110, 24 Pac. Rep. 342; Florence etc. R. R. Co. v. Pembler, 45 Kan. 625, 26 Pac. Rep. 1; St. Louis etc. R. R. Co. v. Hammers, 51 Kan. 127,

grass from dirt washed from an embankment was held a proper item of damage.⁹

"In an inquiry whether, and how much, the part of a farm not taken for railroad right of way is depreciated in value by the appropriation of a part, evidence as to the size of the farm; the purpose for which it was used; the improvements thereon, and how located; the direction of the road across the farm; the cuts and fills made or to be made in the construction of the road; the width of the right of way; the height of embankments; the depth of ditches; the inconvenience in crossing the track from one part of the farm to another; the liability of stock being killed; the danger from fire from passing trains,—are all facts competent for the jury's consideration in determining the depreciation in value of the remainder of the farm."¹⁰ In the case just referred to it was also said that "everything which tended to show that the continuing presence and operation of the road across the farm tended to make it more valuable was competent, and everything which tended to show that the continuing presence and operation of the road across the farm depreciated its market value was competent."¹¹ Every element arising from the construction and operation of the work or improvement, which, in an appreciable degree, is capable of ascertainment in dollars and cents, that enters into the diminution or increase of the value of the particu-

32 Pac. Rep. 922; Chicago etc. R. R. Co. v. Shafer, 49 Neb. 25, 68 N. W. Rep. 342.

⁹ Railroad Co. v. Gilson, 8 Watts 243.

¹⁰ Omaha Southern R. R. Co. v. Todd, 39 Neb. 818, 58 N. W. Rep. 289. Approved in Fremont etc. R. R. Co. v. Bates, 40 Neb. 381, 58 N. W. Rep. 959. To the same effect, Little Rock etc. R. R. Co. v. Allen, 41 Ark. 431; Chicago etc. R. R. Co. v. Bowman, 122 Ill. 595; Kiernan v. Chicago etc.

R. R. Co., 123 Ill. 188; Chicago etc. R. R. Co. v. Nix, 137 Ill. 141, 27 N. E. Rep. 81; Chicago etc. R. R. Co. v. Blume, 137 Ill. 448, 27 N. E. Rep. 601; Bell v. C. B. & Q. R. R. Co., 74 Ia. 343, 37 N. W. Rep. 768; Missouri etc. R. R. Co. v. Haines, 10 Kan. 439; Fremont etc. R. R. Co. v. Meeker, 28 Neb. 94, 44 N. W. Rep. 79; State v. Hudson County Board, 55 N. J. L. 88, 25 Atl. Rep. 322.

¹¹ Omaha Southern R. R. Co. v. Todd, 39 Neb. 818, 58 N. W. Rep. 289,

lar property, is properly to be taken into consideration in determining whether there has been damage and the extent of it.¹² Remote, imaginary, uncertain and speculative damages should be disregarded.¹³ In case of a street opening the cost of future improvements of the street cannot be shown.¹⁴ When the operation of a railroad will pollute a stream, damages from this source may be included.¹⁵ Where an easement was taken for a sewer and the building of the sewer temporarily lowered the water level in the soil and destroyed a crop, it was held a proper element of damages.¹⁶

§ 497. **Danger from fire.**—When a part of a tract is taken for railroad purposes, danger from fire to buildings, fences, timber or crops upon the remainder, in so far as it depreciates the value of the property, may properly be considered.¹⁷ It is immaterial that the railroad company is

¹² Metropolitan W. S. E. R. R. Co. v. Stickney, 150 Ill. 362, 37 N. E. Rep. 1098, 10 Am. R. R. & Corp. Rep. 1. And see Snodgrass v. Chicago, 152 Ill. 600, 38 N. E. Rep. 790.

¹³ Ibid.; Kiernan v. Chicago etc. R. R. Co., 123 Ill. 188; Cook & R. R. Co. v. Sanitary District, 177 Ill. 599, 52 N. E. Rep. 870.

¹⁴ Albertson v. Phila., 185 Pa. St. 223.

¹⁵ Randolph v. Penn. S. V. R. R. Co., 186 Pa. St. 541.

¹⁶ Penny v. Commonwealth, 173 Mass. 507.

¹⁷ St. Louis etc. R. R. Co. v. Anderson, 39 Ark. 167; Texas & St. Louis Ry. Co. v. Cella, 42 Ark. 528; Keithsburg & East R. R. Co. v. Henry, 79 Ill. 290; Kansas City & Emporia R. R. Co. v. Kregelo, 32 Kan. 608; Weber v. Eastern R. R. Co., 2 Met. 147; Pierce v. Worcester & Nashua R. R. Co., 105 Mass. 199; Harrington

v. St. Paul & Sioux City R. R. Co., 17 Minn. 215; Colville v. St. Paul & Chicago Ry. Co., 19 Minn. 283; Curtis v. St. Paul & C. R. R. Co., 20 Minn. 28; Stillman v. Northern Pacific etc R. R. Co., 34 Minn. 420; Somerville & C. R. R. Co. v. Doughty, 22 N. J. L. 495; Hatch v. Cincinnati & Indiana R. R. Co., 18 Ohio St. 92; In re Stockport, Timperley & Altringham Ry. Co., 33 L. J. Q. B. 251. The earlier cases in Pennsylvania hold a contrary doctrine. Sunbury & Erie R. R. Co. v. Hummell, 27 Pa. St. 99; Lehigh Valley R. R. Co. v. Lazarus, 28 Pa. St. 203; but Wilmington & Reading R. R. Co. v. Stauffer, 60 Pa. St. 374; Pittsburgh, Bradford & Buffalo Ry. Co. v. McClosky, 110 Pa. St. 436, establish the law in accordance with the text. Railroad Co. v. Yeiser, 8 Pa. St. 366, depends upon the language of the statute,

made absolutely liable for all losses by fire which originate from the operation of the road, whether they result from negligence or otherwise.¹⁸ Such a liability would doubtless render the depreciation in value less than in cases where the company was liable only for fires resulting from negligence. It is to be borne in mind that compensation is not to be given for increased exposure to fire, nor for increased insurance rates,¹⁹ nor for probable losses by fire in the future for which no recovery can be had, but simply for depreciation in the value of the property by reason of the danger from fire. The evidence should, therefore, be limited to showing all the facts in regard to the situation of the

Little Rock etc. R. R. Co. v. Allen, 41 Ark. 431; Chicago etc. R. R. Co. v. Bowman, 122 Ill. 595; Centralia etc. R. R. Co. v. Brake, 125 Ill. 393, 17 N. E. Rep. 820; Chicago etc. R. R. Co. v. Nix, 137 Ill. 141, 27 N. E. Rep. 81; Chicago etc. R. R. Co. v. Blume, 137 Ill. 448, 27 N. E. Rep. 601; Chicago etc. R. R. Co. v. Greiney, 137 Ill. 628, 25 N. E. Rep. 798; Chicago etc. R. R. Co. v. Atterbury, 156 Ill. 281, 40 N. E. Rep. 826; Chicago etc. R. R. Co. v. Moore, 63 Ill. App. 163; Pingrey v. Cherokee etc. R. R. Co., 78 Ia. 438, 43 N. W. Rep. 285; St. Louis etc. R. R. Co. v. McAuliff, 43 Kan. 185, 23 Pac. Rep. 102; Johnson v. Chicago etc. R. R. Co., 37 Minn. 519, 35 N. W. Rep. 438; Chicago etc. R. R. Co. v. O'Connor, 42 Neb. 90, 60 N. W. Rep. 326; Laing v. United N. J. R. R. Co., 54 N. J. L. 576, 25 Atl. Rep. 409; Philadelphia etc. R. R. Co. v. Rogers, 2 Walker's Pa. Supr. Ct. 275; Gainesville etc. R. R. Co. v. Waples, 3 Tex. Ct. of App. p. 482, § 409; Seattle & M. R. R. Co. v. Gilchrist, 4 Wash.

509, 30 Pac. Rep. 738; Hamilton v. Pittsburg etc. R. R. Co., 190 Pa. St. 51, 42 Atl. Rep. 369.

Contra: Fleming v. Chicago etc. R. R. Co., 34 Ia. 353; Pittsburg etc. R. R. Co. v. Noftsgger, 148 Ind. 101; In matter of Union etc. R. R. Co., 53 Barb. 457; St. Louis etc. R. R. Co. v. North, 31 Mo. App. 345. See Matter of Brooklyn El. R. R. Co., 6 App. Div. 53, 39 N. Y. Supp. 474.

¹⁸ Bangor & Piscataquis R. R. Co. v. McComb, 60 Me. 290; Aden v. Railroad Co., 55 N. H. 413.

¹⁹ Patten v. Northern Central R. R. Co., 33 Pa. St. 426. In Pingrey v. Cherokee etc. R. R. Co., 78 Ia. 438, 43 N. W. Rep. 285, it was held incompetent to show that insurance rates would be increased. But the contrary is held in the following, on the ground that increased insurance rates would affect the value of the property. Cedar Rapids etc. R. R. Co. v. Raymond, 37 Minn. 204, 33 N. W. Rep. 704; Erlich v. Mason City etc. R. R. Co., 75 Ia. 443, 39 N. W. Rep. 700.

property and improvements relatively to the railroad²⁰ and perhaps to showing the distance from the road to which the danger extends. Evidence of actual damages by fire before the assessment of damages should be excluded.²¹ Where a railroad was laid so near buildings that reasonable prudence would require their removal, it was held proper to show this and the cost of removal.²² Where a railroad was laid in close proximity to a planing mill, it was held error to exclude evidence that the owners of the mill could, by the use of a certain kind of dust receiver, make the mill comparatively safe from fires from sparks.²³ It has been held that danger from fire during the process of constructing a public work may not be considered.²⁴

§ 498. **Cost of fencing.**—Where, by taking a part of a tract, additional fencing will be rendered necessary in order to the reasonable use and enjoyment of the remainder, as it probably will be used in the future, and the burden of constructing such additional fence is cast upon the owner of the land; then the burden of constructing and maintaining such fence in so far as it depreciates the value of the land, is a proper element to be considered in estimating the damages.²⁵ In some of the cases cited an allowance was made

²⁰ *Lance v. Chicago, M. & St. P. R. R. Co.*, 57 Ia. 636; *Gilmore v. Pittsburgh etc. R. R. Co.*, 104 Pa. St. 275.

²¹ *Gilmore v. Pittsburgh etc. R. R. Co.*, 104 Pa. St. 275.

²² *Philadelphia etc. R. R. Co. v. Rogers*, 2 Walker's Pa. Supm. Ct. 275.

²³ *Fort Street Union Depot Co. v. Backus*, 92 Mich. 33, 52 N. W. Rep. 790.

²⁴ *High Bridge Lumber Co. v. United States*, 69 Fed. Rep. 320, 16 C. C. A. 460.

²⁵ *St. Louis etc. R. R. Co. v. Anderson*, 39 Ark. 167; *Texas & St. Louis Ry. Co. v. Cella*, 42 Ark. 528; *Sacramento Valley R.*

R. Co. v. Moffatt, 6 Cal. 74; *Butte Co. v. Boydston*, 64 Cal. 110; *Leavenworth etc. Ry. Co. v. Paul*, 28 Kan. 816; *Louisville & Nashville R. R. Co. v. Glazebrook*, 1 Bush 325; *Alton & Sangamon R. R. Co. v. Baugh*, 14 Ill. 211; *Tonica etc. R. R. Co. v. Unsicker*, 22 Ill. 221; *Evansville etc. R. R. Co. v. Fitzpatrick*, 10 Ind. 120; *Same v. Stringer*, 10 Ind. 551; *Montmorency Gravel Road Co. v. Rock*, 41 Ind. 263; *Baltimore & Ohio R. R. Co. v. Lansing*, 52 Ind. 229; *Hagaman v. Moore*, 84 Ind. 496; *Commonwealth v. Comrs.*, 2 Mass. 489; *Stone v. Heath*, 135 Mass. 561; *Winona & St. Peter R. R. Co.*

for the cost of fencing as a specific item, and the language of many of the decisions seems to warrant the same view. But this is clearly not correct, unless such an allowance is required by the statute under which the proceedings are had.²⁶ It is a question of damage to the land, as land. If, in view of the probable future use of the land, additional fencing will be necessary, of which the jury or commissioners are to judge,²⁷ and the owner must construct the fence if he has it, then the land is depreciated in proportion to the expense of constructing and maintaining such fencing. Nothing can be allowed for fence, as fence.²⁸ The allowance should be for the depreciation of the land in conse-

v. Denman, 10 Minn. 267; Readington v. Dilley, 24 N. J. L. 209; New York & Greenwood Lake R. R. Co. v. Heirs of Stanley, 39 N. J. Eq. 361; Plank Road Co. v. Rammage, 20 Pa. St. 95; Pittsburgh, Bradford & Buffalo Ry. Co. v. McClosky, 110 Pa. St. 436; Greenville & Columbus R. R. Co. v. Partlow, 5 Rich. (S. C.) 428; Eddings v. Seabrook, 12 Rich. (S. C.) 504; Milwaukee & Mississippi R. R. Co. v. Eble, 4 Chand. Wis. 72; Robbins v. Milwaukee Horicon R. R. Co., 6 Wis. 636.

Newgass v. St. Louis etc. R. R. Co., 54 Ark. 140, 15 S. W. Rep. 188, 4 Am. R. R. & Corp. Rep. 44; Los Angeles etc. R. R. Co. v. Rumpp, 94 Cal. 432, 29 Pac. Rep. 872; Board of Comrs. v. Hogan, 39 Kan. 606, 18 Pac. Rep. 611; Van Bentham v. Board of Comrs., 49 Kan. 30, 30 Pac. Rep. 111; Street v. New Orleans etc. R. R. Co., 43 La. An. 116, 9 So. Rep. 15; First Parish v. County of Plymouth, 8 Cush. 475; White v. Foxborough, 151 Mass. 28, 23 N. E. Rep. 652; Curtin v.

Nittany Valley R. R. Co., 135 Pa. St. 20, 19 Atl. Rep. 740; Montour R. Co. v. Scott, 1 Penny. 503; Griffin v. Penn. Schuylkill Val. R. R. Co., 1 Mont. Co. L. Rep. 169; Norfolk & W. R. R. Co. v. Stephens, 85 Va. 302, 7 S. E. Rep. 251; Seattle & M. R. R. Co. v. Murphine, 4 Wash. 448, 30 Pac. Rep. 720.

And see Los Angeles etc. R. R. Co. v. Rump, 104 Cal. 20, 37 Pac. Rep. 859; Nelson v. Minneapolis etc. R. R. Co., 40 Minn. 131, 42 N. W. Rep. 788. Compare Alabama & Florida R. R. Co. v. Burkett, 46 Ala. 569.

²⁶ See opening of 15th St., 10 Phila. 214.

²⁷ Milwaukee & Mississippi R. R. Co. v. Eble, 4 Chand. Wis. 72; First Parish v. County of Plymouth, 8 Cush. 475. If no additional fencing will be necessary, no allowance can be made on that basis. North Eastern R. R. Co. v. Sineath, 8 Rich. L. 185; Lockie v. Mutual Union Tel. Co., 103 Ill. 401.

²⁸ Hanrahan v. Fox, 47 Ia. 102;

quence of the burden thus cast upon it.²⁹ Evidence of the cost of suitable fencing is competent as affording a means of arriving at the extent of the burden.³⁰ Where by statute a railroad is bound to fence its right of way, no allowance can be made to the owner for that purpose.³¹ So, where by general law the railroad is bound to construct half the fence, damages should be assessed accordingly.³² Where the railroad company was not bound to fence its track for six months, an instruction that the jury might consider the damage which would result from keeping open the road during that time was held proper.³³ And where the law required the railroad company to fence its track it was held proper to instruct the jury that they might consider whether the owner would not be damaged more by a road with fences than by one without them.³⁴ In Illinois it has been held that, if the company has built a fence, or procures the damage to be assessed on the basis that it will do so, the owner may compel it to do so,³⁵ and that the record should show whether or not an allowance is made for that purpose, in order that there may be no doubt about the

Seattle etc. R. R. Co. v. Murphine, 4 Wash. 448, 30 Pac. Rep. 720; Montour R. Co. v. Scott, 1 Penny. 503; Commissioners' Court v. Street, 116 Ala. 28, 22 So. Rep. 629.

²⁹ Delaware etc. R. R. Co. v. Burson, 61 Pa. St. 369; Pennsylvania & New York R. R. Co. v. Bunnell, 81 Pa. St. 414.

³⁰ Butte Co. v. Boydston, 64 Cal. 110; Stone v. Heath, 135 Mass. 561; Commissioners Court v. Street, 116 Ala. 28, 22 So. Rep. 629.

³¹ Winona & St. Peter R. R. Co. v. Waldron, 11 Minn. 515; Sedalia, Warsaw & Southern Ry. Co. v. Abell, 18 Mo. App. 632; Chicago etc. R. R. Co. v. Bakér,

102 Mo. 553, 15 S. W. Rep. 64; St. Joseph etc. R. R. Co. v. Shambaugh, 106 Mo. 557, 17 S. W. Rep. 581.

³² Winona & St. Peter R. R. Co. v. Denman, 10 Minn. 267; Matter of Rennsalaer & Saratoga R. R. Co., 4 Paige 553.

³³ St. Louis etc. R. R. Co. v. Kirby, 104 Ill. 345; Centralia etc. R. R. Co. v. Rixman, 121 Ill. 214; Centralia etc. R. R. Co. v. Brake, 125 Ill. 393, 17 N. E. Rep. 820; Chicago etc. R. R. Co. v. Eaton, 136 Ill. 9, 26 N. E. Rep. 575; Chicago etc. R. R. Co. v. Greiney, 137 Ill. 628, 25 N. E. Rep. 798.

³⁴ Minnesota Valley R. R. Co. v. Doran, 17 Minn. 188.

³⁵ St. Louis etc. R. R. Co. v. Mitchell, 47 Ill. 165.

future obligations of the parties.³⁶ If the statute requires an allowance for fencing through improved lands, the record should show, when an allowance is made, that the lands are improved.³⁷ It has been held that where the owner claimed damages for additional fencing required in case of laying out a highway, the county might show that a hedge on the part taken could be moved at much less expense than the cost of a new fence.³⁸ Where a strip half a rod wide was taken next to a railroad right of way for a telegraph, it was held error to make an allowance for additional fencing, because none was necessary.³⁹ So if it appears that there is no necessity for a fence, or if none is shown, no allowance can be made on that account.⁴⁰ Where the owner conveys to a railroad, he can recover nothing from it for having to fence the right of way, though this would have been an element of damages in case of condemnation.⁴¹

§ 499. **The question of interest.**—The question of interest in condemnation cases has been the subject of much diversity of opinion. In the absence of any statutory provisions controlling the subject, the rules in respect to interest must be derived from the constitutional provision requiring just compensation. Where damages are assessed for property which has already been lawfully appropriated to public use, interest should be allowed from the time of the appropriation, or entry on the property.⁴² And where property is

³⁶ *Rock Island etc. R. R. Co. v. Lynch*, 23 Ill. 645.

³⁷ *New Jersey etc. R. R. Co. v. Suydam*, 17 N. J. L. 25.

³⁸ *Commissioners of Shawnee Co. v. Beckwith*, 10 Kan. 603. And see *Hire v. Knisley*, 130 Ind. 295, 29 N. E. Rep. 1132.

³⁹ *Lockie v. Mutual Union Tel. Co.*, 103 Ill. 401.

⁴⁰ *Detroit v. Beecher*, 75 Mich. 454, 42 N. W. Rep. 986; *Newgass v. St. Louis etc. R. R. Co.*, 54 Ark. 140, 15 S. W. Rep. 188, 4 Am. R. R. & Corp. Rep. 44.

Whether land is worth fencing or not is held to be a question for the jury. *Colusa County v. Hudson*, 85 Cal. 633, 24 Pac. Rep. 791.

⁴¹ *St. Louis etc. Ry. Co. v. Walbrink*, 47 Ark. 330.

⁴² *Missouri River, Fort Scott & Gulf R. R. Co. v. Owen*, 8 Kan. 409; *Lawrence v. Second Municipality*, 2 La. An. 651; *Gay v. Gardiner*, 54 Me. 477; *Bangor & Piscataquis R. R. Co. v. McComb*, 60 Me. 290; *Whitman v. Boston & Maine R. R. Co.*, 7 Al-

taken possession of for public use, though wrongfully, and a suit or proceeding is commenced for the just compensation, interest should be allowed from the date of the entry.⁴³ And where damages are assessed for property to be afterwards taken, the award or verdict should include interest from the time with reference to which the damages are estimated, to be reduced by the value of the use of the property to the owner while he continues to have such use.⁴⁴ As we have before observed, the estimating and

len 313; *Reed v. Hannover Branch R. R. Co.*, 105 Mass. 303; *Edmunds v. Boston*, 108 Mass. 535; *Kidder v. Oxford*, 116 Mass. 165; *Chandler v. Jamaica Pond Aqueduct Co.*, 125 Mass. 544; *Drury v. Midland R. R. Co.*, 127 Mass. 571; *Railroad Co. v. Gesner*, 20 Pa. St. 240; *Delaware etc. R. R. Co. v. Burson*, 61 Pa. St. 369; *Chicago v. Smythe*, 33 Ill. App. 28; *Old Colony R. R. Co. v. Miller*, 125 Mass. 1; *Geissinger v. Hellertown*, 133 Pa. St. 522, 19 Atl. Rep. 412; *Weiss v. South Bethlehem*, 136 Pa. St. 294, 20 Atl. Rep. 801; *Myers v. Schuylkill Riv. E. S. R. R. Co.*, 19 Phil. 468, 5 Pa. Co. Ct. 634; *Bridge-man v. Village of Hardwick*, 67 Vt. 653, 32 Atl. Rep. 502; *Velte v. United States*, 76 Wis. 278, 45 N. W. Rep. 119; *James v. Ontario etc. R. R. Co.*, 12 Ont. 624.

⁴³ *Phillips v. South Park Commissioners*, 119 Ill. 626; *Cohen v. St. Louis, Ft. Scott & Wichita R. R. Co.*, 34 Kan. 158; *Ragan v. Kansas City etc. R. R. Co.*, 144 Mo. 623; *Webster v. Kansas City etc. R. R. Co.*, 116 Mo. 114, 22 S. W. Rep. 474; *Longworth v. Cincinnati*, 48 Ohio St. 637, 29 N. E. Rep. 274; *Alloway v. City of Nashville*, 88 Tenn. 510, 13 S. W.

Rep. 123, 1 Am. R. R. & Corp. Rep. 123; *Bellingham Bay etc. R. R. Co. v. Strand*, 14 Wash. 144, 44 Pac. Rep. 140. But in the following cases it was held that interest should be allowed from the commencement of the suit or proceeding. *Shreveport & A. R. R. Co. v. Hollingsworth*, 42 La. An. 729, 7 So. Rep. 693; *New-gass v. St. Louis etc. R. R. Co.*, 54 Ark. 140, 15 S. W. Rep. 188, 4 Am. R. R. & Corp. Rep. 44. See *Greeley etc. R. R. Co. v. Yount*, 7 Col. App. 189, 42 Pac. Rep. 1023. *Compare Tudor v. Chicago etc. R. R. Co.*, 164 Ill. 73, 46 N. E. Rep. 446.

⁴⁴ *Warren v. First Division of St. Paul & Pacific R. R. Co.*, 21 Minn. 424; *Knauff v. St. Paul etc. R. R. Co.*, 22 Minn. 173; *Whitacre v. St. Paul & Sioux City R. R. Co.*, 24 Minn. 311; *Minneapolis v. Wilkin*, 30 Minn. 145; *Mont Clair R. R. Co. v. Benson*, 36 N. J. Eq. 557; *Metler v. Easton & Amboy R. R. Co.*, 37 N. J. L. 222; *West v. Milwaukee etc. Ry. Co.*, 56 Wis. 318; *Matter of New York*, 40 N. Y. App. Div. 281; *Miller v. Asheville*, 112 N. C. 759, 16 S. E. Rep. 762. But in *Imbesheid v. Old Colony R. R. Co.*, 171 Mass. 209, 50 N. E.

payment of the compensation should be concurrent with the taking. As this is impossible in practice, a time must be selected with reference to which the compensation shall be assessed and to which the title will relate when the compensation is paid. This point of time must necessarily be before the compensation can be paid. Between that time and the payment the owner has only a qualified use of his property. He may use it as it is, but he cannot improve or sell it except subject to rights acquired by the condemnation. As his just compensation is withheld from him, though necessarily, he should have an equivalent for such withholding, and that, in law, is legal interest. This is just to the owner. But he should not have more than is just, and justice to the party condemning requires that the value of the possession to the owner should be deducted from the interest.

"While the assessed value, if paid at the date taken for the assessment, might be just compensation, it certainly would not be, if payment be delayed, as might happen in many cases, and as did happen in this case, till several years after that time. This difference is the same as between a sale for cash in hand and a sale on time.

"It is true that, until the company actually takes possession, at the end of the proceedings, the owner has the legal right to possess and use the land. It cannot be assumed that the value of this legal right is equivalent to the interest on the assessed value of the land. From the time of the award, he is practically deprived of his right to dispose of the land. His possession is precarious, liable to be terminated at any time; he cannot safely rent; he cannot safely improve; if he sows, he cannot be sure that he will reap. As he is not placed in this position by any act of his own, is not in as a wrong-doer, nor under any contract, there would be no justice in charging him with any assumed value of the use. Where the owner has actually derived benefit

Rep. 609, where the owner kept the condemner out of possession for a year, it was held that he	was entitled to interest without deduction for the use of the premises.
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and value from his possession and use, between the filing of the award and the assessment by the jury, the value of such possession and use may be ascertained by the jury, and the amount of it deducted from the interest allowed."⁴⁵

Where, pending an appeal, the party condemning deposits the damages awarded and takes possession, if the owner secures an increase of the award, he should have interest on the whole award from the date of possession.⁴⁶ Some cases hold that interest should be allowed only on the excess.⁴⁷ In either case the interest should be included in the award, as a distinct action cannot be maintained for its recovery.⁴⁸ If the damages are not increased on appeal, the owner is not entitled to interest.⁴⁹

In a suit for damages by a change of grade, it was held, that the plaintiff was entitled to interest from the time of making the change.⁵⁰ But in a similar suit for damages by a railroad in a street, interest was allowed from the com-

⁴⁵ *Warren v. First Division St. Paul & Pacific R. R. Co.*, 21 Minn. 424, 427. Approved in *Minneapolis v. Wilkin*, 30 Minn. 145. See also *Philadelphia v. Miskey*, 68 Pa. St. 49; *Uniacke v. Chicago, Mil. & St. Paul Ry. Co.*, 67 Wis. 108; *Seefeld v. Same*, 67 Wis. 96; *Atlantic etc. R. R. Co. v. Prudhomme*, 2 Montreal Supr. Ct. 21; *In re Dublin etc. R. R. Co.*, 27 L. R. Ireland 79. The following cases support the view that the owner is not entitled to interest while he retains possession: *Matter of Department of Public Works*, 53 Hun 280, 25 N. Y. St. Rep. 9, 6 N. Y. Supp. 750; *Shoemaker v. United States*, 147 U. S. 282, 13 S. C. Rep. 361.

⁴⁶ *Selma, Rome & Dalton R. R. Co. v. Gammage*, 63 Ga. 604; *Hayes v. Chicago, Milwaukee & St. Paul Ry. Co.*, 64 Ia. 753; *Sioux City etc. R. R. Co. v.*

Brown, 13 Neb. 317; *Atlantic & Great Western R. R. Co. v. Koblentz*, 21 Ohio St. 334; *Wichita & W. R. R. Co. v. Kuhn*, 38 Kan. 104, 16 Pac. Rep. 75; *Neilson v. Chicago etc. R. R. Co.*, 91 Wis. 557, 64 N. W. Rep. 849; *In re Navan etc. R. R. Co.*, 10 Irish Rep. Eq. 113; *Chicago etc. R. R. v. Buel*, 56 Neb. 205.

⁴⁷ *Hollingsworth v. Des Moines etc. R. R. Co.*, 63 Ia. 443; *Shattuck v. Wilton R. R. Co.*, 23 N. H. 269; *St. Louis etc. R. R. Co. v. Fowler* 113 Mo. 458, 20 S. W. Rep. 1069; *Chicago etc. R. R. Co. v. Eubanks*, 130 Mo. 270, 32 S. W. Rep. 658.

⁴⁸ *Hayes v. Chicago, Mil. & St. P. Ry. Co.*, 64 Ia. 753.

⁴⁹ *March v. Portsmouth & Concord R. R. Co.*, 19 N. H. 372; *Reisner v. Union Depot & R. R. Co.*, 27 Kan. 382.

⁵⁰ *Cincinnati v. Whetstone*, 47

mencement of the suit.⁵¹ Whether interest should be assessed as a distinct item or included in the general award, will depend upon the practice of the particular jurisdiction.⁵²

As to interest on the award or judgment for compensation, some of the cases hold that it bears interest from the date of confirmation or entry, like an ordinary judgment;⁵³

Ohio St. 196, 24 N. E. Rep. 409; Hampton v. Kansas City, 74 Mo. App. 129.

⁵¹ Taylor v. Bay City St. R. R. Co., 101 Mich. 140, 59 N. W. Rep. 447. The decision of the court is that it was not error to allow such interest, but it is intimated that interest might have been allowed from the date of the damage. The court says: "Complaint is made of the instruction to the jury to add interest from the date of the commencement of suit. The authorities are not uniform upon this subject. The old rule undoubtedly was that interest could not be allowed upon unliquidated damages, and, in actions of tort, damages are of course unliquidated. The tendency of courts has been, however, to set this rule aside, and adopt the more reasonable one, in cases of injury to property, that the jury must first determine the actual damage sustained, and allow interest upon that sum from its date. This court has adopted this rule in the following cases: Lucas v. Wattles, 49 Mich. 380, 13 N. W. Rep. 782; Kendrick v. Towle, 60 Mich. 368, 27 N. W. Rep. 567. Some cases hold that it is discretionary with the jury to allow interest on damages in case

of trespass to real property. Railway Co. v. Cobb, 35 Ohio St. 94; Walrath v. Redfield, 18 N. Y. 457; Railway Co. v. Swinney, 97 Ind. 586. The supreme court of Illinois held it error to allow it as a matter of legal right. Chicago v. Allcock, 36 Ill. 384. For a discussion of the principle and authorities, see Suth. Dam. § 355. We think there was no error in the instruction."

⁵² See Pennsylvania S. V. R. R. Co. v. Ziemer, 124 Pa. St. 560, 17 Atl. Rep. 187; Reading & P. R. R. Co. v. Balthaser, 126 Pa. St. 1, 17 Atl. Rep. 518; Weiss v. South Bethlehem, 136 Pa. St. 294, 20 Atl. Rep. 801; Klages v. Philadelphia etc. R. R. Co., 160 Pa. St. 386, 28 Atl. Rep. 862. These cases hold it should be included in the general award.

⁵³ Cooke v. South Park Comrs., 61 Ill. 115; Morris v. Baltimore, 44 Md. 598; Mississippi River Bridge Co. v. Ring, 58 Mo. 491; Pennsylvania R. R. Co. v. Cooper, 58 Pa. St. 408; Haley v. Philadelphia, 68 Pa. St. 45; Miskey v. Same, 68 Pa. St. 48; Philadelphia v. Miskey, 68 Pa. St. 49; Morris v. Philadelphia, 70 Pa. St. 333; Davis v. North Pennsylvania R. R. Co., 2 Phila. 146; Millick v. Philadelphia, 11 Phila. 354; Phillips v. Pease, 39 Cal. 582; State

others that interest should only be computed from the date of possession by the party condemning,⁵⁴ or from the time when the owner can enforce payment,⁵⁵ or from the time of demand.⁵⁶ If the award is accepted without demanding interest, though under protest, interest cannot be recovered afterwards.⁵⁷ The owner should account for rents and profits actually received during such time as he has possession, subsequent to the award.⁵⁸ The owner is entitled to interest until payment is made and not simply to the time when he could have obtained payment by making demand.⁵⁹

§ 500. When property is taken for a street which is sub-

Park Comrs. v. Henry, 38 Minn. 266, 36 N. W. Rep. 874; *Plum v. City of Kansas*, 101 Mo. 525, 14 S. W. Rep. 657, 3 Am. R. R. & Corp. Rep. 428; *Devlin v. New York*, 131 N. Y. 123, 30 N. E. Rep. 245; *Hays v. B. & O. R. R. Co.*, 3 Penny. 52; *Leiper v. B. & O. R. R. Co.*, 5 Pa. Co. Ct. 60; *United States v. Engeman*, 46 Fed. Rep. 898; *Reuben v. Ontario etc. R. R. Co.*, 5 Montreal Supr. Ct. 211; *Railroad Co. v. Burnett's Ex'r's*, 11 Lea 525; *Epling v. Dickson*, 170 Ill. 329; *Weide v. St. Paul*, 62 Minn. 67, 64 N. W. Rep. 65; *Martin v. St. Louis*, 139 Mo. 246; *Pepin v. Elizabeth*, 57 N. J. L. 653, 32 Atl. Rep. 213; *Matter of Board of Street Opening*, 21 App. Div. 357.

⁵⁴ *Illinois & St. Louis R. R. Co. v. McClintock*, 68 Ill. 296; *South Park Comrs. v. Dunlevy*, 91 Ill. 49; *Beveridge v. West Park Comrs.*, 7 Ill. App. 460; *Fiske v. Chesterfield*, 14 N. H. 240; *Hammersley v. New York*, 67 Barb. 35; S. C., 56 N. Y. 533; *Stewart v. County*, 2 Pa. St. 340; *Second Street, Harrisburg*, 66 Pa. St.

132; *Evanston v. Clark*, 77 Ill. App. 234.

⁵⁵ *Phillip v. Pease*, 39 Cal. 582; *Chicago v. Wheeler*, 25 Ill. 478; *Dyer v. Philadelphia*, 4 Phila. 328; *Fink v. Newark*, 40 N. J. L. 11; *Supervisors v. Buffalo*, 63 Hun 565, 45 N. Y. St. Rep. 365, 18 N. Y. Supp. 635.

⁵⁶ *Beveridge v. South Park Comrs.*, 100 Ill. 75; *Barnes v. New York*, 27 Hun 236. Consult also, on the subject of interest, *People v. Township Board of La-Grange*, 2 Mich. 187; *Metler v. Easton & Amboy R. R. Co.*, 25 N. J. Eq. 214; *Railroad Co. v. Cobb*, 35 Ohio St. 94; *Attorney General v. Turpin*, 3 Hen. & Mun. 548; *Tyson v. Milwaukee*, 50 Wis. 78.

⁵⁷ *Cutler v. New York*, 92 N. Y. 166; *Jamieson v. Burlington etc. R. R. Co.*, 87 Ia. 265, 54 N. W. Rep. 242. But see *In re Baltimore Extension R. R. Co.* (1895), 1 I. R. 169.

⁵⁸ *Plum v. City of Kansas*, 101 Mo. 525, 14 S. W. Rep. 657, 3 Am. R. R. & Corp. Rep. 428.

⁵⁹ *Matter of Board of Street Opening*, 35 N. Y. App. Div. 406.

ject to a public easement of way by dedication or prescription.—In such cases the owner of the fee is entitled to only nominal damages.⁶⁰ The same is true where the land is subject to a prescriptive right of way in the public.⁶¹ But, if the dedication has not been accepted by the public, the owner is entitled to the full value of the property.⁶² If there is a private easement of way over the property taken, this should be taken into consideration in fixing the damages, and the value subject to such easement should be awarded.⁶³ The mere fact that the land sought to be condemned had been previously included in the lines of a street laid down on a map of street extensions, approved by the municipality, would not affect the right to compensation or the amount of damages.⁶⁴ If the land sought to be taken is subject to

⁶⁰ *Valentine v. Boston*, 22 Pick. 75; *Stetson v. Bangor*, 60 Me. 313; *S. C.*, 73 Me. 357; *Bartlett v. Same*, 67 Me. 460; *Walker v. Manchester*, 58 N. H. 438; *Clark v. Elizabeth*, 37 N. J. L. 120; *Matter of Seventeenth Street*, 1 Wend. 262; *Matter of Lewis Street*, 2 Wend. 472; *Wyman v. New York*, 11 Wend. 486; *Matter of Furman Street*, 17 Wend. 649; *Matter of Thirty-second Street*, 19 Wend. 128; *Matter of Twentieth Street*, 1 Hill 189; *Matter of Opening Sixty-seventh Street*, 60 How. Pr. 264; *Matter of Department of Public Works*, 6 Hun 486; *Baldwin v. Buffalo*, 35 N. Y. 376; *Matter of City of Brooklyn*, 73 N. Y. 179; *In re Story St.*, 11 Phila. 456; *In re Opening of Berks St.*, 15 Phila. 381; *Sherer v. City of Jasper*, 93 Ala. 530, 9 So. Rep. 584; *Danforth v. City of Bangor*, 85 Me. 423, 27 Atl. Rep. 268; *In re Adams*, 141 N. Y. 297, 36 N. E. Rep. 313, affirming, 73 Hun 581, 26 N. Y. Supp. 422; *Village of Olean v. Stey-*

ner, 155 N. Y. 341, 32 N. E. Rep. 9; *Matter of Department of Public Works*, 53 Hun 556, 25 N. Y. St. Rep. 231, 6 N. Y. Supp. 779; *Carpenter Street*, 3 Walker's Pa. Supm. Ct. 286; *Gamble v. Philadelphia*, 2 Pa. Dist. Ct. 560; *Hancock v. Philadelphia*, 4 Pa. Dist. Ct. 345.

⁶¹ *Matter of Commissioners of Central Park*, 54 How. Pr. 313.

⁶² *Matter of Brooklyn Heights*, 48 Barb. 238.

⁶³ *Tufts v. Charlestown*, 2 Gray 271; *Tufts v. Charlestown*, 4 Gray 537; *Abbott v. Stewartstown*, 47 N. H. 228; *Case of Private Road*, 1 Ashmead 417; *Beale v. Boston*, 166 Mass. 53, 43 N. E. Rep. 1029. See *Matter of Opening 94th St.*, 22 Misc. N. Y. 32.

⁶⁴ *Quigley v. Pennsylvania S. V. R. R. Co.*, 121 Pa. St. 35, 15 Atl. Rep. 478; *In re Opening of 44th Street*, 19 Phil. 563, 7 Pa. Co. Ct. 69; ante, § 144. See *Opening Brooklyn St.*, 118 Pa. St. 640, 12 Atl. Rep. 664; *In re Opening Wayne Ave.*, 124 Pa. St. 135, 16

an easement of way in the abutting owners, only nominal damages can be awarded when it is laid out as a public street.⁶⁵ But in such case if the public seek to condemn the fee for a public street substantial damages must be given.⁶⁶ The fact that the owner of land has permitted the public to travel over it for a number of years without hindrance, is immaterial if there has been no dedication.⁶⁷ If, in a proceeding to condemn land for a street which has already been dedicated for that purpose, a person is alleged to be the owner, it is held to estop the petitioner from showing the dedication.⁶⁸ Where a road had been used by the public across the plaintiff's land for more than twenty years, but he had kept it enclosed by fences and gates, it was held that the gates could not be removed, or the road thereon opened absolutely without compensation to the plaintiff.⁶⁹

§ 500a. **When the fee of an existing street is taken.**—The city of Buffalo was authorized to condemn the fee of any existing street, square or alley, which had been used as such for more than ten years. In a proceeding under this statute it was held that the abutter, owning the fee, was entitled to substantial damages, and not merely nominal damages.⁷⁰ We have endeavored to show that there is a tendency to disregard distinctions based upon the ownership of the fee of streets.⁷¹ In New York the ownership of the fee gives to the abutter substantial advantages and he should, therefore, receive substantial damages when he is deprived of

Atl. Rep. 631; *Clark v. Elizabeth*, 40 N. J. L. 172; S. C., 37 N. J. L. 120; *Gamble v. Philadelphia*, 2 Pa. Dist. Ct. 560.

⁶⁵ *In re Adams*, 141 N. Y. 297, 36 N. E. Rep. 318, affirming 73 Hun 581, 26 N. Y. Supp. 422; *Village of Olean v. Steyner*, 155 N. Y. 341, 32 N. E. Rep. 9; *Gamble v. Philadelphia*, 162 Pa. St. 413, 29 Atl. Rep. 739.

⁶⁶ *In re One Hundred and Seventy-third Street*, 78 Hun 487, 29 N. Y. Supp. 205.

⁶⁷ *Ayres v. Richards*, 41 Mich. 680.

⁶⁸ *San Jose v. Freyschlog*, 56 Cal. 8; *Princeton v. Templeton*, 71 Ill. 68; *Olean v. Steyner*, 155 N. Y. 341, 32 N. E. Rep. 9.

⁶⁹ *Green v. Bethea*, 30 Ga. 896.

⁷⁰ *City of Buffalo v. Pratt*, 131 N. Y. 293, 30 N. E. Rep. 233, 6 Am. R. R. & Corp. Rep. 499 and note. See *In re One Hundred and Seventy-third Street*, 78 Hun 487, 29 N. Y. Supp. 205.

⁷¹ *Ante*, § 911.

it.⁷² But in States where the rights of the abutting owner are substantially the same whether he owns the fee or not, the taking of the fee and adding it to the public right would be no substantial detriment, and, therefore, the occasion of only nominal damages.

§ 501. **Enhancement caused by the work or improvement.**—Whatever the time fixed upon with reference to which the compensation shall be estimated, the owner is entitled to the actual value of the land at that time, even though it may have been enhanced by reason of the projected improvement for which it is taken.⁷³ It is said this is not really making the condemning party pay for an enhancement caused by its own work, as such enhancement does not come from the mere projection of the work, but from the existence of circumstances which create a demand for the work, and render it probable that such a work will sooner or later be built.⁷⁴ It is not proper, however, to consider what the property would have been worth if it could have had the benefit of the proposed improvement without being taken.⁷⁵ The same rules would apply with reference to an actual depreciation caused by the projected work.

§ 502. **The right or estate acquired for the public use should be considered.**—Where a perpetual easement is taken

⁷² *Fobes v. Rome etc. R. R. Co.*, 121 N. Y. 505, 24 N. E. Rep. 919, 3 Am. R. R. & Corp. Rep. 182.

⁷³ *Texas & St. Louis Ry. Co. v. Cella*, 42 Ark. 528; *Union Depot Street Ry. & Transfer Co. v. Brunswick*, 31 Minn. 297; *Virginia & Truckee R. R. Co. v. Lovejoy*, 8 Nev. 100; *Stafford v. Providence*, 10 R. I. 567; *Sanitary District v. Loughran*, 160 Ill. 362, 43 N. E. Rep. 359; *In re Condemnation of Land for New State House*, 19 R. I. 382, 33 Atl. Rep. 523; *Snouffer v. Chicago etc. R. R. Co.*, 105 Ia. 681.

⁷⁴ But see *May v. Boston*, 158 Mass. 21, 32 N. E. Rep. 902; *Bowditch v. Boston*, 164 Mass. 107, 41 N. E. Rep. 132; *Northern Pacific etc. R. R. Co. v. Coleman*, 3 Wash. 228, 28 Pac. Rep. 514; *Shoemaker v. United States*, 147 U. S. 282, 13 S. C. Rep. 361; *Gibson v. Norwalk*, 13 Ohio C. C. 428; *Mowrey v. Boston*, 173 Mass. 425.

⁷⁵ *Matter of the Water Comrs.*, 3 Edwards, Ch. 552; *Dorgan v. Boston*, 12 Allen 223; *Abbott v. Southern Pacific R. R. Co.*, 109 Cal. 282, 41 Pac. Rep. 1099.

for a use which is in its nature exclusive, as for railroad purposes, it amounts practically to a fee, and the owner is entitled to the full value of the land.⁷⁶ And it has been held in Iowa not to be error to refuse to call the attention of the jury to the fact that the fee remains in the owner, it being of merely nominal value.⁷⁷ It would, of course, not be improper to call their attention to the fact, if it is done in such a way as not to mislead them.⁷⁸ And in Kansas it has been held error to refuse to instruct the jury in this regard.⁷⁹ Where there was only taken the right to construct a water conduit seventy feet underneath the surface, and the right to use the surface remained in the owner, it was held he was not entitled to the value of the land, but only to the damages caused by the proposed use.⁸⁰ Where a street was filled and the filling sloped upon the plaintiff's land, it was held that only an easement of support was taken and that the plaintiff was only entitled to recover the damages caused by taking such an easement, and not the value of the land occupied by the slope.⁸¹ Where a town takes all the waters of a pond and of all streams flowing into and from it, it cannot show, for the purpose of reducing damages, that it will only need or use a part of such waters.⁸² The damages must be assessed on the basis of its right to take and use all. So in all cases regard should be had to what is taken by the one party and what is left to the other in the property in question, and the

⁷⁶ *Robbins v. St. Paul etc. R. Co.*, 22 Minn. 286. When land is taken for a railroad it is held that damages should be awarded on the basis of a perpetual easement, though the life of the condemnor is limited. *Miner v. New York Cent. etc. R. R. Co.*, 123 N. Y. 242, 25 N. E. Rep. 339; *Davis v. Memphis etc. R. R. Co.*, 87 Ala. 633, 6 So. Rep. 140.

⁷⁷ *Cummins v. Des Moines & St. Louis Ry. Co.*, 63 Ia. 396.

⁷⁸ *Alabama & Florida R. R. Co. v. Burkett*, 42 Ala. 83.

⁷⁹ *Kansas City & Emporia R. Co. v. Kregelo*, 32 Kan. 608. And see *Larkin v. Scranton*, 162 Pa. St. 289, 29 Atl. Rep. 910.

⁸⁰ *Taylor v. Baltimore*, 45 Md. 576. And see *Atlanta v. Hunnicutt*, 95 Ga. 138, 22 S. E. Rep. 130.

⁸¹ *Dodson v. Cincinnati*, 34 Ohio St. 276.

⁸² *Howe v. Weymouth*, 148 Mass. 605, 20 N. E. Rep. 316; also *Leonard v. Rutland*, 66 Vt. 105, 28 Atl. Rep. 885. Compare *Bailey v. Woburn*, 126 Mass. 416.

damages adjusted with reference thereto.⁸³ The rights of the respective parties in the property taken are discussed in a future chapter.⁸⁴ The condemnor may qualify or limit the right or estate taken and have the damages assessed on that basis.⁸⁵

§ 503. **The extent of the use may be considered.**—In case of property taken for a railroad or similar purpose it is proper to consider the extent to which it is likely to be used. Thus in one case it was held proper to show that there was a junction on the land in question, and that engines and cars were standing on the tracks a great deal of the time;⁸⁶ and in another case that the freight depot was on the next block, and the number of tracks on the property taken.⁸⁷ Where a town condemned the right to take the waters of a pond to supply a village, it was held that the damages should be assessed on the basis that the town could take all the water if necessary, but not on the basis that all was taken; that the probable use must be estimated as near as possible, and damages fixed accordingly.⁸⁸ In case of a railroad right of way it has been held improper to consider or assume that the owner will have any beneficial use of it.⁸⁹

§ 503a. **Damages which would be irremediable if no property taken.**—Where part of a tract is taken, the remainder may be affected by causes connected with the use of the part taken, which would not be actionable in the case of property so affected, no part of which was taken. May these

⁸³ *Atlanta v. Hunnicutt*, 95 Ga. 138, 22 S. E. Rep. 130; *Old Colony R. R. Co. v. Miller*, 125 Mass. 1; *Greenwood v. Wilton R. R. Co.*, 23 N. H. 261; *St. Louis v. Conn. Mut. Life Ins. Co.*, 90 Mo. 135; *Matter of Thompson*, 57 Hun 419, 10 N. Y. Supp. 705; *Beacon v. Pittsburgh etc. R. R. Co.*, 1 Pa. Dist. Ct. 618.

⁸⁴ Post, chap. xxv.

⁸⁵ *Wallace v. Jefferson Gas Co.*, 147 Pa. St. 205, 23 Atl. Rep. 416; ante, § 481.

⁸⁶ *Union R. R. & C. Co. v. Moore*, 80 Ind. 458. To same effect: *Cedar Rapids etc. R. R. Co. v. Raymond*, 37 Minn. 204, 33 N. W. Rep. 704.

⁸⁷ *Cummins v. Des Moines & St. Louis Ry. Co.*, 63 Ia. 397.

⁸⁸ *Bailey v. Woburn*, 126 Mass. 416.

⁸⁹ *Lake Superior & Miss. R. R. Co. v. Greve*, 17 Minn. 322; and see last section.

sources of injury be considered in estimating the damages to the part not taken? Under the general rule, approved in innumerable cases, that the damages to the part not taken are measured by the difference in value before and after the taking, excluding such benefits, if any, as the local law requires, all such elements of damage are necessarily included.⁹⁰ In the New York elevated railroad cases it is held that, in estimating the permanent damages, nothing can be given on account of noise and vibration, loss of privacy, obstruction of view, and like annoyances.⁹¹ But it is also held that these same annoyances may be considered in estimating damages for a past wrongful occupation.⁹² In a proceeding to take part of a tract of land, suitable for building purposes, for a sewerage farm, £4,000 were awarded for damages to the part not taken. It was claimed that if the works became a nuisance the owner would have his remedy, and if not a nuisance the damage was imaginary, and that in any case there was no jurisdiction to make the allowance. But the House of Lords sustained the award, holding that where part of a tract is taken there may be compensation for sorts of damage for which there would be no remedy on the part of those who had no land taken, and that the damages in question were not too remote or too speculative.⁹³ Cases somewhat similar have

⁹⁰ Ante, § 471a, and see cases cited in §§ 466-471, 496. And so under the rule that damages from construction, use and operation may be included. Ante, § 480a.

⁹¹ American Bank Note Co. v. New York El. R. R. Co., 129 N. Y. 152, 29 N. E. Rep. 302, 5 Am. R. R. & Corp. Rep. 583; Messenger v. Manhattan R. R. Co., 129 N. Y. 648, 29 N. E. Rep. 955; Moore v. New York El. R. R. Co., 130 N. Y. 523, 29 N. E. Rep. 997; Bischoff v. New York El. R. R. Co., 138 N. Y. 257, 33 N. E. Rep. 1073; ante, § 493.

⁹² Ibid.

⁹³ Essex v. Local Board of Acton, L. R. 14, H. L. 153. The award was sustained by the Queen's Bench Division (14 Q. B. D. 753) and disallowed by the court of appeals (17 Q. B. D. 447). In course of his opinion Lord McNaughten said: "It was said that the objection to a sewage farm comes from an unfounded apprehension of possible mischief. Does that matter? Call it what you will; ignorance, or prejudice, or fancy; the loss to the owner who may want to sell is not the less real. In such a

been decided in Massachusetts. A sewer was laid through a tract of land in what was claimed to be a public way and part of the tract was taken for works in connection therewith. It was held that there could be no recovery for quasi nuisances and annoyances arising from the construction and operation of works, which would not be actionable in case of an owner no part of whose land was taken, except so far as the damage is caused by increased proximity due to taking a part of the tract.⁹⁴ "The difference between the annoyance just outside the petitioner's original parcel and the same in its intended place is the measure." There would probably be no question about the allowance of all such damages, under constitutions which require compensation for property damaged or injured, as well as for property taken.⁹⁵

§ 503b. Damages by retarding or preventing increase of value.—In case of railroads in streets, it has been held that the abutting property may be damaged, though not lessened in value, if the presence of the railroad prevents

case apprehension of mischief is damage of itself. And the depreciation in value must be the measure of compensation if the owner is to be compensated fairly. * * * When lands are required for the purpose of a public undertaking, and the owner claims compensation for injury to other lands held therewith, I think the tribunal which assesses compensation is bound to take into consideration the purpose of the undertaking, the consequences likely to result from the execution of the works on the land required, and any alteration in the character of the property which those works are calculated to bring about."

⁹⁴ Taft v. Commonwealth, 158

Mass. 526, 33 N. E. Rep. 1046; Lincoln v. Commonwealth, 164 Mass. 368, 41 N. E. Rep. 489. Blesch v. Railroad Co., 48 Wis. 168, favors a recovery for such damages. Compare Pasadena v. Stimson, 91 Cal. 238, 27 Pac. Rep. 604.

⁹⁵ Wiley v. Elwood, 134 Ill. 281, 25 N. E. Rep. 570; Chicago etc. R. R. Co. v. Hazels, 26 Neb. 364, 42 N. W. Rep. 93; Gainesville etc. R. R. Co. v. Hall, 78 Tex. 169, 14 S. W. Rep. 259, 3 Am. R. R. & Corp. Rep. 251; Ft. Worth etc. R. R. Co. v. Downie, 82 Tex. 383, 17 S. W. Rep. 620. And see Ante, §§ 221-236. Compare McMahon v. St. Louis etc. R. R. Co., 41 La. An. 827, 6 So. Rep. 640; New Orleans etc. R. R. Co. v. Barton, 43 La. An. 171, 9 So. Rep. 19.

or retards its increase in value from other causes.⁹⁶ The same rule has been applied in case of a change of grade.⁹⁷

§ 503c. Whether the effect of the entire work or improvement is to be considered or merely that portion thereof which is on the part taken.—In Iowa it has been held that where a railroad was laid in a street in front of plaintiff's land, who owned the fee to the center of the street, he could only recover such proportion of the total damage to his property, by the railroad in the street, as the part of the track on his own land bore to the entire track.¹ But other courts have repudiated this position and have held that the railroad is to be regarded as one entire thing and the effect of the whole structure considered.² A strip was taken from the south side of plaintiff's land for part of railroad right of way, but the road was constructed almost wholly on land taken from an adjoining proprietor. It was

⁹⁶ *Roberts v. New York El. R. Co.*, 155 N. Y. 31; *Powers v. Brooklyn El. R. R. Co.*, 157 N. Y. 105, 51 N. E. Rep. 516; *Lake Roland El. R. R. Co. v. Frick*, 86 Md. 259; *Ante*, § 493a, note 65.

⁹⁷ *Cole v. St. Louis*, 132 Mo. 633, 34 S. W. Rep. 469; *Schaller v. Omaha*, 23 Neb. 325, 36 N. W. Rep. 533. In the last case the court says: "It is claimed, on behalf of the city, that, if the property will sell for as much after the improvement is made as before, the owner has sustained no damage, although other property in the vicinity may have been greatly enhanced in value thereby. Such a rule, however, takes into account public benefits, and thereby casts the burden entirely upon the party alleged to be benefited. Suppose two or more railroads reaching out into the interior of the state were to be built terminating in Omaha, with the right to lay

their tracks along Farnam street. Such roads, when constructed, no doubt would greatly enhance the value of property in the city of Omaha, while by reason of destroying Farnam street as a public thoroughfare they would prevent the rise of property on that street in proportion to other portions of the city, yet if the argument of defendant's attorney is sound, if real estate on Farnam street did not depreciate in value by reason of its occupancy by the railways, the owners could recover nothing, although property in other portions of the city had advanced fifty or one hundred per cent. That such a rule is not just compensation for property damaged is self-evident." See also *Burky v. Town of Lake*, 30 Ill. App. 23.

¹ *Kucheman v. C. C. & D. R. Co.*, 46 Ia. 366.

² *Blesch v. Chicago etc. R. R. Co.*, 48 Wis. 168; *S. C.*, 43 Wis.

contended that the plaintiff could recover damages solely for the injuries sustained by him because of the use of that part of the right of way taken from his own land, and that nothing could be recovered because of cuts and embankments made on land taken from others or because of the construction and operation of the road on such land. The court, however, held otherwise, and say: "It may be conceded that if the railroad company had constructed its road just over the line entirely on the town site, without appropriating any of plaintiff's land for its right of way, the plaintiff could not recover anything therefor. This often appears to work great hardship. It sometimes happens that a railroad company builds its road in such manner as to greatly injure adjacent property, and it seems a great hardship for landowners to sustain such injuries, and be without remedy. That, however, is not the case under consideration. Here the company concedes the necessity of having a portion of plaintiff's land for its right of way. It seeks to condemn the right to use it for necessary purposes connected with the construction and operation of its road. Having obtained such right, it is not limited in the use of it to the one roadway already constructed, but it has the right, if it chooses, to construct sidings or other tracks on that portion of the right of way taken from plaintiff's land, or it may move its line over onto his land. The right to condemn the land is based on a necessity existing, or at least supposed to exist, that the company should have it for use in connection with its road. We think the cuts, embankments, tracks, ditches, and right of way are to be considered as one entire thing in determining the plaintiff's damages. Usually the appropriation of a narrow strip along one of the boundary lines of a tract of land results in comparatively little damage to the land not taken, but it is not always so, and, where any portion of the plaintiff's land is condemned, we are unable to conceive any rule by which the plaintiff's damages could or should be measured at either

more or less than the whole damage which he actually sustains by reason of the appropriation of his land, and the construction of the road.”³

In Minnesota it has been held that, in case of railroads in streets, the abutter's compensation must be confined to the damage occasioned by the construction and operation of that part of the road in front of his lot.⁴

§ 503d. Measure of damages when property is damaged or injured but no part taken.—Under constitutions, or statutes giving compensation for property damaged or injured for public use, the measure of damages is the diminution in value caused by the work or improvement, excluding such benefits, if any, as the local law requires.⁵ The con-

³ Chicago etc. R. R. Co. v. Van Cleave, 52 Kan. 665, 33 Pac. Rep. 472. See also Wichita etc. R. R. Co. v. Fechheimer, 49 Kan. 643, 31 Pac. Rep. 127; Shealy v. Chicago etc. R. R. Co., 77 Wis. 653, 46 N. W. Rep. 887; Springer v. Chicago, 37 Ill. App. 206; Savanna v. Loop, 47 Ill. App. 214.

⁴ Adams v. Chicago etc. R. R. Co., 39 Minn. 286, 39 N. W. Rep. 629; Demules v. St. Paul etc. R. R. Co., 44 Minn. 436, 46 N. W. Rep. 912; Lakkie v. Chicago etc. R. R. Co., 44 Minn. 438, 46 N. W. Rep. 912. See also Union Pac. R. R. Co. v. Foley, 19 Col. 280, 35 Pac. Rep. 542; Union Pac. R. R. Co. v. Benson, 19 Col. 285, 35 Pac. Rep. 544. In the case first cited, it was held error to receive proof of the difference in rental value “with the road constructed on the street and operated there as roads usually are.” The court says: “The evidence takes into account not merely the consequences to the lot from operating the railroad in front of it, but also from operating the road

upon the whole or any part of it, however remote from the lot. This would allow plaintiff to recover for such consequences of operating the road as he suffered in common with the public generally, and not merely such as were peculiar to himself.”

⁵ City Council of Montgomery v. Maddox, 89 Ala. 181, 7 So. Rep. 433, 2 Am. R. R. & Corp. Rep. 426; Campbell v. Metropolitan St. R. R. Co., 82 Ga. 320, 9 S. E. Rep. 1078; Smith v. Floyd County, 85 Ga. 422, 11 S. E. Rep. 850; Streyer v. Georgia etc. R. R. Co., 90 Ga. 56, 15 S. E. Rep. 637; City Council of Augusta v. Schrameck, 96 Ga. 426, 23 S. E. Rep. 400; Osgood v. Chicago, 154 Ill. 194, 41 N. E. Rep. 40; Springfield v. Griffith, 46 Ill. App. 246; North Alton v. Dorsett, 59 Ill. App. 612; Jacksonville v. Loar, 65 Ill. App. 218; Parker v. City of Atchison, 46 Kan. 14, 26 Pac. Rep. 435; Griffin v. Shreveport etc. R. R. Co., 41 La. An. 808, 6 So. Rep. 624; McMahon v. St. Louis etc. R. R. Co., 41 La. An.

struction of the words "damaged" and "injured" has been considered in another chapter.⁶ All circumstances arising out of the public use, which affect the value of the property, may be shown and considered,⁷ but not such as are merely personal to the occupants of the property and do not affect its value.⁸

§ 503e. Where rights or easements are impaired or destroyed but no land taken.—In such cases the measure of damages is usually held to be the depreciation in the value of the property caused by the injury.⁹ Most of the cases which would fall under this head have been discussed in the chapters on "What constitutes a taking."¹⁰

§ 503f. When the taking produces damage which is pre-

827, 6 So. Rep. 640; Chase v. Portland, 86 Me. 367, 29 Atl. Rep. 1104; Hickman v. City of Kansas, 120 Mo. 110, 25 S. W. Rep. 225; Markowitz v. Kansas City, 125 Mo. 485, 28 S. W. Rep. 642; Dale v. St. Joseph, 59 Mo. App. 566; City of Omaha v. Kramer, 25 Neb. 492, 41 N. W. Rep. 295; Chicago etc. R. R. Co. v. Hazels, 26 Neb. 364, 42 N. W. Rep. 93; Omaha etc. R. R. Co. v. Janeczek, 30 Neb. 276, 46 N. W. Rep. 478; Chicago etc. R. R. Co. v. O'Connor, 42 Neb. 90, 60 N. W. Rep. 326; Chambers v. South Chester, 140 Pa. St. 510, 21 Atl. Rep. 409; Riddle's Exrs. v. Delaware County, 156 Pa. St. 643, 27 Atl. Rep. 569; Dawson v. Pittsburgh, 159 Pa. St. 317, 28 Atl. Rep. 171; Gainesville etc. R. R. Co. v. Hall, 78 Tex. 169, 14 S. W. Rep. 259, 3 Am. R. R. & Corp. Rep. 251; Morrow v. St. Louis etc. R. R. Co., 81 Tex. 405, 17 S. W. Rep. 44; Ft. Worth etc. R. R. Co. v. Downie, 82 Tex. 383, 17 S. W. Rep. 620; Washburn & M. Mfg. Co. v. Worcester, 153 Mass. 494, 27 N. E.

Rep. 664; Wisconsin Central R. R. Co. v. Wieczorck, 51 Ill. App. 498; Plattsmouth v. Boeck, 32 Neb. 297, 49 N. W. Rep. 167; Heinrich v. St. Louis, 125 Mo. 424, 28 S. W. Rep. 626. See also ante, §§ 493-495.

⁶ Ante, chap. viii.

⁷ Streyer v. Georgia etc. R. R. Co., 90 Ga. 56, 15 S. E. Rep. 637; City Council of Augusta v. Schrameck, 96 Ga. 426, 23 S. E. Rep. 400; Dawson v. Pittsburgh, 159 Pa. St. 317, 28 Atl. Rep. 171; Chicago etc. R. R. Co. v. O'Connor, 42 Neb. 90, 60 N. W. Rep. 326.

⁸ Campbell v. Metropolitan St. R. R. Co., 82 Ga. 320, 9 S. E. Rep. 1078.

⁹ Kopp v. Northern Pac. R. R. Co., 41 Minn. 310, 43 N. W. Rep. 73; Rumsey v. New York etc. R. R. Co., 133 N. Y. 79, 30 N. E. Rep. 654, 6 Am. R. R. & Corp. Rep. 67; Rumsey v. New York etc. R. R. Co., 136 N. Y. 543, 32 N. E. Rep. 979.

¹⁰ Ante, chaps. iv, v, vi. See also ante, §§ 493-495.

ventable or necessitates a change, reconstruction or substitution of works.—A railroad was laid through a farm used for raising blooded horses. It divided and destroyed a race track. It was held that the damage to the farm by destroying the race track was measured by the cost of building a new track, it appearing that an equally good one could be built on the same farm, and not by the diminution in the value of the farm, as a stock farm, by being permanently without a race track.¹¹ Where the taking necessitates the reconstruction of a tramway or interferes with machinery and structures for handling coal or stone, the cost of changing and reconstructing the appliances so as to obviate the injury and conform to the new conditions may be shown and considered in estimating damages.¹² Where plaintiff was cut off from the channel of a river by a railroad in the shallow water, it was held that the measure of damages was the cost of a causeway out to the railroad with an allowance for the extra distance to be traversed to get to the water.¹³ Where property is damaged by a change of grade, the cost of adjusting the property to the new grade may be shown,¹⁴ but the damages are not necessarily measured by such cost.¹⁵ And generally the cost of adjusting the property to the changed conditions, brought about by the taking, or of alleviating or preventing the continuance of the damage, or of changing or reconstructing works so as to use the property as before, may properly be shown and considered in estimating how much the property has been damaged.¹⁶

¹¹ Matter of New York etc. R. Co., 29 Hun 1.

¹² Chicago etc. R. R. Co. v. Wolf, 137 Ill. 360, 27 N. E. Rep. 78; Schuylkill Riv. E. S. R. R. Co. v. Kersey, 133 Pa. St. 234, 19 Atl. Rep. 553; Baird v. Schuylkill Riv. E. S. R. R. Co., 154 Pa. St. 459, 25 Atl. Rep. 833.

¹³ Matter of New York etc. R. Co., 29 Hun 646.

¹⁴ City of Topeka v. Martineau,

42 Kan. 387, 22 Pac. Rep. 417; Smith v. Kansas City, 128 Mo. 23, 30 S. W. Rep. 314; Manson v. Boston, 163 Mass. 479, 40 N. E. Rep. 850.

¹⁵ Stewart v. Council Bluffs, 84 Ia. 61, 50 N. W. Rep. 219. But see Koch v. Sackman-Phillips Inv. Co., 9 Wash. 405, 37 Pac. Rep. 703.

¹⁶ See generally Fort Street Union Depot Co. v. Backus, 92

§ 503g. **Miscellaneous items of damage held allowable.**—Where the waters of a stream running through a farm were taken and part of the farm had been laid out in village lots, the owner is entitled to damages for being deprived of the opportunity to sell water rights to purchasers of lots.¹⁷ Where part of plaintiff's lot was taken for a railroad, which crossed a highway on which his lot abutted in a deep cut, he was held entitled to any damage to his lot caused by adjusting the highway to the railroad.¹⁸ Where a railroad is laid through a farm on the bank of a river, the owner may recover for being cut off from the river.¹⁹ Where land was taken for a new levee further back from the river, the owner was held entitled to cost of moving buildings.²⁰ Where a street was constructed through a quarry and rock adjoining was shattered by dynamite used in constructing the road, it was held proper to consider this in the assessment of damages, provided the use of dynamite was reasonably necessary for the proper construction and the result was not due to negligence, but if the injury was due to negligence then the only remedy was in tort.²¹ Plaintiff owned a grist mill with a road leading thereto along the bank of a stream. A railroad was laid through his land adjoining the road, so that on one side was the railroad and on the other a steep bank down to the water. This drove away custom and depreciated the value of the mill. Plaintiff was held entitled to compensation for the damage.²² Where a dam for a reservoir destroys a crossing

Mich. 33, 52 N. W. Rep. 790; Philadelphia etc. R. R. Co. v. Rogers, 2 Walker's Pa. Supm. Ct. 275; Hire v. Knisley, 130 Ind. 295, 29 N. E. Rep. 1132; Ehret v. Schuylkill Riv. E. S. R. R. Co., 151 Pa. St. 158, 24 Atl. Rep. 1068; Burnett v. Nicholson, 86 N. C. 99; Wilcox v. City of Meriden, 57 Conn. 120, 17 Atl. Rep. 366; Cooper v. Dallas, 83 Tex. 239, 18 S. W. Rep. 565; Patton v. Philadelphia, 175 Pa. St. 88, 34 Atl. Rep. 344.

¹⁷ Bridge v. Village of Hardwick, 67 Vt. 653, 32 Atl. Rep. 502.

¹⁸ Sioux City etc. R. R. Co. v. Weimar, 16 Neb. 272.

¹⁹ Boston etc. R. R. Co., v. Montgomery, 119 Mass. 114.

²⁰ Richardson v. Levee Comrs., 68 Miss. 539, 9 So. Rep. 351.

²¹ White v. City of Medford, 163 Mass. 164, 39 Atl. Rep. 997.

²² Western Pennsylvania R. R. Co. v. Hill, 56 Pa. St. 460.

over a railroad, the resulting damage is recoverable.²³ Where the piers of a bridge interfere with the operation of a ferry, the ferry company is entitled to compensation for such interference.²⁴ Part of a lot was taken after a building had been commenced covering the whole lot. It was held that the owner was entitled to recover the value of the unfinished structure on the part taken and the cost of changing the plans of the building to conform to the new conditions.²⁵

§ 504. **Miscellaneous items of damages held not allowable.**—It has been held that no damages can be allowed for depriving the owner of the use of a well and ram situated on another's land and placed there under a parol license, revocable at pleasure;²⁶ nor for the legal expense of proceedings;²⁷ nor for structures unlawfully placed upon public highways.²⁸ In laying out a highway the cost of improvements which may be ordered and assessed upon the property cannot be considered or included as part of the damages.²⁹ Where a highway was laid through a farm alongside a railroad it was held that the liability of injury to crops by reason of teams being frightened by the cars and running into the fields was too remote.³⁰ So, where a railroad was laid through an orchard, it was held that the risk of having fruit stolen by truants and persons on

²³ *Chicago etc. R. R. Co. v. Miller*, 106 Mo. 458, 17 S. W. Rep. 499.

²⁴ *Riverton Ferry Co. v. McKeesport & D. Bridge Co.*, 1 Pa. Supr. Ct. 587.

²⁵ *Matter of New York & B. Bridge*, 18 App. Div. N. Y. 8.

²⁶ *Clapp v. Boston*, 133 Mass. 367.

²⁷ *Canal Bank v. Albany*, 9 Wend. 244; *In re Moyer Street*, 6 Phila. 81.

²⁸ *Thebodereaux v. Maggioli*, 4 La. An. 73; *Harvey v. Lacka-*

wana etc. R. R. Co., 47 Pa. St. 428.

²⁹ *Lewis v. New Britain*, 52 Conn. 568; *Cushing v. Boston*, 144 Mass. 317; *Antoinette Street*, 8 Phila. 461; *Holton v. Milwaukee*, 31 Wis. 27; *Detroit v. Beecher*, 75 Mich. 454, 42 N. W. Rep. 986; *Reyenthaler v. Philadelphia*, 160 Pa. St. 195, 28 Atl. Rep. 840; *Matter of Opening 52nd Street*, 18 Phil. 497, 2 Pa. Co. Ct. 554.

³⁰ *Otoe County v. Heye*, 19 Neb. 289.

the road was too speculative to be considered.³¹ Where the waters of a stream are diverted, the owner of riparian land suitable for a mill site, but not so used, is entitled to only the actual damage sustained and not to the loss of water power as if he had a mill.³² In taking for a railroad the owner cannot show the oral agreement of another railroad to build side tracks to his land, which will be prevented by the taking.³³ It may not be shown that a railroad through a farm destroyed a good building site.³⁴ Where part of a building was taken for widening a street and the most prudent course for the owner is to take down the old building and erect a new one on the new line, there can be no recovery for loss of use while so doing.³⁵ It has already been shown that damages by negligence, improper construction and trespass should not be included.³⁶ Nothing can be allowed for improvements placed on the property after the commencement of proceedings,³⁷ nor for an interference with a gratuitous privilege.³⁸

§ 505. **Reserving rights or easements, or requiring things to be done in lieu of money.**—The commissioners or other tribunal to assess damages have no authority to give compensation in anything but money.³⁹ It is erroneous, there-

³¹ *Kansas City & Emporia R. R. Co. v. Kregelo*, 32 Kan. 608.

³² *New Britain v. Sargent*, 42 Conn. 137; *Clark v. Pennsylvania R. R. Co.*, 145 Pa. St. 438, 22 Atl. Rep. 989.

³³ *St. Louis etc. R. R. Co. v. Clark*, 121 Mo. 169, 25 S. W. Rep. 906, 192.

³⁴ *Traut v. New York etc. R. R. Co.*, 1 Monaghan (Pa. Supm. Ct.) 394.

³⁵ *Boles v. Boston*, 136 Mass. 398.

³⁶ *Ante*, § 482.

³⁷ *Lloyd v. Fair Haven*, 67 Vt. 167, 31 Atl. Rep. 164.

³⁸ *Raulet v. Concord R. R. Co.*, 62 N. H. 561; *Gorgas v. Phila-*

delphia etc. R. R. Co., 144 Pa. St. 1, 22 Atl. Rep. 715; *Mahaffey v. Beech Creek R. R. Co.*, 163 Pa. St. 158, 29 Atl. Rep. 881. And see *Kingsland v. New York*, 110 N. Y. 569, 18 N. E. Rep. 435; *Philadelphia etc. R. R. Co. v. Railroad Co.*, 12 Pa. Co. Ct. 513.

See generally on damages not allowable. *Illinois Cent. R. R. Co. v. Lostant*, 167 Ill. 85, 47 N. E. Rep. 62; *Indiana Natural Gas & O. Co. v. Jones* (Ind. App.), 42 N. E. Rep. 487; *Board of Levee Comrs. v. Brinkley* (Miss.), 19 So. Rep. 296.

³⁹ *Ante*, § 460; also *New Orleans Pacific Ry. Co. v. Murrell*, 34 La. An. 536.

fore, for them in their award to reserve to the owner certain easements or privileges in the property condemned, such as the right to construct a way over it or drains through it,⁴⁰ or the right to leave buildings or parts of buildings standing thereon and use them as before.⁴¹ So it is erroneous for the tribunal to award that the party condemning shall do certain things for the benefit of the owner, and to reduce the damages accordingly.⁴² Thus an award that a railroad company shall build fences, and maintain crossing and cattle-guards,⁴³ or construct culverts and water-ways⁴⁴ is bad. Where a new highway is laid out compensation cannot be made to the owner of land taken by awarding him the land occupied by an old way which is discontinued.⁴⁵ A dam was taken in widening a street, and a new dam constructed on land acquired of a third party, in lieu of compensation. It was held to be wholly unauthorized.⁴⁶ Where a highway was laid out over a railroad, an award of a sum of money and a provision that the railroad company should not be required to grade or macadamize the road was held to be wholly void as to the latter provision.⁴⁷

⁴⁰ *Hill v. Mohawk & Hudson R. R. Co.*, 5 Denio 206; *S. C.*, 7 N. Y. 152; *Chesapeake & Ohio R. R. Co. v. Halstead*, 7 W. Va. 301; *Hewett v. County Comrs.*, 85 Me. 308, 27 Atl. Rep. 179; *Central Ohio R. R. Co. v. Holler*, 7 Ohio St. 220; *Queen v. South Wales R. R. Co.*, 13 A. & E. N. S. 988, 66 E. C. L. R. 987.

⁴¹ *Hyde v. County of Middlesex*, 2 Gray, 267; *Brown v. Worcester*, 13 Gray, 31; *Colburn v. Kittridge*, 131 Mass. 470; *Riker v. New York*, 3 Daly, 174. But see *Commonwealth v. Noxon*, 121 Mass. 42; *Schuchardt v. New York*, 59 Barb. 295; *Omaha & N. W. R. R. Co. v. Menk*, 4 Neb. 21; *Mussey v. Cahoon*, 34 Me. 74.

⁴² *New Orleans Pacific Ry. Co.*

v. Murrell, 34 La. An. 536; *McCord v. Sylvester*, 32 Wis. 451.

⁴³ *Vanderbright v. Delaware R. R. Co.*, 2 Houst. Del. 287; *Jeffries v. Philadelphia etc. R. R. Co.*, 3 Houst. Del. 447; *Chicago, Mil. & St. Paul Ry. Co. v. Melville*, 66 Ill. 329; *Toledo etc. R. R. Co. v. Munson*, 57 Mich. 42; *Chesapeake & Ohio R. R. Co. v. Patton*, 6 W. Va. 147.

⁴⁴ *Morss, Petitioner*, 18 Pick. 443; *Winchester & Potomac R. R. Co. v. Washington*, 1 Rob. (Va.) 67.

⁴⁵ *Commonwealth v. Peters*, 2 Mass. 125; *Barrickman v. Commissioners*, 11 G. & J. 50.

⁴⁶ *Wheeler v. Essex Public Road Board*, 39 N. J. L. 29.

⁴⁷ *Sedalia v. Missouri, Kansas*

Where a railroad company agreed with the owner to pay the expense of moving a building from the right of way, and the owner has moved the building, it was held erroneous in a subsequent assessment of damages for the land taken to include the expense of moving.⁴⁸ The owner's remedy was by action on the agreement. So, where commissioners by authority of law required a railroad company to make a way for the convenience of a particular proprietor, which the company failed to do, it was held the expense of such a way could not be included in the damages, but the owner must pursue his special remedy under the statute.⁴⁹ A city condemned property for the purpose of constructing a sewer or drain through it, and passed an ordinance giving the owners a right to build on the land taken, provided they did not interfere with the drain. It was held the damages could not be diminished by this fact, unless the owner agreed to the condition.⁵⁰ Where a railroad impaired a private right of way it was held that the damages could not be reduced by giving the defendant another outlet.⁵¹ So the owner is not bound to accept licenses and privileges to go upon and use the property taken.⁵²

Awards of this character are not, however, void unless repugnant to the legal effect of the condemnation, as where the statute vests a fee in the party condemning, and the award reserves an easement to the owner,⁵³ or is contrary to a provision of positive law, as in *Sedalia v. Missouri, Kansas & Texas Ry. Co.*⁵⁴ In other cases the parties may ratify such provisions in such a way as to make a binding contract between them capable of being enforced in the usual way.⁵⁵

& Texas Ry. Co., 17 Mo. App. 105.

⁴⁸ *Sherwood v. St. Paul & Chicago Ry. Co.*, 21 Minn. 122.

⁴⁹ *White v. Boston & Providence R. R. Co.*, 6 Cush. 420.

⁵⁰ *Roanoke City v. Berkowitz*, 80 Va. 616.

⁵¹ *Burlington etc. R. R. Co. v. Schweikart*, 10 Col. 178.

⁵² *Chicago etc. R. R. Co. v. McGrew*, 104 Mo. 282, 15 S. W. Rep. 931.

⁵³ *Hill v. Mohawk & Hudson R. R. Co.*, 7 N. Y. 152.

⁵⁴ 17 Mo. App., 105.

⁵⁵ *Pennsylvania R. R. Co. v. Reichert*, 58 Md. 261; *Morss Petitioner*, 18 Pick. 443; *Chicago & Alton R. R. Co. v. Joliet etc.*

§ 506. **Mill cases.**—The same principles apply to these as to other cases of taking. Where the petition for damages is by the owner, his recovery will be limited to such damages as are claimed in the petition.⁵⁶ If the land not flowed is diminished in value by reason of being rendered unhealthy in consequence of noxious vapors rising from the mill-pond, this may be considered in estimating damages.⁵⁷ Where water is ponded back upon the petitioner's waterwheel, he is entitled to nominal damages, though he sustains no actual injury.⁵⁸ It has been held that one could not recover for injury to a mill-site, which he had not and did not intend to use.⁵⁹ Where water was ponded back upon the plaintiff's mill, it was held that he could recover nothing for diminution of tolls caused by the competition of the lower mill, also that he could not show cost of raising his dam and water-wheel so as to avoid the back water.⁶⁰ Injury to fences⁶¹ and to adjoining uplands may be considered.⁶²

§ 507. **Where entry is made and works constructed before obtaining title.**—Persons and corporations vested with the power of eminent domain have no more right than natural persons to enter upon private property before taking the

R. R. Co., 105 Ill. 388. As to by and against whom such agreements may be enforced, see *Piper v. Union Pacific Ry. Co.*, 14 Kan. 568; *Morss v. Boston & M. R. R. Co.*, 2 Cush. 536; *Hewitt v. County Comrs.*, 85 Me. 308, 27 Atl. Rep. 179. Compare § 481.

⁵⁶ *Underwood v. North Wayne Sythe Co.*, 38 Me. 75; *Bridgers v. Purcell*, 1 Ired. Law. 232.

⁵⁷ *Gillet v. Jones*, 1 Dev. & B. (N. C.) 339. The weight of authority would seem to be opposed to the text. *Eames v. New England Worsted Co.*, 11 Met. 570; *Fuller v. Chicago Manf. Co.*, 16 Gray, 46; *Rooker v. Perkins*, 14 Wis. 79. These cases proceed upon the theory that the mill

acts do not authorize a nuisance, and hence, if mill-ponds diffuse noxious vapors, the persons injured may have the usual remedies for damages or abatement.

⁵⁸ *Little v. Standback*, 63 N. C. 285.

⁵⁹ *Worcester v. Great Falls Manf. Co.*, 41 Me. 159.

⁶⁰ *Burnet v. Nicholson*, 86 N. C. 99.

⁶¹ *Jones v. Phillips*, 30 Me. 455.

⁶² *Munson v. Brimfield Manf. Co.*, 15 Pick. 554. And see generally: *Marcy v. Fries*, 18 Kan. 353; *Cain v. Hays*, 4 Dana, Ky. 338; *Jewell v. Gardiner*, 12 Mass. 311; *Kimel v. Kimel*, 4 Jones L. 121; *Wright v. Stowe*, 4 Jones L. 516.

steps prescribed by law to obtain possession. If they do, the owner may have his common law remedies of trespass or ejectment, or he may resort to equity, and enjoin the invasion or use of his land.⁶³ But, in all such cases, the persons making the entry may, by proper proceedings, condemn the property entered upon, and so perfect their right to its possession and enjoyment. The question now to be considered is, whether in proceedings for this purpose the owner of the land is entitled to the value of improvements which have been put upon it by the party condemning. If the entry has been made by consent of the owner, express or implied, it is clear that the owner should not have the value of what has been put upon the land. He has let the condemning party in for the very purpose of making these improvements, and with the expectation that the right permanently to enjoy the land with the improvements would be acquired by agreement or otherwise. The cases all concur upon this point, without much discussion of principles.⁶⁴ In such cases the award includes all damages from the entry.⁶⁵ Such consent may be given by the life tenant so as to bind the reversioner,⁶⁶ or by the mortgagor in possession so as to bind the mortgagee.⁶⁷ If the owner brings a suit to recover the just compensation, such a suit operates as a consent to the occupation which relates back to the

⁶³ Post, chap. xxviii.

⁶⁴ *California Southern R. R. Co. v. Southern Pacific R. R. Co.*, 67 Cal. 59; *Emerson v. Western Union R. R. Co.*, 75 Ill. 176; *Chicago & Alton R. R. Co. v. Goodwin*, 111 Ill. 273; *Indiana, Bloomington & Western Ry. Co. v. Allen*, 100 Ind. 409; *Cohen v. St. Louis etc. R. R. Co.*, 34 Kan. 158; *Morgan's Appeal*, 39 Mich. 675; *Sullivan v. Board of Supervisors*, 58 Miss. 790; *Coster v. New Jersey R. R. etc. Co.*, 24 N. J. L. 730; *North Hudson R. R. Co. v. Booream*, 28 N. J. Eq.

450; *Price v. Weehawken Ferry Co.*, 31 N. J. Eq. 31; *St. Johnsbury etc. R. R. Co. v. Willard*, 61 Vt. 134, 17 Atl. Rep. 38; *Texas etc. R. R. Co. v. Sutor*, 56 Tex. 496.

⁶⁵ *Harlow v. Marquette, H. & O. R. R. Co.*, 41 Mich. 336.

⁶⁶ *Chicago & Alton R. R. Co. v. Goodwin*, 111 Ill. 273. See *Charlestown etc. R. R. Co. v. Hughes*, 105 Ga. 1, 30 S. E. Rep. 972.

⁶⁷ *North Hudson R. R. Co. v. Booream*, 28 N. J. Eq. 450; *St. Johnsbury etc. R. R. Co. v. Willard*, 61 Vt. 134, 17 Atl. Rep. 38.

entry, and, upon the principles above stated, the value of the works put upon the property must be excluded in estimating the damages.⁶⁸

When the entry is made without consent, express or implied, the case presents more difficulty, but it seems clear both upon reason and authority that the owner in a proceeding to ascertain the just compensation is not entitled to the value of works placed upon the property, though without right, for the purpose of adapting the property to the public use intended.⁶⁹ The few cases which hold the contrary proceed upon a strict and technical application of the rule of the common law, that structures placed upon land by a trespasser become a part of the realty and cannot be removed.⁷⁰ In a common law proceeding this rule of the

⁶⁸ *Cohen v. St. Louis, Fort Scott & Wichita R. R. Co.*, 34 Kan. 158.

⁶⁹ *Jones v. New Orleans etc. Co.*, 70 Ala. 227; *California Pacific R. R. Co. v. Armstrong*, 46 Cal. 85; *Chicago & Alton R. R. Co. v. Goodwin*, 111 Ill. 273; *Daniels v. Chicago etc. R. R. Co.*, 41 Ia. 52; *Toledo etc. Ry. Co. v. Dunlap*, 47 Mich. 456; *Greve v. First Division of the St. Paul etc. R. R. Co.*, 26 Minn. 66; *Louisville etc. R. R. Co. v. Dickson*, 63 Miss. 380; *Burgess v. Clark*, 13 Iredel Law, 109; *Oregon Ry. & Nav. Co. v. Mosier*, 14 Or. 519; *Justice v. Nesquehoning Valley R. R. Co.*, 87 Pa. St. 28; *Lyon v. Green Bay & Minnesota Ry. Co.*, 42 Wis. 538; *Newgass v. St. Louis etc. R. R. Co.*, 54 Ark. 140, 15 S. W. Rep. 188, 4 Am. R. R. & Corp. Rep. 44; *Albion R. R. Co. v. Heiser*, 84 Cal. 435, 24 Pac. Rep. 288; *San Francisco etc. R. R. Co. v. Taylor*, 86 Cal. 246, 24 Pac. Rep. 1027; *Jacksonville etc. R. R. Co. v. Adams*, 28 Fla. 631,

10 So. Rep. 465; *Matter of Norwood etc. R. R. Co.*, 47 Hun 489, 14 N. Y. St. Rep. 437; *Preslin v. Sabine etc. R. R. Co.*, 70 Tex. 375, 7 S. W. Rep. 825; *Texas etc. R. R. Co. v. Hays*, 3 Tex. Civ. App. p. 79, §§ 57, 58; *Davidson v. Railroad Co.*, 3 Tex. Ct. of App. p. 473, § 400; *Denver etc. R. R. Co. v. Stancliff*, 4 Utah, 117, 7 Pac. Rep. 530; *Chase v. School District*, 8 Utah 231, 30 Pac. Rep. 757; *Searl v. School District*, 133 U. S. 553, 10 S. C. Rep. 374; *School District v. Searl*, 38 Fed. Rep. 18; *International Bridge & T. Co. v. McLane*, 8 Tex. Civ. App. 665, 28 S. W. Rep. 454; *Bellingham Bay etc. R. R. Co. v. Strand*, 14 Wash. 144, 44 Pac. Rep. 140.

⁷⁰ *United States v. Land in Monterey County*, 47 Cal. 515; *Graham v. Connersville & New Castle Junction R. R. Co.*, 36 Ind. 463; *Matter of Long Island R. R. Co.*, 6 N. Y. Supreme Ct. 298; *New York, West Shore & Buffalo Ry. Co. v. Gennet*, 37 Hun 317;

common law would perhaps apply,⁷¹ but the proceeding to ascertain the just compensation to be paid for property taken for public use is not a common law proceeding. The principles to be applied are broad and liberal, and such as are just to both parties. It is just compensation, no more and no less, which the constitution requires to be paid. In determining what is just the courts are not hampered by any of the hard and fast rules of the common law. As we have already shown, just compensation to the owner is an indemnity for the loss he sustains, irrespective of those general advantages and disadvantages which affect the community at large.⁷² Indemnity, in the case supposed, does not include the value of the works prematurely placed upon the property. The owner has not lost the value of such works, but, if their value is given to him, it is so much in excess of his loss; which is something never contemplated by the constitution. These and other considerations are ably enforced in an opinion of the Supreme Court of Pennsylvania, from which we quote as follows:

“This is not the case of a mere trespass by one having no authority to enter, but of one representing the State herself, clothed with the power of eminent domain, having a right to enter, and to place these materials on the land taken for a public use—materials essential to the very purpose which the State has declared in the grant of the charter. It is true the entry was a trespass, by reason of the omission to do an act required for the security of the citizen, to-wit: to make compensation or give security for it. For this injury the citizen is entitled to redress. But this redress cannot extend beyond his injury. It cannot extend to taking the personal chattels of the railroad company. They are not his, and cannot increase his remedy. The injury was to what the land holder had himself, not to what he had not. Then why should the materials laid

and see *Meriam v. Brown*, 128 Mass. 391; *Dietrich v. Murdock*, 42 Mo. 279; *Richmond & M. R. R. Co. v. Humphreys*, 90 Va. 425, 18 S. E. Rep. 901.

⁷¹ *Holliday v. Atlanta*, 96 Ga. 377, 23 S. E. Rep. 406.

⁷² *Ante*, § 462.

down for the benefit of the public be treated as dedicated to him? In the case of a common trespasser, the owner of the land may take and keep his structures *nolens volens*, but not so in this case; for though the original entry was a trespass, it is well settled, that the company can proceed in due course of law to appropriate the land, and consequently to reclaim and avail itself of the structures laid thereon. *Harrisburg v. Crangle*, 3 W. & S. 460; *McClinton v. Railroad Co.*, 16 P. F. Smith, 409; *Railroad Co. v. Burson*, 11 Id. 379. And in *Harvey v. Thomas*, 10 Watts, 63, it was held that the subsequent proceeding to assess compensation was a protection against a recovery of vindictive damages.

“Another evident difference between a mere tort-feasor and a railroad company is this—the former necessarily attaches his structure to the freehold, for he has no less estate in himself, but the latter can take an easement only, and the structures attached are subservient to the purpose of the easement. A railroad company can take no freehold title, and when its proper use of the easement ceases the franchise is at an end. There is no intention in fact to attach the structure to the freehold. We have therefore these salient features to characterize the case before us, to-wit: The right to enter on the land under authority of law, to build a railroad for public use; the acquisition thereby of a mere easement in the land; the entire absence of an intention to dedicate the chattels entering into its construction to the use of the land; the necessity for their use in the execution of the public purpose; and, lastly, the power to retain and possess these chattels and the structures they compose, by a valid proceeding at law, notwithstanding the original illegality of the entry. For the latter the owner has his appropriate remedy; his action of ejectment to recover and retain his land and its use, until the company shall proceed according to law, and his action of trespass to recover damages for the injury sustained by the unlawful entry and holding possession, and whatever loss has been caused by these illegal acts.

“There are some analogies remotely on the question be-

fore us, showing that property is not gained by the owner of the land because found upon it. Thus in the case of property carried off by a flood and stranded on the premises of another, the owner may follow it, enter and take it, or, if the owner of the land convert it, may recover its value. *Forster v. Bridge Co.*, Harris, 393; *Etter v. Edwards*, 4 Watts, 63. And even a sale will not carry unknown secreted valuables. *Hutlacher v. Harris*, Adm'r, 2 Wright, 491.

"But a case bearing a close analogy, indeed deciding the principle on which this case rests, is *Meigs' Appeal*, 12 P. F. Smith, 28. In the year 1862, the United States, in the prosecution of the war, erected buildings on the public common of New York for military barracks and hospitals. After the close of the war the government was about removing the materials, when the borough authorities proceeded to enjoin the removal, on the ground that the buildings had been affixed to the realty. In that case we said, referring to *Hill v. Sewald*, 3 P. F. Smith, 271, that the old notion of a physical attachment had long since been exploded in this State, and that the question of fixture, or not, depends on the nature and character of the act by which the structure is put in place, the policy of law connected with its purpose and the intentions of those concerned in the act. This language applies emphatically to the case now under consideration. It was further said then, the nature and character of the structures are also to be considered. They were not improvements made for objects connected with the soil—neither intended to give value to it, nor to receive value from it; so, precisely here, the railroad having no connection with the improvement of the land or its uses. 'The act' (says the opinion) 'is distinguishable from that of an ordinary trespasser. There was no intent to improve the ground or to make it accessory to some business or employment. It was not an assertion of title in the soil, or of an intention to hold adverse possession. Indeed there was not a single element in the case which characterizes the act of a tort-feasor, who annexes a structure to the freehold, and is therefore presumed to intend to alter the nature of the chattel and convert it into realty, and thereby to make a gift

of it to the owner of the freehold.' This language strongly characterizes the case before us. Here as there the purpose is a public use; there was no intent to hold adversely as a trespasser, nor to improve the ground or make it useful and valuable by the erection. The rails and ties were not intended to be attached to the freehold, but were laid down as part of an easement under a franchise of the State. There was no intent to use the land as an owner would, and no intent to abandon the materials to the use of the owner, but they were subject to a legal proceeding resulting in maintaining both ownership and use for the charter purpose. We think therefore the ownership of the rails, ties, etc., did not vest in the plaintiff in error by the mere trespass in the original entry."⁷³

Where land subject to mortgage was deeded for a right of way and the mortgage was foreclosed after the road was built, it was held that the foreclosure deed carried the title to the structure and that on a subsequent condemnation the owner was entitled to damages therefor.⁷⁴

In all cases of unlawful entry the owner may recover in

⁷³ *Justice v. Nesquehoning Valley R. R. Co.*, 87 Pa. St. 28, 31. So in *Jones v. New Orleans etc. Co.*, 70 Ala. 227, 232, the court say: "Though the appellee was a trespasser, by reason of the neglect to pursue the proper remedy for acquiring the lands—acquiring them without the consent of the owner—there is in the right continuing in him to pursue the remedy, rendering the possession rightful, and by which title may be acquired, a plain distinction between the appellee and a common trespasser. As against such trespasser, the proprietor can keep the lands, and keeping them, hold the improvements he may have annexed to the soil. No remedy is given the trespasser, by which he may ac-

quire the use and enjoyment of, or title to, the lands. There is, also, another distinguishing fact: the structures of the appellee were dedicated, not to the use and enjoyment of the freehold, but to public uses, which are the consideration for the grant to the appellee of corporate franchises, and of the right, in the exercise of these franchises, to take and appropriate private property." See also *Searl v. School District*, 133 U. S. 553, 10 S. C. Rep. 374.

⁷⁴ *Briggs v. Chicago etc. R. R. Co.*, 56 Kan. 526, 43 Pac. Rep. 1131. Compare *Illinois Central R. R. Co. v. Le Blanc*, 74 Miss. 650.

trespass such damages as he has sustained thereby.⁷⁵ Whether the recovery in trespass should be deducted from the amount to be allowed for just compensation in a subsequent assessment of damages will depend upon the principles upon which such damages are assessed. Some courts hold that the damages should be estimated with reference to the date of the entry, and interest allowed from that date.⁷⁶ If this is done, the amount of a previous recovery in trespass ought to be deducted,⁷⁷ otherwise not.⁷⁸

But there is no reason why the date of an unlawful entry should be fixed upon as the date with reference to which damages should be estimated. There is no reason why it should be different in such cases than in others, unless by consent of the owner.⁷⁹ The damages should then be estimated with reference to the date of filing the petition, or of the commissioners' award, or of the filing of the instrument of appropriation, according to the practice of the different States. Damages accruing prior to that time by reason of the unlawful entry should be recovered in trespass.⁸⁰ But, if such prior damages are actually litigated and included in the award, it will be a bar to any recovery in trespass therefor, and may be so pleaded.⁸¹

⁷⁵ Bethlehem South Gas & Water Co. v. Yoder, 112 Pa. St. 136; Leber v. Minneapolis & Northwestern Ry. Co., 29 Minn. 256.

⁷⁶ Daniels v. Chicago etc. R. Co., 41 Ia. 52; North Hudson R. R. Co. v. Booream, 28 N. J. Eq. 450.

⁷⁷ Ibid; and see Pomeroy v. Chicago & North Western Ry. Co., 25 Wis. 641.

⁷⁸ Hopson v. Louisville etc. R. Co., 71 Miss. 503, 15 So. Rep. 37.

⁷⁹ As to the time with reference to which damages should be estimated, see ante, § 477.

⁸⁰ La Fayette, Muncie etc. R. Co. v. Murdock, 68 Ind. 137;

Missouri, Kan. & Tex. R. R. Co. v. Ward, 10 Kan. 325; Proetz v. St. Paul Water Co., 17 Minn. 163; Louisville, N. O. & Tex. R. R. Co. v. Dickson, 63 Miss. 380; Blodgett v. Utica etc. R. R. Co., 64 Barb. 580; Callaman v. Port Huron & N. W. Ry. Co., 61 Mich. 15; Liber v. Minneapolis & North Western Ry. Co., 29 Minn. 256. But see Childs v. Newport, 70 Vt. 62, 39 Atl. Rep. 627.

⁸¹ Liber v. Minneapolis & North Western R. R. Co., 29 Minn. 256; Bethlehem South Gas & Water Co. v. Yoder, 112 Pa. St. 136.

§ 508. **When the owner is estopped to claim damages.**—The fact that one has signed a petition for the laying out of a street or highway, or for any public improvement, does not estop him from recovering for property taken or damaged thereby.⁸² But it has been held in several cases, that abutters, who sign a petition for the improvement of a street in a particular manner, and acquiesce in the making of this improvement, cannot claim damages on account thereof.⁸³ In most of the cases cited the estopped did not rest upon the signing of the petition alone. An agreement by the owner to waive damages has been held to operate as an estoppel after being acted upon,⁸⁴ but it may be revoked until then.⁸⁵ Where the estoppel has taken effect as to the owner, his subsequent grantee will also be estopped.⁸⁶ A grantee in an unrecorded deed, who was present at the hearing and failed to make known his title or to claim damages, was held estopped to assert an independent claim for damages.⁸⁷ But in another case, the fact that the real owner, not a party to the proceedings, testified as to the value of the land, was held not to estop him from maintain-

⁸² *Barker v. Taunton*, 119 Mass. 392; *Turner v. Stanton*, 42 Mich. 506; *Newville Road Case*, 8 Watts 172; *Board of Comrs. v. Bronne*, 49 Kan. 291, 30 Pac. Rep. 483; *Jones v. Bangor*, 144 Pa. St. 638, 23 Atl. Rep. 252; *Lewis v. Darby*, 166 Pa. St. 613, 31 Atl. Rep. 335; *Thames Conservators v. Victoria etc. R. R. Co.*, 4 L. R. C. P. 59.

⁸³ *City of Atlanta v. Schneltzer*, 83 Ga. 609, 10 S. E. Rep. 543; *Cross v. City of Kansas*, 90 Mo. 13; *Vaile v. Independence*, 116 Mo. 333, 22 S. W. Rep. 695; *Pratt v. Holmes St. R. R. Co.*, 49 Mo. App. 63; *Hembling v. Big Rapids*, 89 Mich. 1, 50 N. W. Rep. 741. And see *County Commissioners v. Hoag*, 48 Kan. 413, 29 Pac.

Rep. 758; *Preston v. Cedar Rapids*, 95 Ia. 71, 63 N. W. Rep. 577; *Texarkana v. Talbot*, 7 Tex. Civ. App. 202, 26 S. W. Rep. 451.

⁸⁴ *Macon & Augusta R. R. Co. v. Bowen*, 45 Ga. 531; *Foster v. Boston*, 22 Pick. 33; *Conwell v. Springfield & North Western R. R. Co.*, 81 Ill. 232; *Clement v. Durgin*, 5 Me. 9.

⁸⁵ *Turner v. Village of Stanton*, 42 Mich. 506; *Maxwell v. Bay City Bridge Co.*, 41 Mich. 453.

⁸⁶ *Haskell v. New Bedford*, 108 Mass. 208; *Conabeer v. New York Central etc. R. R. Co.*, 84 Hun 34, 32 N. Y. Supp. 6; *Ward v. Metropolitan El. R. R. Co.*, 152 N. Y. 39, 46 N. E. Rep. 319.

⁸⁷ *Brown v. County Comrs.*, 12 Met. 208.

ing ejectment against the condemnor.⁸⁸ One who attested a deed to a railroad company and afterwards saw the company construct its road on the land conveyed without objection, was held estopped to set up an older adverse title to the land.⁸⁹ Where a street was opened through a certain block, an owner whose land was taken was held not estopped by a deed, by his grantor, of lands in the next block, which recognized the street in the latter block.⁹⁰ A waiver of one item of damages cannot be construed into a waiver of damages generally.⁹¹ An abutter who consents to the occupation of a street by a railroad company has been held estopped to claim damages therefor.⁹² So where the abutter signed a petition to the council to grant a franchise for such use of the street.⁹³ Where property is owned by a firm, the consent of one member of the firm does not bind the others.⁹⁴ The owner of an undivided half of an abutting

⁸⁸ *Owen v. St. Paul etc. R. R. Co.*, 12 Wash. 313, 41 Pac. Rep. 44.

⁸⁹ *Georgia Pacific R. R. Co. v. Strickland*, 80 Ga. 776.

⁹⁰ *Easton Borough v. Rinek*, 116 Pa. St. 1.

⁹¹ *Mitchell v. Bridgewater*, 10 Cush. 411.

⁹² *Merchants' Union Barb-Wire Co. v. Chicago etc. R. R. Co.*, 79 Ia. 614, 44 N. W. Rep. 900; *White v. Manhattan R. R. Co.*, 139 N. Y. 19, 34 N. E. Rep. 887, 8 Am. R. R. & Corp. Rep. 739; *Herzog v. New York El. R. R. Co.*, 76 Hun 486, 27 N. Y. Supp. 1034; ante, § 120. Contra: *Evansville etc. R. R. Co.*, 6 Ind. App. 56, 33 N. E. Rep. 129; *Fred v. Kansas City Cable R. R. Co.*, 65 Mo. App. 121; *Heimbürg v. Manhattan R. R. Co.*, 19 App. Div. 179.

⁹³ *Joyce v. East St. Louis El. St. R. R. Co.*, 43 Ill. App. 157. But a petition signed by the

president and several members of an association, without anything to show that they had power to bind the association, will not estop the association from claiming damages. *Lake Roland El. R. R. Co. v. Hibernian Society*, 83 Md. 420, 34 Atl. Rep. 1017. And it has been held that the request must be direct to the company and that a petition to rapid transit commissioners was not sufficient to produce an estoppel. *Koehler v. New York El. R. R. Co.*, 9 App. Div. 449, 41 N. Y. Supp. 209; S. C. affirmed 159 N. Y. 218, 53 N. E. Rep. 1114. The expression of a preference for one method of construction over another will not work an estoppel. *Roberts v. New York El. R. R. Co.*, 155 N. Y. 31.

⁹⁴ *White v. Manhattan R. R. Co.*, 139 N. Y. 19, 34 N. E. Rep. 887, 8 Am. R. R. & Corp. Rep. 739.

lot gave such consent and afterwards acquired the other half. It was held that he was not estopped to maintain a bill for injunction and damages as to the latter estate.⁹⁵ Where an abutter, as a member of a city council votes for an ordinance granting the right to construct and operate a railroad in the street in front of his property, his assent is to be referred to the public easement only and not to his private rights of property in the street.⁹⁶ The fact that a man was active in promoting the location of a railroad through his town, and urged the passage of an ordinance which authorized it to occupy the street in front of his property, was held not to estop him from claiming damages.⁹⁷ Plaintiff, after the construction of a railroad, conveyed to it a right of way 100 feet wide across all of his lands in and near F. Held to bar a suit for damages to property abutting on a street in which the road was laid.⁹⁸ The conveyance of property for public use is not a bar to a claim for damages to other property of the grantor by the use of that conveyed, nor for damages to property parcel of that conveyed by the construction and use of works elsewhere by the grantee.⁹⁹ In other words the effect of such a conveyance is limited to the property conveyed or to the tract of which the property conveyed is a part. One who dedicates land for a street or waives damages for its opening, is deemed to consent to the construction of the street at a proper grade and cannot claim damages for such grading of the street.¹ But it is otherwise as to a subsequent

⁹⁵ *Eldridge v. Rochester City* etc. R. R. Co., 54 Hun 194.

⁹⁶ *Lamm v. Chicago* etc. R. R. Co., 45 Minn. 71, 47 N. W. Rep. 455.

⁹⁷ *Penn. Mut. Life Ins. Co. v. Heiss*, 141 Ill. 35, 31 N. E. Rep. 138, 6 Am. R. R. & Corp. Rep. 407.

⁹⁸ *Faires v. San Antonio* etc. R. R. Co., 80 Tex. 43, 15 S. W. Rep. 588.

⁹⁹ *Longworth v. Meriden & W.*

R. R. Co., 61 Conn. 451, 23 Atl. Rep. 827; *Tinker v. Rockford*, 137 Ill. 123, 27 N. E. Rep. 74; *Lamm v. Chicago* etc. R. R. Co., 45 Minn. 71, 47 N. W. Rep. 455; *Beaver v. Harrisburg*, 156 Pa. St. 547, 27 Atl. Rep. 4; *Eaton v. B. C. & M. R. R. Co.*, 51 N. H. 504.

¹ *Righter v. Philadelphia*, 161 Pa. St. 73, 28 Atl. Rep. 1015; *Winner v. Graner*, 173 Pa. St. 43, 33 Atl. Rep. 698; *Ball v. City of*

change of grade.² Where an owner agrees to waive damages if a public work is located or constructed in a particular manner, and the agreement is acted upon, it is binding.³ But if not complied with, it is no estoppel.⁴ The consent of the owner to the occupation of his land for a public purpose, or his failure to resist such occupation, do not estop him from asserting a claim for compensation for its future use or permanent appropriation.⁵ Some miscellaneous cases are referred to in the note.⁶

Tacoma, 9 Wash. 592, 38 Pac. Rep. 133.

² Fernald v. Boston, 12 Cush. 574; Bartlett v. Tarrytown, 52 Hun 380, 24 N. Y. St. Rep. 272, 5 N. Y. Supp. 240; Clark v. Philadelphia, 171 Pa. St. 30, 33 Atl. Rep. 124.

³ Butler v. County Comrs., 42 Kan. 416, 22 Pac. Rep. 421; Oregon etc. R. R. Co. v. Owsley, 3 Wash. Ter. 38, 13 Pac. Rep. 186.

⁴ Jeffersonville v. Myers, 2 Ind. App. 532, 28 N. E. Rep. 999.

⁵ Ante, § 298; Fusilier v. Great Southern Tel. Co., 50 La. An. 799, 24 So. Rep. 274; San Antonio etc. R. R. Co. v. Hunnicutt, 18

Tex. Civ. App. 310, 44 S. W. Rep. 535.

⁶ Wrightsville etc. R. R. Co. v. Holmes, 85 Ga. 668, 11 S. E. Rep. 658; Ferris v. Ward, 9 Ill. 499; Matter of Rochester etc. R. R. Co., 50 Hun 29, 18 N. Y. St. Rep. 354, 2 N. Y. Supp. 457; Ross v. Metropolitan El. R. R. Co., 57 N. Y. Supr. Ct. 412, 8 N. Y. Supp. 495; In re Chestnut St., 118 Pa. St. 593, 12 Atl. Rep. 585; In re Girard Ave., 18 Phil. 499; Musgrove St., 10 Pa. Co. Ct. 180; Western Union Tel. Co. v. Bulard, 67 Vt. 272, 31 Atl. Rep. 286; Oregon etc. R. R. Co. v. Day, 3 Wash. Ter. 252, 14 Pac. Rep. 588.

CHAPTER XXI.

THE REPORT OR VERDICT, AND ACTION THEREON.

§ 509. **Requisites generally.**—The report should show a compliance in all respects with the statute,¹ but a substantial compliance is sufficient.² Especial care should be taken to set forth the facts upon which the jurisdiction of the tribunal depends.³ If the statute particularly requires a thing to be stated in the report, its omission is fatal.⁴ The report should contain a finding upon all the questions required to be passed upon and the omission of any one will be sufficient ground for setting the report aside.⁵ Thus, where the statute required the jury of inquest, in case of proceedings to

¹ *Martin v. Rushton*, 42 Ala. 289; *State v. Van Geison*, 15 N. J. L. 339; *Griscom v. Gilmore*, 15 N. J. L. 475; *State v. Lord*, 26 N. J. L. 140; *State v. Essex Public Road Board*, 37 N. J. L. 273; *McAfee's Heirs v. Kennedy*, 1 Litt. Ky. 92; *Jefferson v. Delachaise*, 22 La. An. 26; *Pingree v. County Comrs.*, 30 Me. 351; *Kruger v. Le Blanc*, 70 Mich. 76, 37 N. W. Rep. 880; *Truax v. Sterling*, 74 Mich. 160, 41 N. W. Rep. 885; *Furman v. Furman*, 86 Mich. 391, 49 N. W. Rep. 47; *State v. St. Louis*, 1 Mo. App. 503; *Underwood v. Bailey*, 56 N. H. 187; *Howell v. Buffalo*, 15 N. Y. 512; *People v. Supervisors*, 32 Barb. 473; *Appeal of Myer*, 153 Pa. St. 276, 25 Atl. Rep. 816; *Tip-ton v. Miller*, 3 Yerg. 423; *Bridgman v. Hardwick*, 67 Vt. 132, 31 Atl. Rep. 33; *King v. Kent*, 10 Barn. & Cres. 477; *People v. Gardner*, 24 N. Y. 583; *Morris v. Pueblo*, 12 Col. App. 290, 55 Pac.

Rep. 747. But see *Middle Creek Road*, 9 Pa. St. 69.

² *Shaw v. Mills*, 9 Cush. 503; *Detroit Western Transit etc. R. R. Co. v. Crane*, 50 Mich. 182; *Mairs v. Gallahue*, 9 Gratt. 94.

³ *State v. Scott*, 9 N. J. L. 17; *State v. Yauger*, 29 N. J. L. 384; *Thompson v. Multnomah Co.*, 2 Or. 34; *Godchaux v. Carpenter*, 19 Nev. 415, 14 Pac. Rep. 140.

⁴ *O'Hara v. Pennsylvania R. R. Co.*, 25 Pa. St. 445; *State v. Jersey City*, 25 N. J. L. 309; *United States v. Dumplin Island*, 1 Barb. 24; *Denver etc. R. R. Co. v. Stark*, 16 Col. 291, 26 Pac. Rep. 779.

⁵ *Owen v. Jordan*, 27 Ala. 608; *Martin v. Rushton*, 42 Ala. 289; *Damrell v. Board of Supervisors*, 40 Cal. 154; *Pueblo & Arkansas Valley R. R. Co. v. Rudd*, 5 Col. 270; *Windson v. Field*, 1 Conn. 279; *Bibb v. Mountjoy*, 2 Bibb, 1; *Neale v. Cogar*, 1 A. K. Marsh. 589; *Shackelford's Heirs v. Coffey*, 4 J. J. Marsh. 40; *Robinson*

establish a mill-dam, to report the effect upon the health of the neighborhood, the omission to do so was held to be fatal.⁶ But the report need not go beyond the requirements of the statute in this respect, and it can never be a valid objection that the jury have failed to pass upon a question which they were not required to determine.⁷ The form of the report should be clear, explicit and certain, so as to leave no doubt as to what has been done or decided.⁸

Where the statute requires commissioners to include with their report minutes of the testimony taken before them,⁹ or a plat or draft showing courses and distances,¹⁰ it is mandatory and must be complied with. A statute required the jury, where a canal crossed a private or public road, to find whether a bridge or ford was necessary. A report that neither was necessary was held bad.¹¹ Where the quantity and quality of the land taken are required to be stated in the report, it is sufficient to give the dimensions, so that the

v. Robinson, 1 Duvall, 162; Bryant v. Glidden, 36 Me. 36; Pierce v. County Comrs., 63 Me. 252; Philadelphia & Erie R. R. Co. v. Cake, 95 Pa. St. 139; Matter of New York etc. Ry. Co., 35 Hun 232; Matter of Opening 28th St., 11 Phila. 436; Eubank v. Pence, 5 Litt. 338.

⁶ Gherkey v. Haines, 4 Blackf. 159; Mountjoy v. Oldham, 1 A. K. Marsh. 535; Major v. Taylor, 1 A. K. Marsh. 552; Eubank v. Pence, 5 Litt. 338; Epps v. Cralle, 1 Munf. 258; Kownslar v. Ward, Gilmer, Va. 127.

⁷ Aken v. Parfrey, 35 Wis. 249; Toledo etc. R. R. Co. v. Campau, 83 Mich. 33, 46 N. W. Rep. 1026.

⁸ Wood v. Campbell, 14 B. Mon. 339; Connecticut River R. R. Co. v. Clapp, 1 Cush. 559; Feree v. Meily, 3 Yeats, 153; Reitenbaugh v. Chester Valley R. R. Co., 21 Pa. St. 100.

⁹ Matter of New York, West Shore & Buffalo R. R. Co., 33 Hun 293. The correctness of the minutes must be settled before the commissioners and not by the court to which the report is made. Ibid. Testimony taken by commissioners and attached to their report was held to be part of it, in Matter of Rondout etc. R. R. Co. v. Deyo, 5 Lans. 298.

¹⁰ Warrior Run Road, 3 Binn. 3; Rutherford's Road, 10 S. & R. 120; McDermott v. New Castle, 13 Pa. Co. Ct. 474. In State v. English, 22 N. J. L. 291 and 713, it was held that the commissioners could not leave the plat to be made and attached to their report by a practical surveyor after signing.

¹¹ President etc. v. Mifflin, 1 Yeats, 430.

quantity can be computed, and where the property taken is a town lot the quality is sufficiently described by showing how it is used and improved.¹²

If the statute requires the jurors to affix their seals to their report, and they fail to do so, the report will be set aside.¹³ It is said that a "too astute criticism" is not to be applied to such reports.¹⁴ All the statements in the report are to be considered together and given a reasonable construction.¹⁵ The introduction of superfluous matters will not vitiate.¹⁶

§ 510. Describing the property to be taken or location of the improvement. —Much must depend, in this respect upon the requirements of the statute under which the proceedings are had. If the statute requires the report to contain a description of the property taken, such description is indispensable.¹⁷ The report ought to contain such a description upon general principles, in order to show the property to which it relates and for which damages are awarded.¹⁸ The description should be definite and complete,¹⁹ but it

¹² Pennsylvania R. R. Co. v. Bruner, 55 Pa. St. 318.

¹³ Rout v. Mountjoy, 3 B. Mon. 300. But in Hanes v. North Carolina R. R. Co., 109 N. C. 490, 13 S. E. Rep. 896 it was held that such a statute was directory merely.

¹⁴ Case of Spear's Road, 4 Binn. 174; and see Hunt v. Smith, 9 Kan. 137.

¹⁵ Leavenworth etc. R. R. Co. v. Meyer, 50 Kan. 25, 31 Pac. Rep. 700; Dawson v. Moores, 4 Mumf. 535; Mairs v. Gallahue, 9 Gratt. 94; Detroit Western Transit R. Co. v. Crane, 50 Mich. 182.

¹⁶ Wallbridge v. Cabot, 67 Vt. 114, 30 Atl. Rep. 805; Road in Pittston, 4 Luzerne Leg. Reg. Rep. 305.

¹⁷ O'Bannan v. Jackson, Sneed, 201; Missouri Pacific Ry. Co. v.

Carter, 85 Mo. 448; Anderson v. Pemberton, 89 Mo. 61; Vail v. Morris and Essex R. R. Co., 21 N. J. L. 189; Commonwealth v. Fisher, 1 P. & W. 462; Poston v. Terry, 5 J. J. Marsh. 220; Chesapeake & Ohio Canal Co. v. Union Bank, 4 Cranch C. C. 75; Wayne v. Caldwell, 1 S. D. 483, 47 N. W. Rep. 547; Abbott v. County Comrs., 5 Kan. App. 162.

¹⁸ Matter of New York & Jamaica R. R. Co., 21 How. Pr. 434; Smith v. Connelly's Heirs, 1 T. B. Mon. 58; C. G. Larned etc. Co. v. Omaha etc. R. R. Co., 56 Kan. 174, 42 Pac. Rep. 712; Rose v. Kansas City etc. R. R. Co., 128 Mo. 135, 30 S. W. Rep. 518.

¹⁹ Sonnek v. Minnesota Lake, 50 Minn. 558, 52 N. W. Rep. 961; Road in Cheltenham, 3 Mont. Co. L. R. 37.

will be sufficient if the property can be located from it.²⁰ An insufficient description vitiates the report.²¹ It has been held sufficient to refer to a description in the warrant or petition,²² or to a plat or survey attached to or filed with the report or otherwise identified.²³ Where a plan was referred to but no plan was filed, the lay-out of a highway was held void.²⁴ But where the report referred to a plan, and the description in the report and in the plan differed, but the way could be made out from the two with reasonable certainty, the lay-out was sustained.²⁵ A description of a certain number of feet on each side of the center line of a railroad, as located, staked and marked, was held sufficient.²⁶ But a ditch or way cannot be properly described as a line.²⁷ Leave to erect a mill upon section seven, township nineteen, in Macon County, was held too indefinite.²⁸

§ 511. Description of location in case of highways.—The statutes in respect to the establishment of highways are exceedingly various, and the duties cast upon commissioners in such cases sometimes involve the location of the way and sometimes merely the determination of the amount of

²⁰ Robinson v. Winch, 66 Vt. 110, 28 Atl. Rep. 884; Hanes v. North Carolina R. R. Co., 109 N. C. 490, 13 S. E. Rep. 896.

²¹ Bond v. Mullins, 3 Met. 282; Sonnek v. Minnesota Lake, 50 Minn. 558, 52 N. W. Rep. 961; Race Street, 8 Pa. Co. Ct. 95; Road in Franklin, 16 Pa. Co. Ct. 276.

²² Ruston v. Grimwood, 30 Ind. 364; Ohio River R. R. Co. v. Harness, 24 W. Va. 511; Chesapeake & Ohio Canal Co. v. Binney, 4 Cranch C. C. 68; Humboldt County v. Dinsmore, 75 Cal. 604.

²³ State v. Schilb, 47 Ia. 611; Stone v. Cambridge, 6 Cush. 270; Andover v. County Comrs., 5 Gray, 393; Hall v. Manchester, 39 N. H. 295; Whiteley Road, 2

Monaghan (Pa. Supreme Ct.) 194.

²⁴ Jeffries v. Swampscott, 105 Mass. 535. Where a street was ordered to be laid out "as delineated on a plan now before this board," it was held that the plan could be identified by parol evidence. Stone v. Cambridge, 6 Cush. 270.

²⁵ Gilkey v. Watertown, 141 Mass. 317.

²⁶ Lower v. Chicago, Burlington & Quincy R. R. Co., 59 Ia. 563; Chicago etc. R. R. Co. v. Randolph, 103 Mo. 451, 15 S. W. Rep. 437.

²⁷ Kroop v. Forman, 31 Mich. 144; Milton v. Wacker, 40 Mich. 229.

²⁸ Macon v. Owen, 3 Ala. 116.

damages. Where the statute requires the width to be fixed in the report, the omission to do so renders the lay-out void.²⁹ If the report describes a single line and states the quantity of land taken, the width can be ascertained and the report will be sufficient.³⁰ If the statute does not require the width to be stated, it has been held unnecessary to do so, and that a reasonable and proper width will be understood.³¹ But the width of a road ought certainly to be fixed, either by statute or by the proceedings to establish it, and the location of a road without any width should be declared void for uncertainty.³² If a maximum width is fixed by law, it is error to exceed the limit,³³ but it has been held to be simply an error and not to render the lay-out void.³⁴ Where the statute provides that highways shall be sixty feet wide unless otherwise ordered or that they shall not be laid out less than three rods wide, and the proceedings are silent as to width, the width or minimum fixed by statute will control.³⁵ A statute required the road to be described by metes and bounds and by courses and distances. A strict compliance was held necessary.³⁶ The "beginning, course and termination" were required to be given. It was held sufficient to give the termini and describe the course as along the bank of the Ohio River.³⁷ A

²⁹ *Carlton v. State*, 8 Blackf. 208; *Barnard v. Haworth*, 9 Ind. 103; *Erwin v. Fulk*, 94 Ind. 235; *Strong v. Makeever*, 102 Ind. 578; *Hays v. Shackford*, 3 N. H. 10; *Road Case*, 4 W. & S. 39; *Hudson v. Voreis*, 134 Ind. 642, 34 N. E. Rep. 503; *Matter of Freney*, 20 Misc. N. Y. 272. In the following cases such a report is held erroneous but not void. *Pearce v. Gilmer*, 54 Ill. 25; *Sidener v. Essex*, 22 Ind. 201.

³⁰ *Herrick v. Stover*, 5 Wend. 580; *People v. Commissioners of Highways*, 13 Wend. 310.

³¹ *Kennet's Petition*, 24 N. H. 139.

³² *Beardslee v. French*, 7 Conn. 125; *Hays v. Shackford*, 3 N. H. 10.

³³ *Killbuck Private Road*, 77 Pa. St. 39.

³⁴ *Knowles v. Muscatine*, 20 Ia. 248.

³⁵ *Crowley v. Board of Comrs.*, 14 Mon. 292, 36 Pac. Rep. 313; *People v. Brown*, 47 Hun 459, 14 N. Y. St. Rep. 457.

³⁶ *Wood v. Campbell*, 14 B. Mon. 339; *Phillips v. Tucker*, 3 Met. (Ky.) 69; *State v. Clark*, 1 N. J. L. 226; *Race Street*, 8 Pa. Co. Ct. 95.

³⁷ *Hays v. State*, 8 Ind. 425.

statute required the commissioners to return a plat showing the courses and distances of the road and references to the most remarkable places and to the improvements through which it passed. The phrase remarkable places was held to mean such places as would serve to fix the location of the road.³⁸ It does not require a specification of town and county lines.³⁹ The word *improvements* was held to mean enclosed fields, and that the plat should show the fence lines, the distance through each field and the name of the owner.⁴⁰ Barns and houses were held not to be such improvements as were intended by the statute.⁴¹ An omission to comply with the statute was held fatal.⁴² Under a similar statute in Pennsylvania it was held that, if the road did not pass through any improvements, the negative fact need not be stated.⁴³

In general the description should be such that a person conversant with such matters can locate the road upon the ground,⁴⁴ otherwise it will be void for uncertainty.⁴⁵ But the whole report must be considered, and that is certain which can be rendered certain by the report itself.⁴⁶ The termini should be definitely stated.⁴⁷ The following are

³⁸ *Hoffman v. Rodman*, 39 N. J. L. 252.

³⁹ *Public Road*, 4 N. J. L. 290; *State v. Cake*, 24 N. J. L. 516.

⁴⁰ *State v. Hulick*, 33 N. J. L. 307; *State v. Hopping*, 18 N. J. L. 423; *State v. Hulick*, 3 N. J. L. 70; *Mt. Olive v. Hunt*, 51 N. J. L. 274, 17 Atl. Rep. 291.

⁴¹ *State v. Smith*, 21 N. J. L. 91.

⁴² *State v. Lippincott*, 25 N. J. L. 434; *Leet Tp. Road*, 159 Pa. St. 72, 28 Atl. Rep. 238.

⁴³ *Case of Road from McCord's*, 13 S. & R. 83.

⁴⁴ *Todemier v. Aspinwall*, 43 Ill. 401; *Spohr v. Schofield*, 66 Ind. 168; *Lewiston v. County Comrs.*, 30 Me. 19; *Jackson v. Rankin*, 67 Wis. 285; *Woolsey v.*

Tompkins, 23 Wend. 324.

⁴⁵ *Hinkley v. Hastings*, 2 Pick. 162; *Bean's Road*, 35 Pa. St. 280; *Isham v. Smith*, 21 Wis. 32; *Moll v. Benckler*, 30 Wis. 584; *Pagel v. Board of Comrs.*, (Mon.) 44 Pac. Rep. 86; *Road in Franklin*, 16 Pa. Co. Ct. 276. So in a railroad location. *Northern R. R. Co. v. Concord & Clarmount R. R. Co.*, 27 N. H. 183.

⁴⁶ *St. Paul & Sioux City R. R. Co. v. Matthews*, 16 Minn. 341; *McConnell's Mill Road*, 32 Pa. St. 285; *Springfield Road*, 73 Pa. St. 127; *Robinson v. Winch*, 66 Vt. 110, 28 Atl. Rep. 884; *Whiteley Road*, 2 Monaghan (Pa. Supm. Ct.) 194.

⁴⁷ *Road in Lower Merion*, 58 Pa. St. 66; *Road in Cheltenham*,

descriptions held void for uncertainty: "Commencing at or near the residence of S.,"⁴⁸ "beginning near the New Jersey Central Railroad depot and in a line of road known as Chestnut Street;"⁴⁹ or "near the old Chase garden and nearly opposite the tenement house owned by S. S. Stevens;"⁵⁰ "over land of A B to the H Road and there to end;"⁵¹ "running nearly in a northwesterly direction near where the travel is now seeking to get the best route;"⁵² "northwardly about one hundred yards;"⁵³ "the north side of said road to begin at," etc. (here describing point of beginning and courses and distances) "which said lines of course are in the middle of the public road now laid out;"⁵⁴ following a specified line "as near as practicable;"⁵⁵ a road on the "Elam Route," beginning at a certain section corner and extending to "Drum Valley."⁵⁶ A terminus described as "beginning in the public road from G to H one rod distant easterly from the line of B," was held sufficient.⁵⁷ A lay-out giving width and describing a single line was held good, the line described being taken in law as the center line of the road.⁵⁸ If a point is defined by a monument the monument will control, though it does not correspond to the courses and distances.⁵⁹ Stating the courses as according

3 Mont. Co. L. R. 37; North Lebanon Road, 6 Pa. Co. Ct. 598.

⁴⁸ DeLong v. Schimmel, 58 Ind. 64. To same effect, Griscom v. Gilmore, 16 N. J. L. 105; Appeal of Western Penn. R. R. Co., 152 Pa. St. 319. But the same description of a terminus was held good in *Re Road in Sterrett Township*, 114 Pa. St. 627. And see *People v. Collins*, 19 Wend. 56.

⁴⁹ *State v. Woodruff*, 36 N. J. L. 204.

⁵⁰ *People v. Diver*, 19 Hun 263.

⁵¹ *State v. Hart*, 17 N. J. L. 185.

⁵² *Blodgett v. Whaley*, 47 Mich. 469.

⁵³ *Craig v. North*, 3 Met. (Ky.) 187.

⁵⁴ *State v. Green*, 15 N. J. L. 88.

⁵⁵ *Sonnek v. Minnesota Lake*, 50 Minn. 558, 52 N. W. Rep. 961.

⁵⁶ *People v. Whitaker*, 101 Cal. 597, 36 Pac. Rep. 109.

⁵⁷ *State v. Emmons*, 24 N. J. L. 45. In the following cases descriptions somewhat uncertain were held good: *Gage v. Chicago*, 146 Ill. 499, 34 N. E. Rep. 1034; *Vogle v. Bridges*, (Ky.) 22 S. W. Rep. 82.

⁵⁸ *Tingle v. Tingle*, 12 Bush 160; see §§ 350-352.

⁵⁹ *Knowles' Petition*, 22 N. H. 361.

to the compass of the surveyor on a given date was held not to vitiate.⁶⁰ It has been held that, where the road can be located from what is stated and from facts judicially noted, such as the geography of the country and the government surveys, it would be sufficient.⁶¹ Where the description of the commissioners was defective but they reported that they had laid out the road pursuant to the application, it was held sufficient.⁶² So where the road could be located from the report and petition, which was made a part of the report, it was held good.⁶³

§ 512. **What is a sufficient finding on the question of damages.**—The report ought properly to contain an explicit finding, on the question of damages, as to every piece of property taken or affected, and as to every party or interest.⁶⁴ But where several tracts belonged to one person an award in gross has been held good.⁶⁵ The items of damages should not be specified⁶⁶ unless required by statute or unless an allowance is required to be made for some specific matter.⁶⁷ In some States it is held that, if the report is silent as to any tract or owner, it is equivalent to an express award of no damages, and the owner's only remedy is by

⁶⁰ *State v. Schanck*, 9 N. J. L. 107.

⁶¹ *Mossman v. Forrest*, 27 Ind. 233. For long descriptions held sufficient see *Suits v. Murdock*, 63 Ind. 73; *Rochester v. Sledge*, 82 Ky. 344.

⁶² *Satterly v. Winne*, 101 N. Y. 218.

⁶³ *Humboldt County v. Dinsmore*, 75 Cal. 604; and see *Bause v. Clark*, 69 Minn. 53.

⁶⁴ *New Washington Road*, 23 Pa. St. 485; *Fitzpatrick v. Pennsylvania R. R. Co.*, 10 Phila. 107; *Dolphin v. Pedley*, 27 Wis. 469; *Brannan v. St. Paul*, 44 Minn. 464, 47 N. W. Rep. 55; *State v. Everett*, 23 N. J. L. 378; *Mt. Olive v. Hunt*, 51 N. J. L. 274,

17 Atl. Rep. 291; *McDermott v. New Castle*, 13 Pa. Co. Ct. 474.

⁶⁵ *American Cannel Coal Co. v. Huntingburg etc. R. R. Co.*, 130 Ind. 98, 29 N. E. Rep. 566; *Chicago etc. R. R. Co. v. Baker*, 102 Mo. 553, 15 S. W. Rep. 64; post, § 515.

⁶⁶ *Michigan Air Line Ry. Co. v. Barnes*, 44 Mich. 222; *Ford v. County Comrs.*, 64 Me. 408; *Philadelphia etc. R. R. Co. v. Trimble*, 4 Whart. 47; *Ohio & Penn. R. R. Co. v. Wallace*, 14 Pa. St. 245; *People v. Gilon*, 76 Hun 346, 27 N. Y. Supp. 704.

⁶⁷ *California Pacific R. R. Co. v. Frisbie*, 41 Cal. 356; *Robinson v. Robinson*, 1 Duvall, 162; *Lodge v. Railroad Co.*, 9 Phila. 543.

appeal.⁶⁸ But in other States it is held that there should be an express finding of no damages.⁶⁹ A report that certain owners made no claim for damages was held insufficient.⁷⁰ An award of damages to the owner of certain lots and stating that in all other cases the benefits equaled the damages was held good without specifying each lot.⁷¹ A verdict that the owner was entitled to "\$420.00 as compensation and to \$411.25 as damages, a total sum of \$831.25," was held good.⁷² Where the commissioners inserted directions as to payment, they were treated as surplusage and the report sustained.⁷³ It has been held that if the award is intended to cover damages to the part not taken, the report or verdict should so state,⁷⁴ but such damages need not be separately stated.⁷⁵ So damages and benefits need not be separately stated unless so required.⁷⁶

⁶⁸ *Clifford v. Town of Eagle*, 35 Ill. 444; *Howland v. County Comrs.*, 49 Me. 143; *North Reading v. County Comrs.*, 7 Gray 109; *Hildreth v. Lowell*, 11 Gray 345; *Childs v. County of Franklin*, 128 Mass. 97; *Case of Road*, 2 S. & R. 277; *Sisson v. New Bedford*, 137 Mass. 255; *In re Road in Kingston*, 134 Pa. St. 409, 19 Atl. Rep. 750. A verdict that plaintiffs were damaged, and allowing damages to each as follows, to-wit: to A. B. nothing, etc., is not void for repugnancy, but is a good verdict of no damages. *Chace v. Fall River*, 2 Allen 533. So of a report that damages are appraised as follows, where no appraisal follows. *Reed v. Acton*, 117 Mass. 384. So the dismissal of a petition for damages was held to be an adjudication of no damages sustained. *Smith v. Boston*, 1 Gray 72. A decision that no damages be awarded is a compliance with a statute requiring an esti-

mate of damages. *Cambridge v. County Comrs.*, 117 Mass. 79.

⁶⁹ *Commissioners v. Durham*, 43 Ill. 86; *State v. Cooper*, 23 N. J. L. 381; *State v. Bennett*, 25 N. J. L. 329; *Washington v. Fisher*, 43 N. J. L. 377; *Kearsley v. Gibbs*, 44 N. J. L. 169; and see also *Fitzpatrick v. Pennsylvania R. R. Co.*, 10 Phila. 107.

⁷⁰ *State v. Runyan*, 24 N. J. L. 256.

⁷¹ *State v. Leslie*, 30 Minn. 533.

⁷² *Illinois etc. R. R. Co. v. Mayrand*, 93 Ill. 591.

⁷³ *In re Road in O'Hara Township*, 87 Pa. St. 366.

⁷⁴ *Bloomington v. Miller*, 84 Ill. 621.

⁷⁵ *Packard v. Bergen Neck R. R. Co.*, 54 N. J. L. 553, 25 Atl. Rep. 506, affirming 54 N. J. L. 229, 23 Atl. Rep. 722.

⁷⁶ *Beekman v. Jackson County*, 18 Or. 283, 22 Pac. Rep. 1074, 1 Am. R. R. & Corp. Rep. 665. And see *Gallatin Canal Co. v. Lay*, 10 Mon. 528, 26 Pac. Rep. 1001.

§ 513. What is a sufficient finding on the question of necessity, public utility, etc.—Where, by the constitution or statute, the commissioners or jury are required to pass upon the necessity or public utility of the proposed taking, their failure to do so will vitiate the proceedings.⁷⁷ A finding that the taking would be for public use is not equivalent to finding that it is necessary.⁷⁸ But a finding “that the public convenience requires that the highway should be laid out” was held equivalent to finding that it was necessary.⁷⁹ A finding that a highway “ought to be laid out,”⁸⁰ or that it will be convenient and necessary,⁸¹ is a sufficient finding that it is of common convenience and necessity as required by statute. A finding that common convenience and necessity require that the prayer of the petition should be in part granted, was held void for uncertainty.⁸² Where viewers were required to state whether the taking was necessary for a public or private road, a report that they had laid the way out for a public use was held a sufficient designation of it as a public road.⁸³ Where the question of necessity or public use is submitted by statute to the commissioners or jury, the court cannot disregard their finding and decide differently.⁸⁴ A statute of Kentucky requires the viewers in road cases to report the conveniences and inconveniences that will result to the public or individuals by reason of the proposed improvement. The omission to

⁷⁷ Bass v. Elliott, 105 Ind. 517; Arnold v. Decatur, 29 Mich. 77; Rundell v. Blakeslee, 47 Mich. 575; Rice v. Wellman, 5 Ohio C. C. 334; State v. Curtis, 86 Wis. 140. Where the finding read that the health of the neighborhood would probably be endangered but it was apparent from the whole return that the word “not” was omitted, the court construed it as a clerical error and supplied the omission. Rushton v. Martin, 43 Ala. 555.

⁷⁸ McClary v. Hartwell, 25 Mich. 139.

⁷⁹ Hunter v. Newport, 5 R. I. 325. To same effect, Road in Versailles, 4 Brews. Pa. 57.

⁸⁰ Price v. Southbury, 29 Conn. 490.

⁸¹ Cushing v. Gay, 23 Me. 9. See also Dorman v. Lewiston, 81 Me. 411, 17 Atl. Rep. 316.

⁸² Veamans v. County Comrs., 16 Gray 36.

⁸³ Road in Norriston & Whittpain, 4 Pa. St. 337.

⁸⁴ Wilmington etc. Co. v. Dominguez, 50 Cal. 505.

make such report will vitiate the proceedings.⁸⁵ The inconveniences to individuals should be specifically stated. Merely reporting that certain individuals will suffer inconveniences is not sufficient.⁸⁶ It is sufficient to designate the individuals who will suffer the inconveniences as the heirs of A, without naming them.⁸⁷ The public conveniences and inconveniences should in like manner be specifically stated.⁸⁸

§ 514. Of naming and describing the owners of property taken or affected.—The award or report should properly state the names of the owners of the property taken or affected, and the amount allowed to each, if the names are known,⁸⁹ and if not known that fact should be stated.⁹⁰ If the statute requires the names of the owners to be stated, the omission will be fatal to the proceedings.⁹¹ But in a prosecution for obstructing a highway it was held that the defendant was estopped from insisting upon such an omission by the fact that himself and his grantor had moved their fences to correspond with the highway, and had recognized its existence for years.⁹² Owners should be designated by their appropriate names. Awards to “Mrs. Kearsley;”⁹³ to persons by their firm name,⁹⁴ to “A and others,”⁹⁵ to the

⁸⁵ *Grimes v. Doyle*, Sneed, 58; *Daviess v. County Court*, 1 Bibb 514; *Fletcher's Heirs v. Fugate*, 3 J. J. Marsh. 631; *Winston v. Waggoner*, 5 J. J. Marsh. 41; *Peck v. Whitney*, 6 B. Mon. 117.

⁸⁶ *Wood v. Campbell*, 14 B. Mon. 339.

⁸⁷ *Gashweller's Heirs v. McIlvoy*, 1 A. K. Marsh. 84.

⁸⁸ *Foreman's Heirs v. Allen*, 2 Bibb 581.

⁸⁹ *Honenstine v. Vaughn*, 7 Blackf. 520; *Commonwealth v. Combs*, 2 Mass. 489; *Commonwealth v. Great Barrington*, 6 Mass. 492; *Mt. Olive v. Hunt*, 51 N. J. L. 274, 17 Atl. Rep. 291.

⁹⁰ *Commonwealth v. Great*

Barrington, 6 Mass. 492. In some States the omission to state the names of the owners of any tract or parcel is held equivalent to an award of no damages, and hence the omission does not vitiate the award. *Cushing v. Gay*, 23 Me. 9; and see cases cited in last section.

⁹¹ *Roberts v. Williams*, 15 Ark. 43. Failure to name a tenant cropping on shares was held not to vitiate. *Taliaferro v. Roach*, (Ky.) 12 S. W. Rep. 1039.

⁹² *State v. Wertzell*, 62 Wis. 184.

⁹³ *Kearsley v. Gibbs*, 44 N. J. L. 169.

⁹⁴ *Vawter v. Gilliland*, 55 Ind. 278; *State v. Woodruff*, 36 N. J. L. 204.

"estate of A,"⁹⁶ to the "devisees of A deceased,"⁹⁷ and to the "heirs of A,"⁹⁸ have been held to be bad. An award to the "guardian of A, a minor," was held to be substantially an award to the minor.⁹⁹ An award to "Adam Sture, Appellant," instead of "Andrew Sture, Appellant," was held good.¹

§ 515. **Whether the award of damages should be joint or several.**—A separate award should be made to the owner of each lot or parcel, and an award in gross to the owners of two or more parcels will be erroneous.² If one person owns several lots or parcels, it has been held proper to award a gross sum for damages to all,³ but the better practice would seem to be to make a separate award for each distinct lot, tract or parcel.⁴ If a tract is owned by several persons jointly, an award to all jointly is proper.⁵ Where there are distinct estates or interests in the same tract, such as leaseholds, life estates, mortgage interests and the like, there should be a separate award to the owner of each estate or

⁹⁵ State v. Oliver, 24 N. J. L. 129.

⁹⁶ Washington v. Fisher, 43 N. J. L. 377; Neal v. Knox & Lincoln R. R. Co., 61 Me. 298; Matter of William & Anthony Streets, 19 Wend. 678.

⁹⁷ State v. Blauvelt, 33 N. J. L. 36.

⁹⁸ State v. Woodruff, 36 N. J. L. 204; Oxford v. Brands, 45 N. J. L. 332; Adams v. Rulan, 50 N. J. L. 526, 14 Atl. Rep. 881. See, Contra: Todemier v. Aspinwall, 43 Ill. 401.

⁹⁹ Peavy v. Wolfborough, 37 N. H. 286.

¹ Red River & Lake of the Woods R. R. Co. v. Sture, 32 Minn. 95.

² Smith v. Rogers, Litt. Select Cas. (Ky.) 117; Harris v. Howes, 75 Me. 436; State v. Fisher, 26 N. J. L. 129; Rusch v. Milwaukee,

L. & W. Ry. Co., 54 Wis. 136; Matter of Daly, 23 App. Div. N. Y. 232.

³ Kankakee & Ill. River R. R. Co. v. Chester, 62 Ill. 235; Sherwood v. St. Paul & Chicago Ry. Co., 21 Minn. 122; Same v. Same, 21 Minn. 127; ante, § 512, note 65.

⁴ Rentz v. Detroit, 48 Mich. 544; Smith v. Trenton Delaware Falls Co., 17 N. J. L. 5.

⁵ East Saginaw etc. R. R. Co. v. Benham, 28 Mich. 459; Snoddy v. County of Pettis, 45 Mo. 361; State v. Fisher, 26 N. J. L. 129; Pittsburgh etc. R. R. Co. v. Hall, 25 Pa. St. 336; Thornton v. Town Council of North Providence, 6 R. I. 433; Suver v. Chicago etc. R. R. Co., 123 Ill. 293; Musick v. Kansas City etc. R. R. Co., 114 Mo. 309, 21 S. W. Rep. 491. In Iowa an apportionment of the damages to each according to his

interest.⁶ It is the practice in some States to assess a gross sum to be apportioned by the court.⁷ Where a road is laid out partly in two towns, and a person owns a tract partly in both towns, damages should be assessed for the part in each town separately, but this is because each town is separately liable for the cost of the part of the road within its limits.⁸

§ 516. **Conditional and alternative awards.**—The right of commissioners to award the owner certain easements or privileges in the property taken, or to require the party condemning to do certain things for the benefit of the owner in lieu of money, has been considered in the chapter on damages.⁹ The award should be positive and definite, and all awards upon condition or in the alternative are erroneous and, according to some courts, void. An award of \$972 in a railroad case and, if the company refused to make certain culverts, then \$2,000 additional, was held a good award as to the \$972 only.¹⁰ Damages were claimed for interference with a right of way. The jury found there was no right of way, but reported further that, if they were to take the right of way for granted, they assessed the damages at £150. The award was held bad altogether.¹¹ A conditional report submitting certain questions of law to the court is a nullity.¹² The lay-out of a highway upon

interest is commended, as the better practice. *Ruepert v. C. etc. R. R. Co.*, 43 Ia. 490. And see *In re Daly*, 88 Hun 188, 34 N. Y. Supp. 414.

⁶ *Harris v. Howes*, 75 Me. 436; *Rentz v. Detroit*, 48 Mich. 544; *Chesapeake & Ohio Canal Co. v. Hoye*, 2 Gratt. 511.

⁷ *Tide Water Canal Co. v. Archer*, 9 G. & J. 479; *Ross v. Elizabethtown etc. R. R. Co.*, 20 N. J. L. 230.

⁸ *State v. Garretson*, 23 N. J. L. 388.

⁹ Ante, § 505.

¹⁰ *Winchester & Potomac R. R.*

Co. v. Washington, 1 Rob. Va. 67. It was also held that, though a suit would not lie for the \$2,000, yet, if a proper construction of the road required the culverts, a suit would lie for damages by omitting them.

¹¹ *Queen v. London & Northwestern Ry. Co.*, 3 E. & B. 443; *S. C.* 77 E. C. L. R. 443. In *re Wright & Cromford Co.*, 1 A. & E. N. S. 98; *S. C.* 41 E. C. L. R. 454, is a similar case.

¹² *Germantown etc. Turnpike Road Co.*, 4 Rawle, 191; *Case of a Road*, 2 S. & R. 277.

condition that the applicants should pay for the same was held void in New Hampshire,¹³ but otherwise in Kentucky.¹⁴

§ 517. **As to the time of making report.**—A statute limiting the time within which a report must be made is mandatory,¹⁵ and a report made after the time has expired is invalid, even though the delay is sanctioned by an agreement of counsel.¹⁶ The same is true where the time is fixed by order of court.¹⁷ A court which has a general power to fix the time within which a report shall be made may extend the time.¹⁸ A continuance after the time has expired,¹⁹ or an order entered nunc pro tunc either confirming the report²⁰ or extending the time,²¹ will be of no avail. Where the report is to be delivered to an officer who is directed to return it to the next term of court in the county, it means

¹³ *Dudley v. Butler*, 10 N. H. 281.

¹⁴ *McIlvoy v. Speed*, 4 Bibb. 85; *Thurman v. Emmerson*, 4 Bibb. 279; and see *Wilson v. Whitsell*, 24 Ind. 306.

¹⁵ *Breese v. Poole*, 16 Ill. App. 551; *Inhabitants of Windham, Petitioners*, 32 Me. 452; *Cornville v. County Comrs.*, 33 Me. 237; *Matter of Highway*, 3 N. J. L. 244; *Semon v. Trenton*, 47 N. J. L. 489; *Ex parte Teese*, 4 Pa. St. 69; *Heidelberg Township Road*, 47 Pa. St. 536; *Frankstown Road*, 26 Pa. St. 472; *Martin v. Stillwell*, 50 N. J. L. 530, 14 Atl. Rep. 563; *Contra: Allison v. Commissioners of Highways*, 54 Ill. 170; *Matter of Broadway Widening*, 63 Barb. 572; *People v. Lake County*, 33 Cal. 487; *In re South Market St.*, 76 Hun 85, 27 N. Y. Supp. 843; *Bohr v. Neuenchwander*, 120 Ind. 449, 22 N. E. Rep. 416. See as to construction of Missouri statutes, *Rose v.*

Kansas City etc. R. R. Co., 128 Mo. 135, 30 S. W. Rep. 518.

¹⁶ *City of Belfast Appellant*, 53 Me. 431.

¹⁷ *Munson v. Blake*, 101 Ind. 78; *Claybaugh v. Baltimore & Ohio R. R. Co.*, 108 Ind. 262; *Anderson v. Pemberton*, 89 Mo. 61; *Baldwin and Snowden Road*, 3 Grant's Cas. 62; *Road in Ryberry*, 6 Phila. 384; *Metzler & Hugh's Road*, 62 Pa. St. 151; *In re Road in Salem Township*, 103 Pa. St. 250; *Blake v. Quincy*, 113 Ind. 124.

¹⁸ *Lipes v. Hand*, 104 Ind. 503; *McMullen v. State*, 105 Ind. 334.

¹⁹ *Baldwin and Snowden Road*, 3 Grant's Cas. 62; *Road in Ryberry*, 6 Phila. 384; *In re Magnolia Ave.*, 20 Phila. 387, 10 Pa. Co. Ct. 159.

²⁰ *Road in Reserve Township*, 2 Grant's Cas. 204.

²¹ *In re Road in Salem Township*, 103 Pa. St. 250.

the next term after he gets the report.²² A statute required the report to be returned to the next regular session of court after the proceedings were finished; it was held to mean the next regular term, etc.²³ Where reviewers were appointed at one term, to report at the next term, it was held that a report filed at the same term at which they were appointed was untimely.²⁴ A report, left within the time limited, at the office of the town clerk in his absence, to be filed by him, was regarded as filed, though not so marked.²⁵ If the report refers to a plan and is incomplete without it, both must be filed within the time limited.²⁶ Where the lay-out of a highway was to be reported to and accepted by a town meeting, and the lay-out was required to be filed with the town clerk seven days before the meeting, it was held that, though the lay-out and report might be contained in the same paper, yet they need not be, and that the report need not be filed before presentation to the meeting.²⁷ Where no time is fixed the report must be filed in a reasonable time and a delay of three years was held unreasonable and fatal.²⁸

§ 518. **Filing and recording the report.**—If the statute requires the report to be recorded, or filed with a particular officer, it will have no validity until this is done.²⁹ As to what constitutes recording in the absence of any indication in the statute, it is difficult to say. It has been held that a paper signed by selectmen, setting forth their acts and doings in laying out a highway, and filed with the town

²² Webb v. County Comrs., 77 Me. 180.

²³ Parsonfield v. Lord, 23 Me. 511.

²⁴ Appleby Manor Road, 1 Grant 443; Chartier's Tp. Road, 48 Pa. St. 314; Road in Baldwin etc. Townships, 36 Pa. St. 9.

²⁵ Reed v. Acton, 120 Mass. 130.

²⁶ Jeffries v. Swampscott, 105 Mass. 535.

²⁷ Carr v. Berkley, 145 Mass.

²⁸ Commissioners of Highways v. People, 61 Ill. App. 634.

²⁹ Todd v. Rome, 2 Me. 55; Tuley v. Town of Northfield, 6 Ill. App. 356; Commonwealth v. Merrick, 2 Mass. 529; Burns v. Multnomah Ry. Co., 8 Sawyer 543; Commissioners of Highways v. People, 61 Ill. App. 634. See Oberfelder v. Metropolitan El. R. R. Co., 138 N. Y. 181, 33 N. E. Rep. 937.

clerk, was a sufficient record within the statute.³⁰ In another case, where the statute required a record of the laying out of a highway to be made, it was held necessary that the whole proceedings should be copied into a book prepared for that purpose, in order that it might remain as permanent evidence of the public right.³¹ If, after a report is ordered to be recorded, it is lost, its contents may be proved and a copy recorded.³² Where the statute required the return of laying out of a highway to be recorded it was held that the petition and all proceedings should be recorded as a matter of convenience.³³

§ 519. **Action on the report by non-judicial bodies.**—It has been a common practice to have reports of commissioners, especially in highway and drainage cases, acted upon by legislative bodies, such as a board of trustees, or county commissioners, or a city council, and, in New England, reports laying out highways have been submitted to a general town meeting for approval or rejection. Such bodies usually exercise an absolute discretion, and approve or reject a report according to their view of what the public interests demand.

In the case of town meetings acting in such matters, it is essential that the meeting should be duly called and that the warrant should specify that the particular report will come before it.³⁴ The meeting must not be called until the road has been laid out.³⁵ The meeting, being duly assembled, will proceed as in other cases. It is held in Maine that the report must be accepted or rejected absolutely, and that an acceptance upon conditions is void.³⁶ A contrary doctrine is maintained in Massachusetts, and a vote accepting a highway upon condition that it should be con-

³⁰ *Hardy v. Houston*, 2 N. H. 309.

³¹ *Ohio v. Carman*, Tappan (Ohio), 162.

³² *Frame v. Boyd*, 35 N. J. L. 457.

³³ *Haywood v. Charlestown*, 43 N. H. 61.

³⁴ *State v. Taff*, 37 Conn. 392.

³⁵ *Howard v. Hutchinson*, 10 Me. 335; *Mann v. Marston*, 12 Me. 32.

³⁶ *Wardens of Christ Church v. Woodward*, 26 Me. 172; *State v. Calais*, 48 Me. 456.

structed at the expense of the applicant, and that he should defend the town against all prosecutions, was held valid.³⁷ All the preliminaries required by statute prior to the action of the town meeting, such as notice, filing the report within a specified time, and the like, must be complied with to make the proceedings legal.³⁸

In regard to the acceptance of reports by the legislative authority of cities, villages and counties, similar principles apply. There must be a quorum present, who are qualified to act in the premises.³⁹ And, where a board of trustees consisted of five members, and three constituted a quorum, and four were present, two of whom were disqualified, and a report was confirmed by the vote of the other two, it was held void.⁴⁰ The report must be accepted or rejected as an entirety. Part cannot be accepted and part rejected.⁴¹ Where a city charter provided that, if the city council concluded to make the improvement, they should pass a resolution accepting the report and directing the clerk to deliver a copy of the assessment to the treasurer, it was held that a resolution simply accepting the report was not final, and that the council might afterwards annul the whole proceeding.⁴² The vote need not be recorded unless required by statute.⁴³ It has been held that the acceptance of a report by county commissioners, at a meeting when they were not authorized to act thereon, was erroneous merely, and not void.⁴⁴ Where a city council accepted a report recommending that no damages be allowed the plaintiffs, and afterwards at the request of the plaintiffs voted to meet on the premises, but did not, and no further action was had, it

³⁷ *Harrington v. Harrington*, 1 Met. 404.

³⁸ *Ibid.*; and also *Blaisdell v. Winthrop*, 118 Mass. 138; *Jeffries v. Swampscott*, 105 Mass. 535; *Commonwealth v. Merrick*, 2 Mass. 529; *Reed v. Acton*, 120 Mass. 130.

³⁹ *Mankin v. State*, 2 Swan 206.

⁴⁰ *Coles v. Williamsburgh*, 10 Wend. 659.

⁴¹ *Simmons v. Mumford*, 2 R. I. 172; *Clarke v. Newport*, 5 R. I. 333.

⁴² *Elkhart v. Simonton*, 71 Ind. 7.

⁴³ *Ford v. Whitaker*, 1 Nott & McCord 5.

⁴⁴ *Wright v. Wilson*, 95 Ind. 408.

was held that the acceptance of the report was not affected by the subsequent vote.⁴⁵ Such bodies should conform strictly to the statutory requirements.⁴⁶ A county board on July 5 voted to reject a report of viewers laying out a road. On July 6 they reconsidered the vote, and on the 23rd of the same month voted to confirm the report. Their action was held valid.⁴⁷ It has been held, construing a particular statute, that a council could not arbitrarily set aside a report and order a reappraisement, without any objections being made or hearing had.⁴⁸

§ 520. **Action on the report by a court: General principles.**—Where the proceedings are before a court and the tribunal is appointed by the court, a report should be made to the court, though not expressly required by statute, and the court can accept or reject the report as justice may require.⁴⁹ As the court acts judicially in such matters, it can only act upon them in term time, unless by express provision of the statute.⁵⁰ Though the statute provides that the report of commissioners shall be final and conclusive, it may be set aside for fraud or misconduct.⁵¹ It means that, upon matters committed to the charge of the commissioners, their judgment shall be conclusive when lawfully exercised. A statute provided that the court should not set aside the report of surveyors for illegality or irregularity. It was held to refer to matters of form merely, and not to matters of substance.⁵²

Sometimes statutes provide that the court may set aside

⁴⁵ *Goddard v. Worcester*, 9 Gray 88.

⁴⁶ *People v. Canal Board*, 7 Lans. 220.

⁴⁷ *Higgins v. Curtis*, 39 Kan. 283, 18 Pac. Rep. 207.

⁴⁸ *Schneider v. Rochester*, 160 N. Y. 165.

⁴⁹ *Pueblo & Arkansas Valley R. R. Co. v. Rudd*, 5 Col. 270; *Hingham & Quincy Bridge & Turnpike Co. v. County of Norfolk*, 6 Allen 353; *State v. Mc-*

Donald, 28 Minn. 445. But see *In re South St. Paul St.*, 85 Hun 473, 33 N. Y. Supp. 141.

⁵⁰ *Pillsbury v. Springfield*, 16 N. H. 565.

⁵¹ *Matter of Buffalo, New York & Phila. R. R. Co.*, 32 Hun 289.

⁵² *State v. Connover*, 7 N. J. L. 203; See further on power of court in particular cases; *Vedder v. Marion County, (Or.)* 36 Pac. Rep. 535; *Mayo v. Turner*, 1 Mumford 405.

reports for good cause shown.⁵³ or for sufficient cause.⁵⁴ Under such statutes the practice would be the same as in any case where the court had power to act in the matter of accepting or rejecting the report. And, though the statute authorizes the court to direct a new appraisal before the same or new commissioners, at its discretion, it was held that the court should not interfere unless some substantial error had been committed.⁵⁵ In general it may be said that good grounds for setting aside a report are, any defect or insufficiency in the proceedings prior to the appointment of the tribunal which would have been an adequate reason for refusing the appointment and which have not been waived by the objector, or any mistake, irregularity or partiality in the proceedings of the tribunal materially affecting the merits of the case.⁵⁶ A report should not be confirmed without

⁵³ Fort Street Union Depot Co. v. Backus, 92 Mich. 33, 52 N. W. Rep. 790; See Bennett v. Camden & Amboy R. R. Co., 14 N. J. L. 145.

⁵⁴ See Chapman v. Graves, 8 Blackf. 308.

⁵⁵ Troy & Boston R. R. Co. v. Northern Turnpike Co., 16 Barb. 100.

⁵⁶ "Good cause must be shown before a report of a jury in condemnation proceedings will be set aside, and in the absence of such showing the presumption is in favor of the report, and that the jury discharged their duty. The jury, in such proceedings, exercise, however, important functions, and pass upon valuable rights of property; and upon proper showing their award may be impeached for misconduct on their part, or where they have acted upon a wrong basis, or for partiality, bias, prejudice, or inattention, or unfaithfulness in the dis-

charge of their duties, or for error of such character as to furnish a just inference of the existence of such influences." Orange Belt R. R. Co. v. Craver, 32 Fla. 28, 13 So. Rep. 444. In Bennett v. Camden & Amboy R. R. Co., 14 N. J. L. 145, it is said that the report could not be set aside for any irregularities prior to or including the appointment of commissioners, but that the following were good causes: "First. If the commissioners have not taken and subscribed an oath or affirmation before some person duly authorized to administer an oath, faithfully and impartially to examine the matter in question, and to make a true report, etc., as is directed in the act. Second. If a notice, such as is required in the act, of the time and place of the meeting of the commissioners, is not given to the party, and for want of which he has been prejudiced in his claims. Or if the commis-

a hearing on the exceptions filed.⁵⁷ Where there are reports of viewers and reviewers, a confirmation of the report of one is a rejection of the report of the other.⁵⁸

§ 521. **Defects in the proceedings prior to the appointment of commissioners.**—We have already discussed these matters in the chapters upon the Petition, Notice, and Objections to the application,⁵⁹ as well as the waiver of such defects by not insisting upon them at the time or by going to a hearing upon the merits. It will be unnecessary, therefore, to repeat the discussion at this place.⁶⁰

§ 522. **Irregularities on the part of the commissioners, jurors, etc.**—Any improper conduct on the part of the tribu-

sioners did not meet at the time and place appointed, but at some other time or place, without due notice to, or the consent of the party, so that he had not a fair opportunity of being heard and of presenting his claims. Third. If the commissioners did not "view and examine" the lands and materials, but made their report without such view and examination. Fourth. If the commissioners or any of them acted with partiality or with corruption. Fifth. If mistake of law or fact intervened on the part of the commissioners as to their powers or duty, or in relation to the quantity and value of the land, and such mistake is made manifest; or, Sixth. If, upon the whole matter, there should be reasonable grounds to apprehend that justice may not have been done, and the land-holder is willing to take the hazard of paying costs, which by the statute he must pay, if the jury do not assess his damages at more than the commissioners did." See also *McMahon v. Cincinnati & Chi-*

cago Short Line R. R. Co., 5 Ind. 413; *Tappan's Petition*, 24 N. H. 43; *White v. Landaff*, 35 N. H. 128; *State v. Rye*, 35 N. H. 368; *Shattuck v. Waterville*, 27 Vt. 600; *In re Chapin*, 32 N. Y. Supp. 361.

⁵⁷ *Werley v. Huntington Waterworks Co.*, 138 Ind. 148, 37 N. E. Rep. 582; *In re Opening of Thirteenth St.*, 147 Pa. St. 245, 23 Atl. Rep. 555.

⁵⁸ *In re Road in Kingston*, 134 Pa. St. 409, 19 Atl. Rep. 750. As to keeping jurisdiction of report pending appeal, etc., see *In re East Grant Street*, 121 Pa. St. 596, 16 Atl. Rep. 366.

⁵⁹ See chapters 14, 15 and 16.

⁶⁰ *In Matter of Highway*, 18 N. J. L. 291, it was held that, where the court was required to pass upon the sufficiency of the notice and application when it appointed the commissioners, it could not review its decision when their report came in. And see generally *Nischen v. Hawes*, (Ky.) 21 S. W. Rep. 1049; *In re Frederick Street*, 155 Pa. St. 623, 26 Atl. Rep. 773.

nal or defect in their appointment or selection, or illegality of procedure materially affecting the merits, will be sufficient cause for setting aside the report.⁶¹ These matters have also been discussed in prior chapters, to which the reader is referred.⁶² It will be presumed, however, that the tribunal has proceeded rightly and according to the statute until the contrary appears.⁶³

§ 523. **Accident, mistake or error of judgment on the part of commissioners.**—Where the owner has been prevented by accident or mistake from attending before the commissioners, and has not been guilty of laches, and the award is clearly unjust as to such owner, a rehearing should be granted.⁶⁴

The report may be set aside for errors committed in receiving or rejecting testimony,⁶⁵ or because the award is against the evidence,⁶⁶ or because the tribunal has acted upon erroneous principles,⁶⁷ or proceeded in a careless, negligent or unintelligent manner.⁶⁸

§ 524. **Inadequate or excessive damages.**—The report or verdict may be set aside on the ground that the damages

⁶¹ Matter of New York Central & Harlem River R. R. Co., 64 N. Y. 60; Douglass v. Byrnes, 63 Fed. Rep. 16.

⁶² See chap. xviii.

⁶³ Road in South Abington, 109 Pa. St. 118.

⁶⁴ Matter of New York, L. & W. Ry. Co., 29 Hun 602; S. C. 93 N. Y. 385; Matter of New York Central etc. R. R. Co., 64 N. Y. 60; Matter of New York, L. & W. Ry. Co., 63 How. Pr. 265; Bourgeois v. Mills, 60 Tex. 76.

⁶⁵ Matter of New York, West Shore & Buffalo Ry. Co., 35 Hun 260; Goodwin v. Milton, 25 N. H. 458. Where the statute provided that the decision of commissioners in receiving or rejecting testimony should be final and con-

clusive, it was said that the court would interfere if there was fraud, bad faith or gross error or mistake in such rulings. Thompson v. Conway, 53 N. H. 622.

⁶⁶ Wilson v. Rockford etc. R. R. Co., 59 Ill. 273; Fitchburg R. R. Co. v. Eastern R. R. Co., 6 Allen 98.

⁶⁷ VanWickle v. Camden & Amboy R. R. Co., 14 N. J. L. 162; Williamson v. East Amwell, 28 N. J. L. 270; Swayze v. New Jersey Midland R. R. Co., 36 N. J. L. 295; Crater v. Frittz, 44 N. J. L. 374; Matter of New York, Lackawanna & Western Ry. Co., 33 Hun 639; S. C., 98 N. Y. 447; S. C., 102 N. Y. 704; S. C., 2 How. Pr. N. S. 225; Beckett v. Midland Ry. Co., 1 L. R. C. P. 241.

⁶⁸ Walters v. Houck, 7 Ia. 72.

awarded are too much or too little.⁶⁹ In setting aside a report on the question of damages, the court will be governed by the same principles as obtain in the case of the verdicts of juries in common law suits.⁷⁰ Where there is evidence to sustain the verdict and the testimony is conflicting, the court will not interfere;⁷¹ and especially is

⁶⁹ Chapman v. Groves, 8 Blackf. 308; Kansas City etc. R. R. Co. v. Campbell, 62 Mo. 585; Corporation v. Manhattan Co., 1 Caines R. 507; Clarksville etc. Turnpike Co. v. Atkinson, 1 Sneed, 426; Van Wickle v. Camden & Amboy R. R. Co., 14 N. J. L. 162; Matter of Commissioners of Central Park, 51 Barb. 277; Grand Rapids etc. R. R. Co. v. Weiden, 70 Mich. 390, 38 N. W. Rep. 294; In re Metropolitan El. R. R. Co., 76 Hun 375, 27 N. Y. Supp. 756. Some cases appear to intimate a contrary doctrine, but the language used is to be taken with reference to the propriety of the action rather than with reference to the power of the court in the premises. See matter of Boston Road, 27 Hun 409; Matter of the New Reservoir, 1 Sheldon (N. Y.) 408; Troy & Boston R. R. Co. v. Lee, 13 Barb 169; Willing v. Baltimore R. R. Co., 5 Whart. 460; Allison v. Delaware etc. Canal Co., 5 Whart 482; and cases hereafter cited in this section.

⁷⁰ Rheimer v. Stillwater Ry. & Transfer Co., 29 Minn. 147; Matter of William and Anthony Streets, 19 Wend. 678.

⁷¹ Texas & St. Louis Ry. Co. v. Eddy, 42 Ark. 527; Same v. Cella, 42 Ark. 528; Springfield & Memphis Ry. Co. v. Rhea, 44 Ark. 258; Little Rock Junction Ry. Co.

v. Woodruff, 49 Ark. 381; Selma, Rome & Dalton R. R. Co. v. Gammage, 63 Ga. 604; Illinois & Wisconsin Ry. Co. v. Van Horn, 18 Ill. 257; Kyle v. Miller, 108 Ind. 90; Morgan's Appeal, 39 Mich. 675; Colvill v. St. Paul & Chicago Ry. Co., 19 Minn. 283; Sedalia v. Missouri, Kansas & Texas Ry. Co., 17 Mo. App. 105; City of Kansas v. Kansas City etc. R. R. Co., 84 Mo. 410; Hastings & Grand Island R. R. Co. v. Ingalls, 15 Neb. 123; Virginia & Truckee R. R. Co. v. Elliott, 5 Nev. 358; Somerville etc. R. R. Co. v. Doughty, 22 N. J. L. 495; State v. Miller, 23 N. J. L. 383; Railroad Co. v. Gesner, 20 Pa. St. 240; Fayetteville etc. R. R. Co. v. Combs, 51 Ark. 324, 11 S.W. Rep. 418; Cahill v. Norwood Park, 149 Ill. 156, 36 N. E. Rep. 606; McCarty v. C. B. & Q. R. R. Co., 34 Ill. App. 273; Louisville & N. R. R. Co. v. Ingram, (Ky.) 14 S. W. Rep. 534; New Orleans etc. R. R. Co. v. McNeeley, 47 La. An. 1298, 17 So. Rep. 798; In re Opening Twenty-fifth St., 79 Mich. 584, 44 N. W. Rep. 1151; St. Louis v. Wetzel, 110 Mo. 260, 19 S. W. Rep. 534; Clarke v. Chicago etc. R. R. Co., 23 Neb. 613, 37 N. W. Rep. 484; Matter of Staten Island Rapid Transit Co., 47 Hun 396, 14 N. Y. St. Rep. 494; In re Gilroy, 78 Hun 260, 28 N. Y. Supp. 910; In re Thomp-

this the case where the commissioners or jury have viewed the premises.⁷² Where the owner petitions for damages, it is error to allow him more than he claims in his petition.⁷³ On a petition to condemn a piece of land large enough for a telegraph pole, adjacent to a railroad, every one hundred and fifty feet, across defendant's tract, there being eleven poles on defendant's land, a verdict for \$3,850 was set aside as grossly excessive.⁷⁴ A verdict or award which is more than the amount testified to by the witnesses of one party and less than the amounts testified to by the witnesses for the other, will not be disturbed on the question of amount alone.⁷⁵ Where the award was \$50,000 and the petitioner dismissed the proceedings and commenced anew, and a second award was made of \$18,000, the court, in view of the great discrepancy in the two reports and the conflicting evidence as to value, granted a new trial.⁷⁶ Where the first report was set aside because only nominal damages were awarded, and a second report was made also for nominal damages and no irregularity appeared, the court refused to set it aside.⁷⁷ Where a verdict for \$3,327.08 was reduced

son, 85 Hun 438, 32 N. Y. Supp. 897; *Knapp v. New York El. R. R. Co.*, 4 Misc. 408; *Shoemaker v. United States*, 147 U. S. 282, 13 S. C. Rep. 361; *Metropolitan W. S. R. R. Co. v. Springer*, 159 Ill. 434, 42 N. E. Rep. 871; *Thompson v. De Weere-Dye Ditch & R. R. Co.*, 25 Col. 243, 53 Pac. Rep. 507; *United States v. Senfert Bros. Co.*, 87 Fed. Rep. 35. Where correct rules have been adopted, the award will not be set aside unless the amount is palpably erroneous. *Matter of Thompson*, 45 Hun 261.

⁷² *Western Pacific R. R. Co. v. Reed*, 35 Cal. 621; *McReynolds v. Baltimore etc. Ry. Co.*, 106 Ill. 152; *South Park Comrs. v. Trustees of Schools*, 107 Ill. 489; *Chicago & Evanston R. R. Co. v.*

Blake, 116 Ill. 163; *Omaha & Republican Valley R. R. Co. v. Walker*, 17 Neb. 432; *Virginia & Truckee R. R. Co. v. Henry*, 8 Nev. 165; *Matter of 138th Street*, 60 How. Pr. 290; *Supervisors of Doddridge County v. Stout*, 9 W. Va. 703.

⁷³ *Houston etc. Ry. Co. v. Milburn*, 34 Tex. 224.

⁷⁴ *Mutual Union Tel. Co. v. Katkamp*, 103 Ill. 420.

⁷⁵ *Illinois etc. R. R. Co. v. McClintock*, 63 Ill. 514; *Somerville etc. R. R. Co. v. Doughty*, 22 N. J. L. 495; *Matter of New York etc. R. R. Co.*, 21 Hun 250.

⁷⁶ *New Orleans etc. R. R. Co. v. Zerringue*, 23 La. An. 521.

⁷⁷ *Matter of Prospect Park & Coney Island R. R. Co.*, 24 Hun 199.

to \$2,589 by the trial court, without assigning any particular reason therefor, it was held that a new trial should have been granted.⁷⁸ After a city had taken possession of property condemned and improved it as a street, it was held estopped from having a new bearing on the question of damages.⁷⁹

§ 525. **Departure from the petition in laying out a highway.**—Sometimes the statute vests in the commissioners or other tribunals appointed to lay out a highway a discretion as to its particular location, the petition or application giving merely a general description of the way desired.⁸⁰ In the absence of such a statutory discretion the way as laid out must correspond substantially with the way as described in the petition.⁸¹ Any material departure will vitiate the proceedings,⁸² but slight variations will be immaterial.⁸³ In applying these general rules to particular cases, considerable variation will be found in the decided cases. A variation of four chains in one of the courses was held material.⁸⁴ Also a variation of from fifty to one hun-

⁷⁸ *Parsons etc. R. R. Co. v. Montgomery*, 46 Kan. 120, 26 Pac. Rep. 403.

⁷⁹ *Matter of Widening Market St.*, 11 Phila. 409.

⁸⁰ *Kinnie v. Bare*, 80 Mich. 345, 45 N. W. Rep. 345; *State v. Thompson*, 46 Minn. 302, 48 N. W. Rep. 1111; *In re Essex Ave.*, 121 Mo. 98, 25 S. W. Rep. 891.

⁸¹ *Brennan v. Mecklenberg*, 49 Cal. 672; *Orrington v. County Comrs. of Penobscot Co.*, 51 Me. 570; *Bryant v. County Comrs.*, 79 Me. 128; *Cole v. Canaan*, 29 N. H. 88; *State v. Rye*, 35 N. H. 368; *Bachelor v. Newhampton*, 60 N. H. 207; *State v. Pierson*, 37 N. J. L. 363; *Butterfield v. Pollock*, 45 Ia. 257; *In re Seidel's Road*, 2 Woodward's Decs. 275. In the following cases it was held that the way laid out might be of a

different width: *Raymond v. Griffin*, 23 N. H. 340; *In re State St.*, 8 Pa. St. 485.

⁸² *State v. Molly*, 18 Ia. 525; *Pembroke v. County Comrs.*, 12 Cush. 351; *Bennett v. Cutler*, 44 N. H. 69; *Flanders v. Colebrook*, 51 N. H. 300; *State v. Burnett*, 14 N. J. L. 385; *State v. Vanbuskirk*, 21 N. J. L. 86; *People v. Whitney's Point*, 32 Hun 508; *S. C.*, 102 N. Y. 81; *Road in Byberry*, 6 Phila. 384; *Halverson v. Bell*, 39 Minn. 240, 39 N. W. Rep. 324; *Eames v. Northumberland*, 44 N. H. 67.

⁸³ *Greene v. East Haddam*, 51 Conn. 547; *In re Road in East Deer*, 155 Pa. St. 53, 25 Atl. Rep. 805; *State v. O'Connor*, 78 Wis. 282, 47 N. W. Rep. 433.

⁸⁴ *Powell v. Hitchner*, 32 N. J. L. 211.

dred links.⁸⁵ A variation of a rod in the point of commencement was held to vitiate.⁸⁶ Where the application is for a way running northwesterly from a certain point, and it is laid out with numerous courses all but one or two of which are northwesterly, the variance will not vitiate.⁸⁷ Under a petition to widen, alter or straighten an existing way, an entirely or substantially new highway cannot be laid out.⁸⁸ Nor can only part of the way petitioned for be laid out.⁸⁹ Where the petition was for a road from the house of George B. and the report was from the house of John B., the report was set aside.⁹⁰ Under a petition for a second-class road a first-class road was laid out. It was held erroneous, but not void.⁹¹ The location will be presumed to be according to the petition though different terms are used.⁹² Under a power to make such changes in the road petitioned for, between the termini, as the commissioners may deem for the public convenience, they cannot change the termini.⁹³ And generally where the verdict and judgment relate to a different tract than that described in the petition, the proceedings are erroneous.⁹⁴

§ 526. **Miscellaneous objections.**—The court will not upon slight grounds sustain objections which reflect discredit upon the persons who made the report.¹ A delay of

⁸⁵ *State v. French*, 24 N. J. L. 736; *St. Louis v. Weber*, 140 Mo. 515; *Miller v. Banks*, 146 Ind. 219, 43 N. E. Rep. 930. And see *St. Louis v. Lang*, 131 Mo. 412, 33 S. W. Rep. 54.

⁸⁶ *Shinkle v. Magill*, 58 Ill. 422.

⁸⁷ *State v. Atkinson*, 27 N. J. L. 420; *State v. Hulick*, 33 N. J. L. 307.

⁸⁸ *Lowe v. Brannan*, 105 Ind. 247; *Inhabitants of Livermore, Petitioners*, 11 Me. 275; *State v. Canterbury*, 40 N. H. 307.

⁸⁹ *Thorpe v. County Comrs.*, 9 Gray 57; *People v. Township Board of Springville*, 12 Mich. 434; *Ford v. Danbury*, 44 N. H.

388; *Robinson v. Logan*, 31 Ohio St. 466. See *Princeton v. County Comrs.*, 17 Pick. 154.

⁹⁰ *Boyer's Road*, 37 Pa. St. 257.

⁹¹ *Hamilton County v. Garrett*, 62 Tex. 602.

⁹² *Windham v. Cumberland County Comrs.*, 26 Me. 406; *Smith v. Conway*, 17 N. H. 586; *State v. Stiles*, 13 N. J. L. 172.

⁹³ *Deer v. Commissioners of Highways*, 109 Ill. 379.

⁹⁴ *Chicago etc. R. R. Co. v. Chicago*, 132 Ill. 372, 23 N. E. Rep. 1036; *Keyes v. Minneapolis*, 42 Minn. 467, 44 N. W. Rep. 529.

¹ *State v. Stiles*, 13 N. J. L. 172.

three years in asking for confirmation was held sufficient ground for refusing it.² Where damages were assessed for the property and franchises of a bridge corporation, and pending action upon the report the bridge was blown down and destroyed, the court nevertheless confirmed the report.³ Proceedings were commenced to open a street forty feet wide. Pending these, new proceedings were commenced and completed to open a street over the same ground fifty feet wide. It was held to be error to afterwards confirm a report in the former case.⁴ Where, after commissioners were appointed, the parties made an agreement to submit matters to them so as to enlarge the scope of their inquiries, the report was rejected because not in accordance with statute, and because as a common law award the court had no jurisdiction to act upon it.⁵ Various miscellaneous cases are referred to in the margin.⁶

§ 527. **The time and manner of objecting.**—Where by statute objections are to be first made before the commissioners, and they are authorized to act upon them, a failure to file objections before the commissioners is a waiver of any objections which might be thus made.⁷ Where parties

² *Stearns v. Deerfield*, 51 N. H. 372.

³ *Sunderland Bridge Case*, 122 Mass. 459. A similar case was held good ground for recommitment in *Farmer v. Hooksett*, 28 N. H. 244.

⁴ *Case of Noble Street*, 5 Whart. 333.

⁵ *Hubbard v. Great Falls Mnfg. Co.*, 80 Me. 39, 12 Atl. Rep. 878.

⁶ *Springfield v. Dalbey*, 139 Ill. 34, 29 N. E. Rep. 860; *Smith v. Smith*, 96 Ind. 273; *Campbell v. Fogg*, 132 Ind. 1, 31 N. E. Rep. 454; *Steele v. Empson*, 142 Ind. 397, 41 N. E. Rep. 822; *Fort St. Union Depot Co. v. Jones*, 83 Mich. 415, 47 N. W. Rep. 349; *State v. District Court*, 50 Minn.

14, 52 N. W. Rep. 222; *Berry v. Hebron*, 38 N. H. 196; *Petition of Newport*, 39 N. H. 67; *State v. Brown*, 53 N. J. L. 181, 20 Atl. Rep. 738; *Road in Peach Bottom*, 3 Penny. 541; *In re Sewer on 28th St.*, 158 Pa. St. 464, 27 Atl. Rep. 1109; *Bowers v. Braddock*, 172 Pa. St. 596, 33 Atl. Rep. 759; *Road in Elk*, 2 Pa. Co. Ct. 45; *Road in Manchester*, 15 Pa. Co. Ct. 623; *Road in Friendsville*, 16 Pa. Co. Ct. 172; *Harwell v. Bennett*, 1 Rand. 282.

⁷ *Matter of Clear Lake Water Co.*, 48 Cal. 586; *Thayer v. Burger*, 100 Ind. 262; *Case of the Mayor etc. of New York*, 16 Johns. 231; *Washington Park*, 1 Sandf. 283. See also *Windsor v.*

have until the next term after the report is presented to file objections, but file them at the same term and consent to a confirmation, this is conclusive and they cannot object at the next term.⁸ A statute requiring objections to be in writing is mandatory.⁹ If they are required to be verified by affidavit, a verification by one joint objector is sufficient,¹⁰ and the verification must be made within the time limited for filing objections or it will be unavailing.¹¹ Exceptions must be filed within the time limited,¹² but it has been held that where they are to matters fatal to the proceedings, they may be filed nunc pro tunc after the time has expired.¹³ Exceptions cannot be amended after the time expires, so as to introduce substantially new grounds.¹⁴ They should show who the exceptants are,¹⁵ and that they belong to the class who are entitled to except.¹⁶ The objections should be definite and specific,¹⁷ and to material

Field, 1 Conn. 279; Goodwine v. Leak, 127 Ind. 569, 27 N. E. Rep. 161; Road in Collins, 36 Pa. St. 85. Where the commissioners were required to give notice so that objections could be made before them, and certain parties did not get the notice until it was too late, the court referred back the same so as to give them an opportunity to object. Mayor etc. of New York v. Dover Street, 1 Cow. 74.

⁸ In re Kensington & Oxford Turnpike, 97 Pa. St. 260.

⁹ Bryant v. Knox & Lincoln R. Co., 61 Me. 300.

¹⁰ Munson v. Blake, 101 Ind. 78.

¹¹ Morgan Civil Township v. Hunt, 104 Ind. 590.

¹² Valparaiso v. Parker, 148 Ind. 379; Zoltowski v. Judge, 112 Mich. 349.

¹³ Appeal of Western Penn. R. Co., 152 Pa. St. 319, 25 Atl.

Rep. 602; Cherrytree Tp. Road, 10 Pa. Co. Ct. 389. And see Matter of One Hundred and Sixty-third St., 61 Hun 365, 40 N. Y. St. Rep. 684, 16 N. Y. Supp. 120. And generally as to time of objecting: Phillips v. County Comrs., 83 Me. 541, 22 Atl. Rep. 385; Forsyth Boulevard v. Forsyth, 127 Mo. 417, 30 S. W. Rep. 188; Burlington etc. R. R. Co. v. Dobson, 17 Neb. 450; Latimer v. Tillamook County, 22 Or. 291, 29 Pac. Rep. 734.

¹⁴ Oxford Alley, 8 Pa. Co. Ct. 221; Cherrytree Tp. Road, 10 Pa. Co. Ct. 389.

¹⁵ Exceptions signed, "A. B. attorney for exceptants," were held to be a nullity. Clinton Tp. Road, 3 Pa. Co. Ct. 170.

¹⁶ Bernard v. Calloway County Ct., 28 Mo. 37.

¹⁷ Brooks' Appeal, 32 Cal. 558; Higbee v. Peed, 98 Ind. 420.

matters,¹⁸ or they may be disregarded. And when by statute or the practice of the court written objections are made the objectors will be confined to the objections specified.¹⁹ Where a party might except to the confirmation of the report without notice, rule or pleading, and he obtained a rule for a particular cause, it was held he was not limited to that cause on the hearing.²⁰ But, if a party has leave to except on one ground, after the time to except has expired he will be strictly limited to the ground specified.²¹ Where proceedings are to remain open a month after confirmation, the court cannot confirm *nunc pro tunc* so as to cut off the opportunity to object.²² Where in a highway case the county commissioners, by their misconduct, prevented the filing of remonstrances until after the road was established, it was held that the parties aggrieved could appeal to the Circuit Court and there remonstrate.²³ A statute provided that in railroad proceedings the company, or any defendant, could move to set aside the report as to any tract of land. It was held that this did not authorize the court to set aside the report as to an undivided half interest in the tract.²⁴ Where the statute permitted "any person injured or aggrieved by the laying out of a road" to object, it was held that the privilege was not confined to those whose land was taken, but that any tax-payer could object.²⁵

§ 528. **The practice in hearing objections.**—Where the objections are based upon matters not apparent from the face of the record, the burden of proof is upon the objec-

¹⁸ *Lockwood v. Gregory*, 4 Day 407.

¹⁹ *Mevanda v. Spurlin*, 100 Ind. 380; *Updegraff v. Palmer*, 107 Ind. 181.

²⁰ *Washington etc. R. R. Co. v. Switzer*, 26 Gratt. 661; and see *Bowen v. Snyder*, 66 Ind. 340.

²¹ *United States v. Reed*, 56 Mo. 565.

²² *Road to Ewing's Mill*, 32 Pa. St. 282; *Ross Tp. Road*, 36 Pa. St. 87; *Michigan Central R. R.*

Co. v. Probate Judge, 48 Mich. 638. See also *Gibson & Guy's Mill Road*, 37 Pa. St. 255.

²³ *Breitweiser v. Fuhrman*, 88 Ind. 28; *Rominger v. Simmons*, 88 Ind. 453. And see *Blake v. Quincy*, 113 Ind. 124.

²⁴ *Southern Pacific R. R. Co. v. Wilson*, 49 Cal. 396.

²⁵ *Smith v. Applegate*, 23 N. J. L. 352. And see *Reynolds v. Barre*, 63 Vt. 541, 22 Atl. Rep. 596.

tor.²⁶ The form of proof is largely, if not entirely, in the discretion of the court.²⁷ Proof by affidavits,²⁸ depositions²⁹ and oral evidence³⁰ has been held proper in different cases. In one case it was held proper to appoint an examiner to take and report the evidence.³¹ The affidavits or testimony of commissioners may be received either to support or impeach their report.³² But where the trial is before a jury, the rule in regard to jurors would apply.³³ Under the Illinois statutes a new trial may be granted as to one defendant and refused as to others.³⁴

§ 529. **Power of the court to amend or modify the report, or confirm it in part.**—As a general principle the court can not act upon the matters which are committed by law to the judgment of the jury or commissioners. Consequently the court cannot change, amend or modify the report unless expressly authorized to do so by statute, but must approve or reject it as a whole.³⁵ The proper course is, if the court

²⁶ *Conwell v. Tate*, 107 Ind. 171; *Crawford v. Valley R. R. Co.*, 25 Gratt. 467.

²⁷ *Marquette, Houghton & Ontonagon R. R. Co. v. Probate Judge*, 53 Mich. 217.

²⁸ *Ibid.* and *Cole v. Peoria*, 18 Ill. 301; *New Jersey etc. R. R. Co. v. Suydam*, 17 N. J. L. 25; *Canal Bank v. Albany*, 9 Wend. 244; *Matter of Pearl Street*, 19 Wend. 651.

²⁹ *Burgess v. Grafton*, 10 Vt. 321.

³⁰ *Sullivan v. La Fayette County*, 61 Miss. 271; *Groce v. Zumwalt*, 4 Mo. 567; *Mississippi River Bridge Co. v. Ring*, 58 Mo. 491; *St. Louis & Floressant R. R. Co. v. Almeroth*, 62 Mo. 343; *Cape Girardeau etc. Road Co. v. Dennis*, 67 Mo. 438; *Clarksville etc. Turnpike Co. v. Atkinson*, 1 Sneed 426; *Chesapeake & Ohio Canal Co. v. Mason*, 4 Cranch,

C. C. 123. It was held improper to hear evidence in *Rochester etc. R. R. Co. v. Beckwith*, 10 How. Pr. 168; *Rondout & Oswego R. R. Co. v. Field*, 38 How. Pr. 187.

³¹ *Forbes Street*, 70 Pa. St. 125.

³² *Marquette, Houghton & Ontonagon R. R. Co. v. Probate Judge*, 53 Mich. 217; *New Jersey etc. R. R. Co. v. Suydam*, 17 N. J. L. 25; *Canal Bank v. Albany*, 9 Wend. 244; *In re Delaware St.*, 3 Luzerne Leg. Reg. Rep. 353. *Contra*, *Petition of Groton*, 43 N. H. 91.

³³ *Kyle v. Auburn etc. R. R. Co.*, 2 Barb. Ch. 489; *Oregon etc. R. R. Co. v. Oregon Steam Nav. Co.*, 3 Or. 178.

³⁴ *Gage v. Chicago*, 141 Ill. 642, 31 N. E. Rep. 163.

³⁵ *Winchester v. Hinsdale*, 12 Conn. 88; *Inhabitants of Brunswick, Appellants*, 37 Me. 446; *Ap-*

is not satisfied, to approve or reject it as a whole, to recommit the matter to the same or new commissioners.³⁶ The verdict of a jury upon the question of damages merely is several as to each proprietor or parcel, and may be set aside as to one person or parcel and sustained as to others.³⁷ The court may allow commissioners to amend their report as to formal matters within the time limited for filing the same.³⁸ Where commissioners reported the total value of property at \$81,120, and apportioned it between landlord and tenant, allowing the tenant \$650 for removing his personal property, the court transferred the latter item from the tenant to the landlord and confirmed the report.³⁹ Where the damages are assessed by a jury, the court cannot amend the verdict after the jury has been discharged, judgment rendered and the term elapsed.⁴⁰

§ 530. **Rehearings, recommittals, reviews, etc.**—The powers of courts in these respects must necessarily depend very much upon the statute. It is a common practice to recommit the report for the correction of errors,⁴¹ or to

plication for Widening Roffing-nac Street, 4 Rob. La. 357; Matter of Clairborne St., 4 La. An. 7; Mississippi River Bridge Co. v. Ring, 58 Mo. 491; Rochester Water Works Co. v. Wood, 60 Barb. 137; S. C., 41 How. Pr. 53; Herr's Mill Road, 14 S. & R. 204; In re Public Road in Bensinger Township, 115 Pa. St. 436; Matter of Central New York Tel. Co., 36 N. Y. App. Div. 553; United States v. Tennant, 93 Fed. Rep. 613; Appeal of Kronenwetter, 135 Pa. St. 176, 19 Atl. Rep. 942; Washington St., 12 Pa. Co. Ct. 288. But see Greenville etc. R. R. Co. v. Nunnamaker, 4 Rich. L. 107; Stockton & Copperopolis R. R. Co. v. Galgiani, 49 Cal. 139; Hannibal Bridge Co. v.

Schaubacker, 49 Mo. 555; Kersley v. Gibbs, 44 N. J. L. 169.

³⁶ Oxford v. Brands, 45 N. J. L. 332; Whitworth v. Puckett, 2 Gratt. 531; and see also cases cited in next section.

³⁷ Anthony v. County Comrs., 14 Pick. 189; Gage v. Chicago, 141 Ill. 642, 31 N. E. Rep. 163; St. Joseph v. Geiwetz, 148 Mo. 210, 49 S. W. Rep. 1000.

³⁸ Long v. Calley, 91 Mo. 305; Spring Brook Road, 64 Pa. St. 451.

³⁹ Matter of New York Central & Hudson River R. R. Co., 35 Hun 306.

⁴⁰ Ayer v. Chicago, 149 Ill. 262, 37 N. E. Rep. 57.

⁴¹ Waterbury v. Darien, 9 Conn. 252; Coleman v. Andrews, 48 Me. 562; Pott's Appeal, 15 Pa. St.

include some matter which has been omitted.⁴² Where an award was to A, and B claimed it, the court referred it back to the committee to inquire and report as to B's right.⁴³ Under a statutory power to refer to the same or new commissioners, the court may refer to commissioners part old and part new.⁴⁴ In recommitting the report, the court may direct the commissioners as to the principles by which they are to be governed, but cannot direct them to allow a certain amount on account of a particular item of damages omitted from their report.⁴⁵ Where a report was made by commissioners one of whom did not qualify until after the report was made, and their report was set aside and the matter referred back to the same commissioners, who merely changed and signed the old report, it was held bad and that they should have made a new view and new report.⁴⁶ Where a report was recommitted for want of notice to certain parties, such parties are entitled to a full and fair hearing.⁴⁷ Where a party made default before commissioners and showed an excuse therefor on the motion to confirm, the court held that the assessment should be set aside and a new hearing granted.⁴⁸ It has been held that a report might be referred back to viewers even after an absolute confirmation, for the correction of errors as to location.⁴⁹

414; *Deering v. County Comrs.*, 87 Me. 151, 32 Atl. Rep. 797; *Adams v. Rulon*, 50 N. J. L. 526, 14 Atl. Rep. 881; *Pennsylvania R. R. Co.'s Appeal*, 2 Walker's Pa. Supm. Ct. 506; *West Manchester Road*, 10 Pa. Co. Ct. 429; *In re Washington St.*, 19 R. I. 156, 33 Atl. Rep. 516; *State v. Larabee*, 59 N. J. L. 259.

⁴² *Ives v. East Haven*, 48 Conn. 272; *McArthur v. Morgan*, 49 Conn. 347; *Reed v. Brenneman*, 72 Ind. 288; *Evers v. Vreeland*, 50 N. J. L. 386, 13 Atl. Rep. 241; *Kingston Tp. Road*, 5 Luzerne Leg. Reg. Rep. 43; *Appeal of Elliott*, 154 Pa. St. 541, 25 Atl.

Rep. 814; *Board of Water Comrs. v. Shutts*, 25 App. Div. N. Y. 22.

⁴³ *Greene v. East Haddam*, 51 Conn. 547.

⁴⁴ *Matter of Henry Street*, 7 Cow. 400.

⁴⁵ *Matter of Commissioners of Central Park*, 61 Barb. 40; *Matter of Commissioners of Central Park*, 4 Lans. 467.

⁴⁶ *Cambria Street*, 75 Pa. St. 357.

⁴⁷ *Stinson v. Dunbarton*, 46 N. H. 385.

⁴⁸ *Matter of New York etc. R. R. Co.*, 93 N. Y. 385.

⁴⁹ *Hause's Appeal*, 3 Walker's Pa. Supm. Ct. 54.

The recommittal of a report is held to be a matter in the discretion of the court.⁵⁰

In Pennsylvania, in road cases, a review by new viewers is held to be a matter of right, though not authorized by statute.⁵¹ The court may adopt the report of either the viewers or reviewers.⁵² But, where both the viewers and reviewers reported in favor of the road, it was held that the court must confirm the last award, if any.⁵³ Where the statute required the application for a review to be made at the next term after the reviewers filed their report, an application after the next term will be futile.⁵⁴ Where the report of reviewers is set aside because one was ineligible, the court should appoint new reviewers on the same petition.⁵⁵

Where a report was referred back to the same commissioners with directions to file an amended report within ten days, a report filed after the ten days had expired was set aside, because not in compliance with the order.⁵⁶ Where the statute provided for a reassessment of damages, it was held the first assessment remained in force until the new assessment was completed. And where there was a mistrial on the first attempt to reassess and nothing further was done for eleven months, the application for reassessment was held to be abandoned.⁵⁷

§ 531. **When objectors are estopped.**—If the owner accepts the damages awarded, he cannot object to the report

⁵⁰ Wilcox v. Meriden, 57 Conn. 120, 17 Atl. Rep. 366.

⁵¹ King's Road, 1 Dall. 11; Road in Franklin County, 2 Yeats 53; Berlin Road, 3 Yeats 263; Bachman's Road, 1 Watts 400.

⁵² Buckwalter's Road, 3 S. & R. 236; Bachman's Road, 1 Watts 400; Ralpho Tp. Road, 1 Monaghan (Pa. Supm. Ct.) 427.

⁵³ Road in Lewiston, 84 Pa. St. 410.

⁵⁴ Road in Indiana County, 51 Pa. St. 296. See also, on the subject of reviews, Matter of High-

way, 3 N. J. L. 272; Addis v. Priest, 3 N. J. L. 378; State v. Cruser, 14 N. J. L. 401; George's Creek Coal & Iron Co. v. New Central Coal Co., 40 Md. 425; Hannibal & St. Joseph R. R. Co. v. Rowland, 29 Mo. 337.

⁵⁵ Leet Tp. Road, 159 Pa. St. 72, 28 Atl. Rep. 238. And see North Union Tp. Road, 150 Pa. St. 512, 24 Atl. Rep. 749.

⁵⁶ New Orleans, Dryades St., 11 La. An. 458.

⁵⁷ People v. Lewis, 26 How. Pr. 378.

either on account of the amount awarded or any other ground.⁵⁸ So, if the party condemning takes possession of the property, under the proceedings,⁵⁹ or pays the damages awarded,⁶⁰ it will be estopped from prosecuting objections to the report or proceedings. One person cannot urge an objection which affects another only.⁶¹ Parties are estopped from urging objections against the confirmation of the report which they might have made at an earlier stage of the proceedings and omitted to make.⁶² But objections which go to the jurisdiction may be made at any time and are not waived by not being urged in the first instance.⁶³

§ 532. **The order confirming the report of commissioners.**—The nature of the order to be entered depends upon the provisions of the statute and the nature and circumstances of the case. The statutes are so various that we shall not do more than refer to the points decided. The order entered should, of course, conform to the statute, so far as the statute prescribes its form or contents.⁶⁴ The order should be certain,⁶⁵ and unconditional.⁶⁶ Where the statute re-

⁵⁸ *Matter of Application of Woolsey*, 95 N. Y. 135; *Ft. Worth Ice Co. v. Chicago etc. R. R. Co.*, 11 Tex. Civ. App. 600, 33 S. W. Rep. 159.

⁵⁹ *Wilmington & Susquehanna R. R. Co. v. Condon*, 8 G. & J. 443.

⁶⁰ *Marquette, Houghton & Ontonagon R. R. Co. v. Probate Judge*, 53 Mich. 217.

⁶¹ *Boyd v. Negley*, 40 Pa. St. 377.

⁶² *Huntress v. Effingham*, 17 N. H. 584; *Stevens v. Goffstown*, 21 N. H. 454; *Matter of Application of Cooper etc.*, 93 N. Y. 507; *Chesapeake & Ohio R. R. Co. v. Pack*, 6 W. Va. 397.

⁶³ *Hughes v. Sellers*, 34 Ind. 337; *Wilkinson v. Mayo*, 3 Hen. & Munf. 565.

⁶⁴ *Reynolds v. Reynolds*, 15 Conn. 83; *Indianapolis etc. R. R. Co. v. Smythe*, 45 Ind. 322; *Terre Haute & Logansport R. R. Co. v. Crawford*, 100 Ind. 550; *Snoddy v. County of Pettis*, 45 Mo. 361; *State v. Dover*, 10 N. H. 394; *State v. Cincinnati & Indiana R. R. Co.*, 17 Ohio St. 103; *Ft. Worth & Denver City R. R. Co. v. Lamphear*, 1 Tex. App. Civil Cases, p. 127; *London v. Sample Lumber Co.*, 91 Ala. 606, 8 So. Rep. 281.

⁶⁵ *Portland etc. R. R. Co. v. County Comrs.*, 65 Me. 292; *Yeamans v. County Comrs.*, 16 Gray 36.

⁶⁶ *In re Road in Lathrop Township*, 84 Pa. St. 126. But orders

quires the court in highway proceedings to fix the width of the road in its order, a failure to do so is fatal to the proceedings.⁶⁷ The omission cannot be cured by a nunc pro tunc order at a succeeding term.⁶⁸ But on appeal or error the order may be reversed with directions to fix the width and enter a new order.⁶⁹ Where the statute provided that, upon payment or tender of the damages assessed, the party condemning might take possession, an order which requires the payment or tender of damages and costs is erroneous.⁷⁰ Where the order of confirmation required the execution of deeds upon payment of the award, it was held that, though the requirement was illegal, the order was not invalid collaterally.⁷¹ Where the company condemning is already in possession, a provision in the order that it be restrained from using the property until the damages are paid,⁷² or directing the proper officer of the court to oust the company in case of non-payment, is improper.⁷³ It has been held in Pennsylvania that an order confirming an award of damages has the effect of a judgment upon which execution may issue.⁷⁴ As a general rule a personal judgment is improper unless expressly authorized.⁷⁵ It is improper, in

of confirmation, conditional upon payment of costs by the petitioners, and remitting part of his damages by the owner, were held valid in the following cases, respectively: *Partridge v. Ballard*, 2 Me. 50; *Matter of Wharton St.*, 48 Pa. St. 487.

⁶⁷ *Road in Pitt Township*, 1 Pa. St. 356; *Road in Township of Lackawanna*, 112 Pa. St. 212; *Clowe's Road*, 2 Grant's Cases 129; *Shamokin Road*, 6 Binn. 36; *Hauser v. Burbank*, 117 Mich. 642, 76 N. W. Rep. 111.

⁶⁸ *Road in Township of Lackawanna*, 112 Pa. St. 212. But see *Matter of Terminal R. R. Co.*, 16 App. Div. 515.

⁶⁹ *Clowe's Road*, 2 Grant's Cases 129.

⁷⁰ *Evansville, Indianapolis and Cleveland, Straight Line R. R. Co. v. Fitzpatrick*, 10 Ind. 120; *Same v. Stringer*, 10 Ind. 551.

⁷¹ *Morris v. New York*, 55 Hun 476, 29 N. Y. St. Rep. 376, 8 N. Y. Supp. 763.

⁷² *Chicago & Great Southern Ry. Co. v. Jones*, 103 Ind. 386.

⁷³ *Reed v. Chicago, Mil. & St. P. Ry. Co.*, 25 Fed. Rep. 886.

⁷⁴ *Davis v. North Pennsylvania R. R. Co.*, 2 Phila. 146; *Neal v. Pittsburgh & Connellsville R. R. Co.*, 2 Grant's Cases 137; *Neal v. Pittsburgh etc. R. R. Co.*, 31 Pa. St. 19; and see *Matter of Rhinebeck etc. R. R. Co.*, 8 Hun 34.

⁷⁵ *Wichita etc. R. R. Co. v. Kuhn*, 38 Kan. 104, 16 Pac. Rep. 75; *Kansas City etc. R. R. Co.*

the order, to make the award, payable to the parties entitled or to their attorneys.⁷⁶

§ 533. **The judgment to be entered on the verdict of a jury.**—Some cases hold that it is proper to render a personal judgment upon the verdict of a jury in condemnation cases, and to award execution, the same as in common law suits.⁷⁷ If the statute is so far silent upon the subject as to leave the matter open for judicial construction, then the proper judgment to be entered will depend upon the following considerations: If possession has already been taken of the property, either by consent or otherwise, or if the property has already been taken by virtue of an instrument of appropriation, as it may be in some States, before the compensation is paid, then a personal judgment with all its incidents may properly be entered.⁷⁸ But, if the property has not been entered upon and cannot be until compensation is made, and the effect of the proceedings is to fix a price at which the petitioner can take the property if it elects so to do, then a personal judgment is improper and should not be entered.⁷⁹ Under the Illinois statutes it is

v. Kennedy, 49 Kan. 19, 30 Pac. Rep. 126; State v. Mills, 29 Wis. 322.

⁷⁶ Matter of Opening Cathedral Parkway, 20 N. Y. App. Div. 404.

⁷⁷ Deitrichs v. Lincoln & North Western R. R. Co., 12 Neb. 225; Drath v. Burlington & Missouri River R. R. Co., 15 Neb. 367. These decisions are not based upon any provision of the statute authorizing it.

⁷⁸ Cook v. South Park Comrs., 61 Ill. 115; Rockford etc. R. R. Co. v. Coppinger, 66 Ill. 510; St. Louis etc. Ry. Co. v. Teters, 68 Ill. 144; Peoria & Rock Island Ry. Co. v. Mitchell, 74 Ill. 394; Curtis v. St. Paul etc. R. R. Co., 21 Minn. 497; Robbins v. St. Paul etc. R. R. Co., 24 Minn. 191; Billingham Bay etc. R. R. Co. v.

Strand, 14 Wash. 144, 44 Pac. Rep. 140. But in Louisville etc. R. R. Co. v. Ryan, 64 Miss. 399, it was held improper to render a personal judgment, though the railroad was in possession, on the ground that the company might prefer to abandon the location and remain liable for the trespass.

⁷⁹ Peoria etc. R. R. Co. v. Peoria etc. R. R. Co., 66 Ill. 174; Springfield etc. Ry. Co. v. Turner, 68 Ill. 187; Barbican v. Chicago, 80 Ill. 482; Bloomington v. Miller, 84 Ill. 621; Evansville & Crawfordsville R. R. Co. v. Miller, 30 Ind. 209; St. Louis, Lawrence & Denver R. R. Co. v. Wilder, 17 Kan. 239; Kansas City etc. R. R. Co. v. Merrill, 25 Kan. 421; Elizabethtown etc. R. R.

held that where a defendant appears and claims title to a tract of land and there is no controversy as to his title and the evidence is confined to the question of damages, he is entitled to an order that the damages be paid to him or deposited for his benefit, and an order that the damages should be deposited with the county treasurer "for the benefit of the owners and parties interested" was held erroneous.⁸⁰ In one case it is held that the judgment should provide that unless the compensation is paid within a specified time, the right to take the property should be forfeited.⁸¹

§ 534. **Setting aside the order of confirmation.**—Some New York cases hold that, under the statutes construed, the court acted as a commissioner in confirming the report, and that when it had once acted the matter passed forever beyond its control.⁸² But, although the act under which the proceedings are had makes the confirmation final, a subsequent act authorizing the court to set aside the confirmation for good cause shown will be valid.⁸³ Where the court acts in its ordinary capacity as a judicial tribunal, there is no reason why it should not have the same control over an order of confirmation as over other orders which are final; that is, the court has control over such orders during the term at which they are entered and no longer.⁸⁴ A motion

Co. v. Thompson, 79 Ky. 52; Commonwealth v. Blue Hill Turnpike, 5 Mass. 420; Derby v. Gage, 60 Mich. 1; State v. Hug, 44 Mo. 116; Oregon Ry. Co. v. Bridwell, 11 Or. 282; Chesapeake & Ohio R. R. Co. v. Bradford, 6 W. Va. 220; State v. Mills, 29 Wis. 322; Commissioners Court v. Street, 116 Ala. 28, 22 So. Rep. 629; Mobile etc. R. R. Co. v. Postal Tel. Cable Co., 120 Ala. 21.

⁸⁰ *Convers v. Atchison etc. R. R. Co.*, 142 U. S. 671, 12 S. C. Rep. 351. And see *McCormick v. West Chicago Park Comrs.*, 118 Ill. 655.

⁸¹ *Skagit County v. McLean*, 20 Wash. 92, 54 Pac. Rep. 781.

⁸² *Matter of Mayor etc. of New York*, 6 Cow. 571; *Matter of Mount Morris Square*, 2 Hill 14; *Visscher v. Hudson River R. R. Co.*, 15 Barb. 37. And see *Philadelphia etc. R. R. Co. v. Shipley*, 72 Md. 88, 19 Atl. Rep. 1.

⁸³ *Matter of Widening Broadway*, 61 Barb. 483; S. C., 42 How. Pr. 220; S. C., 49 N. Y. 150.

⁸⁴ *Matter of New York Central & Hudson River R. R. Co.*, 64 N. Y. 60; *Dolan v. Mayor etc.*, 62 N. Y. 472; *Matter of Curtis Street*, 1 Sheldon (N. Y.) 425; *Marsh et al., Petitioners*, 2 Aikin

to set aside an order of confirmation is addressed largely to the discretion of the court, and the jurisdiction will be exercised upon equitable principles.⁸⁵

239; *Reiff v. Conner*, 10 Ark. 241.

⁸⁵ *Matter of Opening Lexington Ave.*, 50 How. Pr. 114. As to confirmation by non-judicial bodies, see *Kyle v. Board of*

Commrs., 94 Ind. 115; *Higgins v. Curtis*, 39 Kan. 283, 18 Pac. Rep. 207; *Philadelphia etc. R. R. Co. v. Shipley*, 72 Md. 88, 19 Atl. Rep. 1; *In re Opening of Fourth St.*, 158 Pa. St. 469, 27 Atl. Rep. 1085.

CHAPTER XXII.

REVIEW OF THE PROCEEDINGS, BY APPEAL OR OTHERWISE.

§ 535. **The subject generally: Right of appeal.**—Where the proceedings are not carried on under the supervision of a court of general jurisdiction, the practice is almost universal of providing for an appeal to such a court, or for a review of the proceedings, or a retrial of some or all of the questions involved, by some other tribunal than the one in which the proceedings have been initiated. The modes in which such review or retrial may be had are so various that the decisions are not of general interest. In the absence of constitutional provisions on the subject, there can be no appeal unless granted by statute.¹ It is held that statutes should be construed in favor of the right of appeal or review.² If the constitution provides for an appeal, the legislature cannot take away the right, as by making the decision of arbitrators final.³ Where a statute authorizes a condemnation and provides that the assessment of damages or proceedings shall be according to some other law referred to, if the latter law gives an appeal, the same right of appeal will exist in cases under the former law.⁴ A new statute giving a right of appeal where none existed before,

¹ *Ricks v. Hall*, 4 Porter 178; *City of Waterbury's Appeal*, 57 Conn. 84, 17 Atl. Rep. 355; *Lockman v. County of Morgan*, 32 Ill. App. 414; *Kent v. Board of County Commrs.*, 42 Kan. 534, 22 Pac. Rep. 610; *Kundinger v. Saginaw*, 59 Mich. 355; *Nebraska R. R. Co. v. Van Dusen*, 6 Neb. 160; *Matter of Board of Street Opening*, 111 N. Y. 581, 19 N. E. Rep. 283; *Norfolk Southern R. R. Co. v. Ely*, 95 N. C. 77; *Brown v.*

Robertson, 123 Ill. 631; *State v. Oshkosh*, 84 Wis. 548, 54 N. W. Rep. 1095; *Chappell v. Edmondson Ave.*, 83 Md. 512, 35 Atl. Rep. 19.

² *Meehan v. Wiles*, 93 Ind. 52; *Matter of Turnpike Road*, 18 Phil. 444; *Smeaton v. Austin*, 82 Wis. 76, 51 N. W. Rep. 1090.

³ *Memphis & C. R. R. Co. v. Birmingham etc. R. R. Co.*, 96 Ala. 571, 11 So. Rep. 642.

⁴ *Austin v. Belleville etc. R. R.*

will apply to pending proceedings, in the absence of express provisions indicating a contrary intent.⁵ A statute gave an appeal from "all decrees and decisions of the county court on the merits of any matter affecting the rights or interests of individuals as distinguished from the public." It was held that an individual could not appeal from an order establishing a highway, but only from the order as to damages.⁶ Where an act simply provided for laying out a toll-bridge as a highway and was silent as to an appeal, it was presumed that the legislature intended the general road law to apply and an appeal was entertained.⁷ A statute provided that the owner of land taken for a street, who was aggrieved by the assessment of damages, might appeal to any court having jurisdiction. No court had been given jurisdiction in express terms, but it was held an appeal would lie to the circuit court, the same being a court of general jurisdiction.⁸ A number of cases construing particular statutes as to the right of appeal are referred to in the margin.⁹

§ 536. Statutes making the decision of commissioners or of inferior tribunals final and conclusive.—Statutes of this sort are not uncommon, and are valid, unless in conflict with the local constitution.¹⁰ A statute of Indiana pro-

Co., 19 Ill. 310; *People v. Commissioners*, 3 Hill 599; *C Street*, 118 Pa. St. 171, 12 Atl. Rep. 345; *Hare v. Rice*, 142 Pa. St. 608, 21 Atl. Rep. 976.

⁵ *Smeaton v. Austin*, 82 Wis. 76, 51 N. W. Rep. 1090. But see *State v. Passaic*, 36 N. J. L. 382. In *Eames' Petition*, 16 N. H. 443, there was an express provision that the new law should not apply to pending proceedings.

⁶ *Myers v. Simms*, 4 Ia. 500; *McCune v. Swafford*, 5 Ia. 552.

⁷ *Bridge v. New Hampton*, 47 N. H. 151.

⁸ *Hamilton v. Fort Wayne*, 73 Ind. 1.

⁹ *Appeal of Cockroft*, 60 Conn. 161, 22 Atl. Rep. 482; *Brown v. Township Board*, 92 Mich. 294, 52 N. W. Rep. 614; *Aldridge v. Spears*, 14 S. W. Rep. 118; *In re Big Hollow Road*, 111 Mo. 326, 19 S. W. Rep. 947; *Collins v. Houghton*, 4 Ired. L. 420; *Twelfth St. Market Co. v. Philadelphia etc. R. R. Co.*, 142 Pa. St. 580, 21 Atl. Rep. 902; *Grant Street*, 7 Pa. Co. Ct. 84; *Gardner v. City of Chester*, 13 Pa. Co. Ct. 4; *In re Vernon Park*, 163 Pa. St. 70, 29 Atl. Rep. 972.

¹⁰ *Appeal of S. O. Houghton*, 42

vided that the judgment of the circuit court upon an award of damages in a railroad condemnation case should be final. The Supreme Court, however, sustained a writ of error to the circuit court in such a proceeding, saying: "We do not think that the language is sufficiently explicit to authorize us in saying that a writ of error will not lie in this case."¹¹ Such a proceeding was held not to be a case at law within the meaning of the constitution of California conferring appellate jurisdiction upon the Supreme Court, and a statute making the judgment of the county court final and conclusive was sustained.¹² The constitution of Illinois provided that the Supreme Court should have original jurisdiction in cases relating to the revenue, in mandamus and habeas corpus and appellate jurisdiction in all other cases. A proceeding to condemn land for a railroad was held to be a case within this provision, and an appeal was sustained, though the statute made the decision of the circuit court final and conclusive.¹³

§ 537. **Practice in taking appeals.**—The practice in taking and perfecting appeals is regulated by statute, and the decisions present little of interest beyond the State in which

Cal. 35; *Matter of Canal and Walker Streets*, 12 N. Y. 406; *King v. New York*, 36 N. Y. 182; *Matter of Comrs. of Central Park*, 50 N. Y. 493; *Matter of Prospect Park etc.* R. R. Co., 85 N. Y. 489; *Matter of Comrs. of State Reservation at Niagara*, 102 N. Y. 734; S. C., 16 Abb. N. C. 159, 395; *Norfolk Southern R. R. Co. v. Ely*, 95 N. C. 77; *Oliver v. Union Point etc. R. R. Co.*, 83 Ga. 257, 9 S. E. Rep. 1086; *State v. Oshkosh*, 84 Wis. 548, 54 N. W. Rep. 1095; *Bowman v. Jobs*, 123 Ind. 44, 23 N. E. Rep. 976; *Greenland v. County Comrs.*, 68 Md. 59, 11 Atl. Rep. 581; *Duncan v. Ferguson*, Wright (Ohio) 740; *Fretz's Appeal*, 15

Pa. St. 397. See *In re Southern Boulevard R. R. Co.*, 141 N. Y. 532, 36 N. E. Rep. 600; *In re Southern Boulevard R. R. Co.*, 143 N. Y. 253, 38 N. E. Rep. 276; *Matter of Brook Ave.*, 8 App. Div. 294, 40 N. Y. Supp. 949; *Brown v. Township Board*, 109 Mich. 557, 67 N. W. Rep. 566.

¹¹ *Lawrenceburg & Upper Mississippi R. R. Co. v. Smith*, 3 Ind. 253.

¹² *Appeal of S. O. Houghton*, 42 Cal. 35.

¹³ *St. Louis etc. Ry. Co. v. Lux*, 63 Ill. 523, overruling *Coon v. Mason County*, 22 Ill. 666. And see *Marion County v. Harper*, 44 Ill. 482.

they are made. The conditions imposed by statute must be complied with in order to secure the benefit of an appeal.¹⁴ No conditions can be imposed except those provided by statute.¹⁵ Two statutes may be in effect providing different modes of taking appeals in the same class of cases. In such case the party appealing has his option of the two, but must comply fully with the statute selected.¹⁶ It has been held that compliance with conditions may be waived.¹⁷ Where no time was specified within which an appeal should be taken, it was held that it should be taken to the next term of court, after the right of appeal accrued.¹⁸ It has been held that an appeal by a city must be authorized by its council, that it could not be taken by the city attorney or finance committee.¹⁹ Ordinarily an appeal does not lie until the case is finally disposed of by the tribunal from which the appeal is taken, and a premature appeal will be dismissed.²⁰ An appeal to a wrong court is a nullity.²¹ Where the appellant has done all that the law requires of him to perfect his appeal, the default of an officer to file a transcript will not defeat the appeal.²² If no bond is re-

¹⁴ Jones v. Theiss, 30 Ind. 311; Ford v. Chartiers, 4 Penny. 62; Sherry v. Gettysburg Battlefield Memorial Assn., 2 Pa. Co. Ct. 58; Perry v. Pennsylvania S. V. R. Co., 2 Pa. Co. Ct. 59; Deesher v. Reading & P. R. R. Co., 2 Pa. Co. Ct. 606; In re Williams St., 191 Pa. St. 472, 43 Atl. Rep. 326.

¹⁵ Gettysburg Memorial Assn. v. Sherry, 117 Pa. St. 256, 10 Atl. Rep. 758; Nebraska R. R. Co. v. Van Dusen, 6 Neb. 160.

¹⁶ Wilson v. Commissioners, 18 Kan. 575.

¹⁷ St. Louis etc. R. R. Co. v. Quinn, 24 Kan. 370.

¹⁸ Appleton v. County Comrs., 80 Me. 284, 14 Atl. Rep. 284.

¹⁹ Schroeder v. Lancaster City, 15 Pa. Co. Ct. 466.

²⁰ Ravatte v. Race, 152 Ill. 672, 38 N. E. Rep. 933; Logan v. Kiser, 25 Ind. 393; Wilson v. McClain, 131 Ind. 335, 30 N. E. Rep. 1093; Moore's Appeal, 68 Me. 405; State v. Engleman, 106 Mo. 628, 17 S. W. Rep. 759; Twelfth St. Market Co. v. Philadelphia etc. R. R. Co., 142 Pa. St. 580, 21 Atl. Rep. 902. See Hook v. Chicago etc. R. R. Co., 133 Mo. 313, 34 S. W. Rep. 549.

²¹ Allport v. Helena etc. R. R. Co., 12 Mon. 279, 29 Pac. Rep. 966; Baugher v. Rudd, 53 Ark. 417, 14 S. W. Rep. 623; White Water Valley Canal Co. v. Henderson, 8 Blackf. 528; Postar v. Henderson, 1 Ind. 62.

²² Denton v. Thompson, 136 Ind. 446, 35 N. E. Rep. 264.

quired by statute, none can be required by the tribunal granting the appeal.²³ Material defects in a bond may vitiate the appeal.²⁴ The owner of several parcels affected by one proceeding may join all in one appeal.²⁵ The award or judgment is several as to each owner affected, and each should appeal separately unless a joinder is allowed by statute. A bond with surety may be required,²⁶ and in such case a bond signed by appellants only will be ineffectual.²⁷ Where there are several appellants, each may be security for the other, and, if all the appeals are consolidated in the appellate court, the appeals will still be good, though there is no outside security.²⁸

Where an appeal is given and no mode is pointed out in which to avail of the right, the courts will endeavor, if possible, to make the statute effectual by adopting the practice in similar proceedings, or under other statutes regulating appeals.²⁹ Where the appeal is from proceedings by commissioners or a sheriff's jury, the practice in appeals from justices of the peace has been adopted, so far as applicable.³⁰ And, where an appeal was given in case of private roads, the same procedure was adopted as was provided for appeals in case of public roads.³¹ A statute gave an appeal

²³ *Nebraska R. R. Co. v. Van Dusen*, 6 Neb. 160.

²⁴ *St. Louis etc. R. R. Co. v. Morse*, 50 Kan. 99, 31 Pac. Rep. 676. See further as to defective bonds: *Anderson v. Board of County Comrs.*, 46 Minn. 237, 48 N. W. Rep. 1022; *Twelfth St. Market Co. v. Philadelphia etc. R. R. Co.*, 142 Pa. St. 580, 21 Atl. Rep. 902; *Hemstead v. Cargill*, 46 Minn. 118, 48 N. W. Rep. 686; *Meehan v. Wiles*, 93 Ind. 52.

²⁵ *Neff v. Chicago & Northwestern Ry. Co.*, 14 Wis. 370; *Weyer v. Milwaukee etc. R. R. Co.*, 57 Wis. 329; *Larson v. Superior Short Line Ry. Co.*, 64 Wis. 59.

²⁶ See *Weir v. St. Paul etc. R. R. Co.*, 18 Minn. 155.

²⁷ *McVey v. Heavenridge*, 30 Ind. 100.

²⁸ *Leffel v. Overchain*, 90 Ind. 50.

²⁹ *Warner v. Baker*, 24 Ill. 351; *Peters v. Hastings & Dakota Ry. Co.*, 19 Minn. 260; *Twombly v. Madbury*, 27 N. H. 433; *Kearns v. Thomas*, 37 Wis. 118; *Glassburn v. Deer*, 143 Ind. 174, 41 N. E. Rep. 376.

³⁰ *County of Peoria v. Harvey*, 18 Ill. 364; *Dubuque & Pacific R. R. Co. v. Critenden*, 5 Ia. 514; *Same v. Shinn*, 5 Ia. 516.

³¹ *West v. McGurn*, 43 Barb. 198.

to either party from the award of commissioners, "within sixty days after such assessment," but was otherwise silent as to the manner of taking the appeal. It was held that the time began to run from the doing of the last act to complete the assessment, and that the essential thing to be done to perfect the appeal was the filing of a transcript in the district court; that notifying the county judge and the petitioner and filing a petition in the district court claiming an increase of damages within the sixty days were insufficient to perfect the appeal.³² Under the same statute it was held that the transcript need contain nothing but the commissioners' report, in order to give the district court jurisdiction.³³ A party aggrieved by the award of commissioners for land taken for a highway could apply for a jury within a year. It was held that the application must be made to the board in regular session, and that an application filed with the clerk in vacation, when there would be no meeting of the board until after the year had expired, was too late.³⁴ But, where the appeal was required to be taken to a court, it was held sufficient to file a claim of appeal with the clerk of the court within the time allowed, though the court was not in session during such time.³⁵ Where the appeal was to three supervisors of the county, it was held that their names need not be given, but that it was better to designate them by their respective towns.³⁶ Where an appeal was to be taken within thirty days after the assessment was made, it was held to mean thirty days after it was actually made, reduced to writing and made public or brought to the notice of the parties in interest.³⁷ The appellant must advance the filing fees, though the other party is required to pay all costs in the end.³⁸ The

³² *Gifford v. Republican Valley* etc. R. R. Co., 20 Neb. 538.

³³ *Nebraska & Col. R. R. Co. v. Storer*, 22 Neb. 90.

³⁴ *Eaton v. Framingham*, 6 Cush. 245.

³⁵ *Northampton Bridge Case*, 116 Mass. 442.

³⁶ *People v. Smith*, 15 Ill. 326. For other points under the same statute see *Commissioners v. Supervisors*, 53 Ill. 320.

³⁷ *Jamison v. Burlington & Western Ry. Co.*, 69 Ia. 670.

³⁸ *Scott v. Lasell*, 71 Ia. 180.

inferior tribunal cannot refuse to send up the papers on the ground that the appeal has been taken too late; that is a question for the appellate court to decide.³⁹

Unless the right of appeal in such cases is guaranteed by the constitution, the whole matter is within the control of the legislature, which may grant or withhold it,⁴⁰ or impose such conditions as it sees fit.⁴¹ A justice of the peace, who is a petitioner for a road, cannot act judicially in allowing an appeal to supervisors.⁴²

§ 538. **Parties, and who may appeal.**—As the right of appeal is conferred by statute, every appeal must find its warrant in the statute. In statutes granting appeals, the word “person” will include corporations.⁴³ The words “any party,” or “any party in interest,” will include the owner of any distinct interest in the property,⁴⁴ also the corporation which is seeking to obtain the property.⁴⁵ Any party “interested in or affected by the road” is confined to those who own land taken or abutting on the road.⁴⁶ A “person in-

³⁹ *People v. Canal Appraisers*, 13 Hun 64.

⁴⁰ *Kundinger v. Saginaw*, 59 Mich. 355; *Norfolk Southern R. Co. v. Ely*, 95 N. C. 77; ante, § 535.

⁴¹ *Same and Schwede v. Burnstown*, 35 Minn. 468.

⁴² *Gray v. Jones*, 178 Ill. 169.

The following are miscellaneous cases relating to the subject matter of the section: *Commissioners v. Supervisors*, 53 Ill. 320; *Slayton v. Hulings*, 7 Ind. 144; *Wilson v. Wheeler*, 125 Ind. 173, 25 N. E. Rep. 190; *Gorman v. Supervisors*, 20 Minn. 392; *People v. Commissioners*, 3 Hill 599; *Lambe v. Love*, 109 N. C. 305, 13 S. E. Rep. 773; *Snodley v. City of Asheville*, 110 N. C. 84, 14 S. E. Rep. 514; *Gresinger v. Hellertown*, 133 Pa. St. 522, 19 Atl. Rep. 412; *Appeal of Mans-*

field, 158 Pa. St. 314, 27 Atl. Rep. 959; *Bowers v. Braddock*, 172 Pa. St. 596, 33 Atl. Rep. 759; *Strang v. Braddock*, 172 Pa. St. 600, 33 Atl. Rep. 760; *Pearson v. Island County*, 3 Wash. 497, 28 Pac. Rep. 108.

⁴³ *People v. May*, 27 Barb. 238.

⁴⁴ *Wilkin v. St. Paul etc. R. R. Co.*, 22 Minn. 177; *Washburn v. Milwaukee & Lake Winnebago R. R. Co.*, 59 Wis. 379.

⁴⁵ *Lee v. Northwestern Union Ry. Co.*, 33 Wis. 222. But it has been held that a town cannot appeal from an assessment of damages made by its own road commissioners. *Wrentham v. Corey*, 159 Mass. 93, 34 N. E. Rep. 179. To same effect: *Goodwin v. Merrill*, 48 Me. 282.

⁴⁶ *Long Point Road*, 5 Harr. Del. 152.

terested" in the vacation of a street includes those who own land abutting on the street near the part vacated.⁴⁷ A statute of Kentucky gave a right of appeal to any person who should *think* himself aggrieved by the establishment of a public ferry. It was held that the statute was to be taken as it read, and that a party might appeal without showing any interest or special damage and secure a reversal if there was error.⁴⁸ But in a later case it was held that one not a party must show some ground for thinking himself aggrieved.⁴⁹ And such statutes are usually construed to confer the right of appeal only upon those who suffer some special injury or inconvenience different from that sustained by the general public.⁵⁰ Ordinarily only parties to the proceedings can appeal, or those directly interested in the property taken or affected.⁵¹ The party condemning cannot appeal from an order apportioning the damages among the different parties having interests in the property.⁵² Where there is a transfer of title pending proceedings, the appeal may be in the name of the owner of record, or a substitution may be made.⁵³ But, if the

⁴⁷ Commissioners v. Quinn, 38 Ill. App. 192. A petition for an appeal which alleges that the petitioner is "interested" may be amended to show how he is interested. Whittaker v. Guthridge, 52 Ill. App. 460.

⁴⁸ Lawless v. Rees, 1 Bibb 495. So in State ex rel. v. Wheeler, 97 Wis. 96.

⁴⁹ Cosby v. Lynn, 4 Bibb 249.

⁵⁰ Thus in Schuster v. Supervisors, 27 Minn. 253, it is said: "The person claiming the right must undoubtedly be in a position to be injuriously affected by the order or determination made; in a position, as we think, to sustain special injury, disadvantage or inconvenience, not common to himself with the other inhabitants or property owners

of the town." To same effect: Goldman v. Justices, 3 Head 107; Fleming v. Hight, 95 Ind. 78. And see Grimshaw v. Fall River, 160 Mass. 483, 36 N. E. Rep. 494.

⁵¹ Barr v. Stevens, 1 Bibb 292; Canyonville etc. Road Co. v. County of Douglass, 5 Or. 280; Wingfield v. Crenshaw, 3 H. & M. 245; Moore v. Hancock, 11 Ala. 245; Gaines v. Linn County, 21 Or. 430, 28 Pac. Rep. 133. In the following case it was held that the petitioners for a road had not such an interest as entitled them to appeal. Foster v. Dunklin, 44 Mo. 216.

⁵² Spaulding v. Milwaukee etc. Ry. Co., 57 Wis. 304; Haswell v. Vermont Central R. R. Co., 23 Vt. 228.

⁵³ Connable v. Chicago, Mil. &

transfer is after the right to compensation has vested, the grantee cannot prosecute an appeal.⁵⁴ Joint owners should appeal jointly,⁵⁵ but the owners of distinct interests in the same property should appeal separately.⁵⁶ The statute may, however, provide otherwise. Where a remonstrance was signed Hosmer & Hildreth, and an appeal was taken by Stephen R. Hosmer and Charles C. Hildreth, they were presumed to be the same persons.⁵⁷ The fact that damages are assessed to one not the owner, will not prevent the real owner taking an appeal.⁵⁸

The proper defendants or respondents in case of an appeal by the owner are either the petitioners for the improvement,⁵⁹ or the person or corporation who is seeking to condemn the property.⁶⁰ Under a statute which required notice of appeal in road cases to be served on the county auditor, it was held proper to make the county a defendant in the appeal.⁶¹ The owner cannot appeal from a judgment dismissing the petition to condemn.⁶²

St. P. Ry. Co., 60 Ia. 27; Cedar Rapids etc. R. R. Co. v. Same, 60 Ia. 35. As to who should be substituted in case of the death of an owner, see chap. 14.

⁵⁴ Losch's Appeal, 109 Pa. St. 72; Rines v. Portland, 93 Me. 227.

⁵⁵ Chicago, Rock Island & Pacific R. R. Co. v. Hurst, 30 Ia. 73; Watson v. Milwaukee & Madison Ry. Co., 57 Wis. 332.

⁵⁶ Lance v. Chicago, Mil. & St. P. R. R. Co., 57 Ia. 636; Dixon v. Rockwell etc. R. R. Co., 75 Ia. 367, 39 N. W. Rep. 646; Chicago etc. R. R. Co. v. Ellis, 52 Kan. 41, 48, 35 Pac. Rep. 478, 34 Pac. Rep. 352; Rimback v. Essex County Bank, 62 N. J. L. 494.

⁵⁷ Munson v. Blake, 101 Ind. 78.

⁵⁸ Chicago etc. R. R. Co. v.

Grovier, 41 Kan. 685, 21 Pac. Rep. 779.

⁵⁹ Myers v. Old Mission & Whitbeck Road, 7 Ia. 315; Deaton v. County of Polk, 9 Ia. 594. In the former case it is held improper to make the road defendant, and in the latter, the county. The principal petitioner, who had given bond to pay costs if road not established, was held to be a necessary defendant to an appeal. Commissioners of Chase County v. Carter, 24 Kan. 511.

⁶⁰ Baker v. Windham, 25 Conn. 597; Chase v. Sullivan R. R. Co., 20 N. H. 195; Cummings v. Williamsport, 84 Pa. St. 472.

⁶¹ Raymond v. Clay County, 68 Ia. 130.

⁶² Canandaigua v. Benedict, 13 App. Div. 600, 43 N. Y. Supp. 630.

§ 539. **Notice in case of appeals.**—The notice required by statute must be given.⁶³ Where the notice of appeal is required to be filed with the clerk of the appellate court, a failure to do so will defeat the appeal, though the notice was served on the petitioner.⁶⁴ It has been held that notice should be given to the adverse party, even though the statute makes no provision for it.⁶⁵ Notice was required to be served upon the commissioner or commissioners of the town. It was held that it must be served upon all the commissioners where there were more than one.⁶⁶ Notice was required to be served upon the clerk of the appellate court. It was held sufficient to file the notice with the clerk, calling his attention to it.⁶⁷ A notice was brought to the attention of the sheriff and accepted by his deputy by direction of the former; held a good service upon the sheriff.⁶⁸ Notice of appeal was required to be served upon the "board of aldermen." It was held that service need not be made when board was in session, but service upon the individual members as aldermen, was held good.⁶⁹ Service must be personal in the absence of any statutory provision as to the manner of service.⁷⁰ Where notice was required to be served upon the mayor, it was held that actual service upon the incumbent would be good, no matter how the notice was addressed.⁷¹ A notice of appeal, signed by several and

⁶³ *Butte County v. Boydston*, 68 Cal. 189; *Maxwell v. La Brune*, 68 Ia. 689; *Klein v. St. Paul etc. Ry. Co.*, 30 Minn. 451; *Proprietors of the Morris Aqueduct v. Jones*, 36 N. J. L. 206; *People v. Osborn*, 20 Wend. 186; *People v. See*, 29 Hun 216; *Neff v. Chicago & Northwestern Ry. Co.*, 14 Wis. 370; *Burns v. Spring Green*, 56 Wis. 239; *Finke v. Zeigelmliller*, 77 Ia. 253, 42 N. W. Rep. 183; *Sanger v. Township Board*, 118 Mich. 19; *Hegemeyer v. Board of County Comrs.*, 71 Minn. 42, 73 N. W. Rep. 628.

⁶⁴ *Klein v. St. Paul etc. Ry. Co.*, 30 Minn. 451.

⁶⁵ *Commissioners of Highway v. Claw*, 15 Johns. 537.

⁶⁶ *People v. Lawrence*, 54 Barb. 589.

⁶⁷ *Black v. Chicago & Northwestern Ry. Co.*, 18 Wis. 208.

⁶⁸ *Waltmeyer v. Wisconsin, Ia. & Neb. Ry. Co.*, 64 Ia. 688.

⁶⁹ *Ednia v. Shoot*, 129 Mo. 354, 31 S. W. Rep. 767.

⁷⁰ *Ellis v. Carpenter*, 89 Ia. 521, 56 N. W. Rep. 678.

⁷¹ *Conklin v. Keokuk*, 73 Ia. 343, 35 N. W. Rep. 444.

stating that each appealed for himself, was held sufficient, though informal.⁷² A notice of appeal need not specify what steps have been taken in the matter of the appeal.⁷³ Want or defect of notice is not waived by the appearance of the adverse party in the appellate court as a witness,⁷⁴ or for the purpose of dismissing the appeal.⁷⁵ Where notice of appeal is required to be served upon an agent of a railroad company, service on a civil engineer making the location and surveys for the company was held good.⁷⁶ Where the notice identifies the order appealed from, ascribing a wrong date will not vitiate.⁷⁷ An appearance to the merits waives defective notice.⁷⁸

§ 540. Practice and power of the appellate tribunal.— This is a matter of statutory regulation. Sometimes there is a trial *de novo* upon all the questions tried by the tribunal appealed from. This is usually the effect of allowing an appeal to a court of original jurisdiction.⁷⁹ In such cases the appellate court does not concern itself with errors committed by the tribunal appealed from, and only examines the former proceedings to see that the inferior tribunal

⁷² *Larson v. Superior Short Line Ry. Co.*, 64 Wis. 59.

⁷³ *Andrews v. Marion*, 23 Minn. 372.

⁷⁴ *People v. Osborn*, 20 Wend. 186.

⁷⁵ *Spurrier v. Wirtner*, 48 Ia. 486; *Ellis v. Carpenter*, 89 Ia. 521, 56 N. W. Rep. 678.

⁷⁶ *Jamison v. Burlington & Northern Ry. Co.*, 69 Ia. 670.

⁷⁷ *Haven v. Orton*, 37 Minn. 445, 35 N. W. Rep. 264.

⁷⁸ *Newton v. Alabama Midland R. R. Co.*, 99 Ala. 468, 13 So. Rep. 259.

⁷⁹ *Kemp v. Smith*, 7 Ind. 471; *Providence v. Droon*, 20 Ind. 238; *McPherson v. Leathers*, 29 Ind. 65; *Heady v. Vevay etc. Turn-*

pike Co., 52 Ind. 117; *Coyner v. Boyd*, 55 Ind. 166; *Turley v. Oldham*, 68 Ind. 414; *Schmied v. Keeney*, 72 Ind. 309; *Corey v. Swagger*, 74 Ind. 211; *Fleming v. Hight*, 95 Ind. 78; *Reynolds v. Shults*, 106 Ind. 291; *Hardy v. McKinney*, 107 Ind. 364; *Mississippi & Missouri R. R. Co. v. Rosseau*, 8 Ia. 373; *Shaffner v. Fogleman*, Busbee Law 280; *York Co. v. Fewell*, 21 S. C. 106; *Winslow v. County Comrs.*, 31 Me. 444; *Ringle v. Board of Chosen Freeholders*, 56 N. J. L. 661, 29 Atl. Rep. 483; *Warlick v. Lowman*, 101 N. C. 548, 8 S. E. Rep. 120; *McDonald v. Western N. C. Insane Asylum*, 101 N. C. 656, 8 S. E. Rep. 118.

acquired jurisdiction.⁸⁰ Where the appeal is in respect to matters as to which the inferior tribunal is invested with a discretion, it has been held the appellate court should exercise an appellate jurisdiction only.⁸¹ Sometimes the trial in the appellate court is limited to certain objections filed or made in the tribunal appealed from.⁸² And, where objections may be made in the lower tribunal, it is usually held that objections not made are waived.⁸³ But, where the trial is *de novo*, all questions should be passed upon in the appellate court.⁸⁴ The jurisdiction of the appellate tribunal may be limited to matters in issue below,⁸⁵ or to the question of damages solely,⁸⁶ or it may act only as a court of review.⁸⁷ The trial in the appellate court, in the

⁸⁰ *Dunlap v. Mount Sterling*, 14 Ill. 251; *Turley v. Oldham*, 68 Ind. 114; *Mississippi & Missouri R. R. Co. v. Rosseau*, 8 Ia. 373; *Runner v. Keokuk*, 11 Ia. 543; *Piercy v. Morris*, 2 Iredell Law 168; *Blize v. Castlio*, 8 Mo. App. 290; *Matter of Wells Co. Road*, 7 Ohio St. 16; *Miller v. Prairie du Chien & McGregor Ry. Co.* 34 Wis. 533; *Grimwood v. Macke*, 79 Ind. 100; *People v. Harris*, 63 N. Y. 391; *Little Miami R. R. Co. v. Perrin*, 16 Ohio 479. But see *Forsyth v. Kreuter*, 100 Ind. 27.

⁸¹ *Evans v. Shields*, 3 Head 70; and see *County of Sangamon v. Brown*, 13 Ill. 207.

⁸² *Daggy v. Coats*, 19 Ind. 259; *Shafer v. Bordener*, 19 Ind. 294; *Cummins v. Shields*, 34 Ind. 154; *Green v. Elliott*, 86 Ind. 53; *Breitweiser v. Fuhrman*, 88 Ind. 28; *Rominger v. Simmons*, 88 Ind. 453; *Lowe v. Ryan*, 94 Ind. 450; *Denny v. Bush*, 95 Ind. 315; *Thayer v. Burger*, 100 Ind. 262; *Sutherland v. Holmes*, 78 Mo. 399; *Muire v. Falconer*, 10 Gratt.

12; *Davis v. Boone County*, 28 Neb. 837, 45 N. W. Rep. 249; *Budd v. Reidelbach*, 128 Ind. 145, 27 N. E. Rep. 349.

⁸³ *Ibid.*: *Indianapolis etc. R. R. Co. v. Hood*, 130 Ind. 594, 30 N. E. Rep. 705; and see *ante*, § 531.

⁸⁴ *Scraper v. Pipes*, 59 Ind. 158; *Schermeely v. Stillwater & St. Paul R. R. Co.*, 16 Minn. 506; *Phifer v. Carolina Central R. R. Co.*, 72 N. C. 433; *Meehan v. Wiles*, 93 Ind. 52; *Paisier v. Board of County Comrs.*, 68 Minn. 297.

⁸⁵ *Mathews v. Droud*, 114 Ind. 268; *Wells v. Rhodes*, 114 Ind. 467; *Metty v. Marsh*, 124 Ind. 18, 23 N. E. Rep. 702; *Potter v. McCormack*, 127 Ind. 438, 26 N. E. Rep. 883; *Leeds v. Camden & A. R. R. Co.*, 53 N. J. L. 229, 23 Atl. Rep. 168.

⁸⁶ *Briggs v. Board of Comrs.*, 39 Kan. 90, 17 Pac. Rep. 331; *Rippe v. Chicago etc. R. R. Co.*, 23 Minn. 18; *S. C.*, 20 Minn. 187.

⁸⁷ *Morris v. Salle (Ky.)*, 19 S. W. Rep. 527; *Commissioners v.*

absence of statutory provisions, is usually according to the practice of the appellate court.⁸⁸ But in some States the practice is to proceed according to the forms prescribed for the tribunal appealed from, as near as practicable.⁸⁹ In one case the appellate court caused an issue to be made up in trespass quare clausum fregit, and it was held to be proper.⁹⁰ Where the statute is that on appeal the court may direct a new appraisal, it is permissive only, and if there is no error in the proceedings none will be granted.⁹¹ Two appeals by the same person from different orders,⁹² or as to different tracts of land,⁹³ may be consolidated. Separate appeals by landlord and tenant, it was held, could not be consolidated.⁹⁴ The appellant may dismiss his appeal and the opposite party cannot insist upon a trial.⁹⁵ But in Nebraska, when the condemnor appeals, it is held that while the appellee is not entitled to a trial, the appellant is not entitled to dismiss the appeal, but that the proper practice, if appellant does not wish to go to trial, is to affirm the award with interest and costs.⁹⁶ Where pend-

Judge of Chenango, 25 Wend. 453.

⁸⁸ Kellogg v. Price, 42 Ind. 360; Sigafos v. Talbot, 25 Ia. 214; McNamara v. Minn. Cent. R. R. Co., 12 Minn. 388; Hord v. Nashville etc. R. R. Co., 2 Swan 497; New York etc. R. R. Co. v. Price, 4 Penny. 200.

⁸⁹ Inhabitants of Limerick, 18 Me. 183; Andrews v. Johnson, 1 Law Repos. N. C. 272; Gold v. Vermont Central R. R. Co., 19 Vt. 478.

⁹⁰ Philadelphia etc. R. R. Co. v. Smick, 2 Whart. 273.

⁹¹ New York etc. R. R. Co. v. Coburn, 6 How. Pr. 223.

⁹² Jamaica v. Board of Comrs., 56 Ind. 466.

⁹³ Washburn v. Milwaukee & Lake Winnebago R. R. Co., 59 Wis. 364. When both parties ap-

peal, the two appeals may be treated as one case. Upper Coos R. R. Co. v. Parsons, 66 N. H. 181, 19 Atl. Rep. 10.

⁹⁴ Ortman v. Union Pacific Ry. Co., 32 Kan. 419. And see as to separate trials: Friedenwald v. Baltimore, 74 Md. 116, 21 Atl. Rep. 555.

⁹⁵ Austel v. Atlanta, 100 Ga. 182; Upper Coos R. R. Co. v. Parsons, 66 N. H. 181, 19 Atl. Rep. 10; Wright v. Wisconsin Central R. R. Co., 29 Wis. 341; Fall River R. R. Co. v. Chase, 125 Mass. 483; and see next section.

⁹⁶ Berggren v. Fremont etc. R. R. Co., 23 Neb. 620, 37 N. W. Rep. 470; Robbins v. Omaha etc. R. R. Co., 27 Neb. 73, 42 N. W. Rep. 905.

ing an appeal the petitioner deposits the award and takes possession, and the owner receives the award, and on trial of the appeal the amount is increased, it is held that the judgment should be for the difference only.⁹⁷ It would be impracticable to give in detail all the decisions relating to the powers and jurisdiction of the appellate tribunal and the practice therein, and we refer to some cases which may be of advantage to practitioners in the States to which they respectively belong.⁹⁸

⁹⁷ *St. Louis etc. R. R. Co. v. Russell*, 150 Mo. 453; and see *St. Louis etc. R. R. Co. v. Donovan*, 149 Mo. 93, 50 S. W. Rep. 286.

⁹⁸ *Newton v. Ala. Midland R. R. Co.*, 99 Ala. 468, 13 So. Rep. 259; *McCulley v. Cunningham*, 96 Ala. 583, 11 So. Rep. 694; *Peoria etc. R. R. Co. v. Black*, 58 Ill. 33; *Purviance v. Drover*, 20 Ind. 278; *Board of Comrs. v. Small*, 61 Ind. 318; *Meehan v. Wiles*, 93 Ind. 52; *Logansport v. Shirk*, 129 Ind. 352, 28 N. E. Rep. 538; *American Cannel Coal Co. v. Huntingburg, etc. R. R. Co.*, 130 Ind. 98, 29 N. E. Rep. 566; *Lake Erie & W. R. R. Co. v. Kokomo*, 130 Ind. 224, 29 N. E. Rep. 780; *Bachelor v. Cole*, 132 Ind. 143, 31 N. E. Rep. 569; *Milliser v. Wagner*, 133 Ind. 400, 32 N. E. Rep. 927; *Badger v. Merry*, 139 Ind. 631, 39 N. E. Rep. 309; *Consumers' Gas Trust Co. v. Huntsinger*, 12 Ind. App. 285, 40 N. E. Rep. 34; *Ball v. Humphrey*, 4 G. Greene 204; *Smith v. Dubuque Co.*, 1 Ia. 492; *Des Moines v. Laymon*, 21 Ia. 153; *Pollard v. Dickinson County*, 71 Ia. 438; *Chicago etc. R. R. Co. v. Grovier*, 41 Kan. 685, 21 Pac. Rep. 779; *Chicago etc. R. R. Co. v. Cook*, 43 Kan. 83, 22 Pac. Rep.

988; *Rawlings v. Biggs*, 85 Ky. 251, 3 S. W. Rep. 147; *Winslow v. County Comrs.*, 31 Me. 444; *Friend v. Abbott*, 56 Me. 262; *Curtis v. Portland*, 60 Me. 55; *Jordan v. School District*, 60 Me. 540; *Eden v. Commissioners*, 84 Me. 52, 24 Atl. Rep. 461; *White v. County Comrs.*, 2 Cush. 361; *State v. Haines*, 58 Minn. 96, 59 N. W. Rep. 976; *In re Independence Ave. Boul.*, 128 Mo. 272, 30 S. W. Rep. 773; *Trester v. Missouri Pac. R. R. Co.*, 33 Neb. 171, 49 N. W. Rep. 1110; *Fremont etc. R. R. Co. v. Meeker*, 28 Neb. 94, 44 N. W. Rep. 79; *Campbell v. Windham*, 63 N. H. 465; *Matter of Highway*, 16 N. J. L. 345; *Miller v. Newark*, 35 N. J. L. 460; *Ex parte Comrs. of Danube*, 1 Cow. 142; *Commissioners v. Judge*, 13 Wend. 432; *People v. Supervisors*, 7 Wend. 530; *People v. Canal Board*, 7 Lans. 220; *People v. Carman*, 47 Hun 380, 14 N. Y. St. Rep. 543; *Matter of Niagara Falls etc. R. R. Co.*, 68 Hun 391, 23 N. Y. Supp. 31; *Worthington v. Coward*, 114 N. C. 289, 19 S. E. Rep. 154; *Board of Trustees v. Jones*, 2 Ohio C. C. 482; *Wilson v. Scranton*, 141 Pa. St. 621, 21 Atl. Rep. 779; *In re Frederick St.*, 155 Pa. St. 623, 26

§ 541. **Effect of the appeal.**—Taking an appeal is an entry of appearance and a waiver of defective notice,¹ and also of errors in respect to those matters which are to be retried in the appellate court.² The effect of an appeal where there is a trial de novo in the appellate court is to vacate the decision appealed from until the appeal is disposed of.³ But if the appeal is dismissed, the decision appealed from is restored to full force and effect.⁴ After the appeal is perfected the appellate tribunal has exclusive jurisdiction of the case, and proceedings in the tribunal appealed from are unauthorized.⁵ The petitioner, though appellee, may discontinue the proceedings, and the decision appealed from is then permanently vacated.⁶ The appellant may, of course, dismiss his appeal at any time.⁷ But, where either party had a right to appeal within twenty days, it was held that one having appealed could not dismiss after the twenty days had expired, as this would deprive the other party of his right.⁸ In a proceeding to open a street,

Atl. Rep. 773; *Dawson v. Pittsburgh*, 159 Pa. St. 317, 28 Atl. Rep. 171; *Bosworth v. City of Providence*, 17 R. I. 58, 20 Atl. Rep. 97; *Gulf etc. R. R. Co. v. Kerfoot*, 85 Tex. 267, 20 S. W. Rep. 55; *Smeaton v. Austin*, 82 Wis. 76, 51 N. W. Rep. 1090; *Wilson v. Talley*, 144 Ind. 74, 42 N. E. Rep. 362.

¹ *Atchison etc. R. R. Co. v. Patch*, 28 Kan. 470.

² *Hughes v. Mermod*, 121 Mo. 93, 25 S. W. Rep. 891; *Allison v. Commissioners of Highways*, 54 Ill. 170.

³ *Pool v. Breese*, 114 Ill. 594; *City of Kansas v. Kansas Pacific Ry. Co.*, 18 Kan. 331. As to the effect of the appeal as a superse-deas or to prevent proceedings under the decision appealed from see *Messer v. Wildman*, 53 Conn.

494; *Shannahan v. Waterbury*, 63 Conn. 420, 28 Atl. Rep. 611; *Jersey City etc. R. R. Co. v. Central R. R. Co.*, 48 N. J. Ch. 379, 22 Atl. Rep. 728; *Manhattan R. R. Co. v. Stroub*, 70 Hun 363, 24 N. Y. Supp. 68; *Drake v. Rogers*, 3 Hill 604.

⁴ *Minneapolis & Northwestern R. R. Co. v. Woodworth*, 32 Minn. 452.

⁵ *In re Chestnut St.*, 128 Pa. St. 214, 18 Atl. Rep. 338.

⁶ *Vail v. Fall Creek Turnpike Co.*, 32 Ind. 198; *Wright v. Wisconsin Central R. R. Co.*, 29 Wis. 341.

⁷ *Fall River R. R. Co. v. Chase*, 125 Mass. 483. See last section, notes 95 and 96.

⁸ *Brown v. Corey*, 43 Pa. St. 495; *Schuylkill Riv. E. S. R. R. Co. v. Harris*, 124 Pa. St. 215, 16 Atl. Rep. 838.

and in which both damages and benefits were assessed, it was held that an appeal by one person took up the whole case and that the whole case must be tried *de novo*.⁹ But ordinarily an appeal by one person does not affect the decision appealed from as to others.¹⁰

§ 542 **Certiorari: Its nature and office generally.**—**Certiorari** is a common law writ. It is defined by Bouvier to be “a writ issued by a superior to an inferior court of record, requiring the latter to send into the former some proceeding therein pending, or the record and proceedings in some cause already terminated, in cases where the procedure is not according to the course of the common law.”¹¹ It may issue, not only to inferior courts of record, but also to courts not of record, such as justices of the peace, and to officers and boards exercising quasi judicial functions.¹² Its office is to compel the inferior tribunal to certify its proceedings into the court from which the writ has issued, where the jurisdiction of the inferior tribunal and the legality of its proceedings will be tried by the record so certified.¹³ It is a common mode of reviewing the proceedings in condemnation cases, which are not usually according to the course of the common law. The cases cited in the succeeding sections show that it lies to boards of supervisors or commissioners, common councils of cities and other similar bodies vested with jurisdiction in cases of eminent domain.¹⁴ In New England, where highways are laid out by

⁹ *State v. Gill*, 84 Mo. 248; *Long v. Tulley*, 91 Mo. 305; and see *Phifer v. Carolina Central R. R. Co.*, 72 N. C. 433; *Anders v. Anders*, 4 Jones Law 243; *Portland v. Kamm*, 5 Or. 332.

¹⁰ *Fleener v. Claman*, 126 Ind. 166, 25 N. E. Rep. 900; *Donalson v. Lawson*, 126 Ind. 169, 25 N. E. Rep. 903; *Cason v. Harrison*, 135 Ind. 330, 35 N. E. Rep. 268.

¹¹ See also 1 Tidd's Prac. 397.

¹² See cases cited in this section.

¹³ *McAllilly v. Horton*, 75 Ala. 491; *Commissioners v. Supervisors of Carthage*, 27 Ill. 140; *Savage v. Board of Comrs.*, 10 Ill. App. 204; *Crandall v. Taunton*, 110 Mass. 421; *Lamar v. Commissioners' Court*, 21 Ala. 772. The office of the writ of certiorari and the practice thereon are considered at length in the following cases: *Ex parte Albany*, 23 Wend. 277; *Stone v. New York*, 25 Wend. 157.

¹⁴ *Dwight v. Springfield*, 4 Gray

selectmen and approved at a general town meeting, it has been held that certiorari would not lie to the town to bring up the proceedings, but that the only mode of questioning the validity of the road was in an action of trespass, or the like, where a right or duty was based upon the legal existence of the road.¹⁵

§ 543. When it lies, and when the proper remedy.—Where an appeal is given, certiorari will not usually be granted for the purpose of reaching errors or irregularities that may be reached by an appeal.¹⁶ But, if there is a want of jurisdiction in the inferior tribunal, it is a proper remedy, even though an appeal may lie also.¹⁷ It is the only remedy to take advantage of a want of jurisdiction of the person, because an appeal gives jurisdiction of the person.¹⁸ It is a proper remedy where no appeal is given;¹⁹ and even

107; *Thompson v. Multnomah Co.*, 2 Or. 34; *Wulzen v. Supervisors*, 101 Cal. 15, 35 Pac. Rep. 353.

¹⁵ *Harlow v. Pike*, 3 Me. 438; *Baker v. Runnels*, 12 Me. 235; *Robbins v. Lexington*, 8 Cush. 292; *Robbins v. Bridgewater*, 6 N. H. 524.

¹⁶ *Cedar Rapids etc. Ry. Co. v. Whelan*, 64 Ia. 694; *Dunlap v. Toledo etc. Ry. Co.*, 46 Mich. 190; *Tucker v. Parker*, 50 Mich. 5; *Diets v. Frazier*, 50 Mich. 227; *Moore v. Bailey*, 8 Mo. App. 156; *People v. Wallace*, 4 N. Y. Supreme Ct. 438; *Tarrytown v. Cobb*, 14 Abb. (N. C.) 493; *Boston & Maine R. R. Co. v. Folsom*, 46 N. H. 64; *Faust v. Huntsville*, 83 Ala. 279; *Wright v. Highway Comrs.*, 150 Ill. 138, 36 N. E. Rep. 980; *Flint etc. R. R. Co. v. Norton*, 64 Mich. 248, 31 N. W. Rep. 134; *Weber v. Ryers*, 82 Mich. 177, 46 N. W. Rep. 233;

People v. County Court, 152 N. Y. 214, 46 N. E. Rep. 325.

¹⁷ *Dunlap v. Toledo etc. Ry. Co.*, 46 Mich. 190. See *People v. Hildreth*, 126 N. Y. 360, 27 N. E. Rep. 558.

¹⁸ *Commissioners of Town of Oran v. Hoblit*, 19 Ill. App. 259; *Names v. Commissioners of Highways*, 30 Mich. 490; *Bixby v. Goss*, 54 Mich. 551.

¹⁹ *Commissioners of Talladega Co. v. Thompson*, 15 Ala. 134; *Barnett v. State*, 15 Ala. 829; *Couch ex parte*, 14 Ark. 337; *Cornell v. Crawford Co.*, 11 Ark. 604; *Dietrick v. Highway Comrs.*, 6 Ill. App. 70; *St. Charles v. Stewart*, 49 Mo. 132; *Same v. Rogers*, 49 Mo. 530; *Drainage Comrs. v. Griffin*, 134 Ill. 330, 25 N. E. Rep. 995; *Abney v. Clark*, 87 Ia. 726, 55 N. W. Rep. 6; *Banks et al., appellants*, 29 Me. 288; *Wilson v. Township Board*, 87 Mich. 240, 49 N. W. Rep. 572; *People v. Mosier*, 56 Hun 64, 29 N. Y. St.

though the decision of the inferior tribunal is made final by statute.²⁰ Where no appeal is given from the decision of certain questions, such as the necessity or utility of a road, certiorari will lie as to such decisions,²¹ although an appeal lies as to other questions. In such cases it is held that an appeal and certiorari may both be prosecuted at the same time.²² So it will lie where an appeal is given by statute but is denied by the inferior tribunal,²³ or lost by the lapse of time without negligence.²⁴ In Pennsylvania it is held that it will only lie after a final order in the proceedings.²⁵ Where the court appointed commissioners who afterward proceeded independently, and whose report was final unless a motion was made to set it aside within fifteen days after being filed, it was held that certiorari would lie to bring up the appointment of the commissioners.²⁶ The writ will not lie to review an order refusing to lay out a road, since no private right is thereby invaded.²⁷ A statute provided "that no proceedings had or taken in pursuance of the act should be removed by certiorari." It was held that where there was a total lack of jurisdiction, the proceedings could not be said to be in pursuance of the act, and certiorari would lie, otherwise not.²⁸

§ 544. Application for the writ and proceedings thereon. —The proper mode of obtaining a certiorari is by application in writing to the superior court, in the nature of a

Rep. 128, 8 N. Y. Supp. 621; Collins v. Haughton, 4 Ired. L. 420; Ewing v. St. Louis, 5 Wall. 413; State v. Oshkosh etc. R. R. Co., 100 Wis. 538.

²⁰ Allen v. Levee Comrs., 57 Miss. 163; Baldwin v. Buffalo, 35 N. Y. 375; In re Fitch, 147 N. Y. 334, 41 N. E. Rep. 699.

²¹ Commissioners v. Harper, 38 Ill. 103; People v. Brighton, 20 Mich. 57.

²² People v. Hildreth, 126 N. Y. 360, 27 N. E. Rep. 558.

²³ Shields v. Justices of Green County, 2 Coldw. 60.

²⁴ Roberts v. Williams, 13 Ark. 355; Joliet & Chicago R. R. Co. v. Barrows, 24 Ill. 562.

²⁵ Case of Road etc., 2 S. & R. 419; also Detroit Western Transit Co. v. Backus, 48 Mich. 582; State v. District Court, 44 Minn. 244, 46 N. W. Rep. 349.

²⁶ Clay v. Pennoyer Creek Improvement Co., 34 Mich. 204.

²⁷ Brooks v. Kirby, 19 Ala. 72.

²⁸ Queen v. Bristol etc. R. R. Co., 2 Eng. R. R. Cas. 99. But see South Wales R. R. Co. v. Richards, 6 Eng. R. R. Cas. 197.

petition, setting forth the proceedings to be removed and the irregularities relied upon.²⁹ The petition should be verified by affidavit, and should be certain and specific.³⁰ Different owners may join in one petition.³¹ Notice of the application should be given to the adverse party.³² The affidavit must show a sufficient interest in the subject matter.³³ The interest of a taxpayer, or of one who may be called upon to work upon the road, is not sufficient to enable him to question in this manner the regularity of proceedings to establish a highway.³⁴ Cause may be shown by the adverse party in interest against granting the writ, by answer or counter-affidavit showing a waiver by the applicant of the irregularities complained of or the existence of circumstances which render it inequitable to grant the writ.³⁵ And the court may bear evidence upon the issues thus made.³⁶

²⁹ Board of Supervisors v. Magoon, 109 Ill. 142; Strong v. County Comrs., 31 Me. 578; White v. County Comrs., 70 Me. 317; Bogart v. New York, 7 Cow. 158; Hewett v. County Comrs., 85 Me. 308, 27 Atl. Rep. 179.

³⁰ Ex parte Albany, 23 Wend. 277; Bogart v. New York, 7 Cow. 158; Chambers v. Lewis, 9 Ia. 583.

³¹ Richman v. Board of Supervisors, 70 Ia. 627.

³² Milan v. Sproull, 36 Ga. 393; Albany Water Works Co. v. Albany Mayor's Court, 12 Wend. 292; Ex parte Albany, 23 Wend. 277; Hewett v. County Comrs., 85 Me. 308, 27 Atl. Rep. 179.

³³ Colden v. Botts, 12 Wend. 234; Berryman v. Little, 49 N. J. L. 182.

³⁴ Parnell v. Commissioner's Court, 34 Ala. 278; Vanderstolph v. Highway Commissioner, 50 Mich. 330. As to parties see

Morris' Canal etc. Co. v. State, 14 N. J. L. 411.

³⁵ Spofford v. Bucksport & Bangor R. R. Co., 66 Me. 26, and cases cited in next section. In Maine a copy of the record sought to be quashed is required to be annexed to the writ, and, in regard to a defense to the application, the supreme court says: "At the hearing (of the application) three methods of procedure are open to the defense:

"First. If the record is thought to be sufficient to submit the cause to the court as upon demurrer, then, if the record fails to show jurisdiction on the part of the court entering the judgment, the writ should issue as a matter of right, and refusal would be error, and exceptionable; but if it simply shows inconsequential errors that are harmless, or might palpably be

§ 545. **When granted and when refused.**—The writ of certiorari is not a writ of right, but is granted or withheld in the discretion of the court.³⁷ It will not, therefore, be granted for errors from which no injury has resulted,³⁸ nor

corrected by amendment, the writ should be denied. *Hayford v. Commissioners*, 78 Me. 153, 3 Atl. Rep. 51.

"Second. If the record be defective in not reciting facts that appear from the proceedings, or that were actually adjudged, and omitted inadvertently from the record, to file, under oath, an answer setting up such facts, and the answer is conclusive evidence of the facts thus recited, but not of the legal conclusions to be drawn from them. *Levant v. Commissioners*, 67 Me. 429; *Andrews v. King*, 77 Me. 239. If the facts so set up show that an amended record would sustain the jurisdiction of the court over the matter before it, leaving, perchance, only defects that do not materially affect the substantial rights of the parties interested, the writ should be denied, otherwise it should issue; or, if ordered to issue, the court below may send up an amended record according to the facts in the case (*Dresden v. Commissioners*, 62 Me. 365; *Lapan v. Commissioners*, 65 Me. 160); for when the writ issues the sufficiency of the record returned in answer to the writ must be determined from an inspection of it (*Levant v. Commissioners*, *supra*).

"Third. Matters in estoppel or bar of the writ may be pleaded by way of answer, or included in

the answer last before considered. Sometimes such matters appear from the record sent up in answer to the writ, and then operate the same as if interposed by answer. *Phillips v. Commissioners*, 83 Me. 541, 22 Atl. Rep. 385." *Hewitt v. County Comrs.*, (Me.) 27 Atl. Rep. 179. And see *Commissioners v. Judges*, 10 Wend. 434.

³⁶ *White v. County Comrs.*, 70 Me. 317; *Drainage Comrs. v. Volke*, 163 Ill. 243, 45 N. E. Rep. 415.

³⁷ *Keys v. Morin Co.*, 42 Cal. 252; *Board of Supervisors v. Magoon*, 109 Ill. 142; *Thorpe v. County Comrs.*, 9 Gray 57; *Granville v. County Comrs.*, 97 Mass. 193; *Petition of Landaff*, 34 N. H. 163; *Boston & Maine R. R. Co. v. Folsom*, 46 N. H. 64; *Lisbon v. Merrill*, 12 Me. 210; *Waterville, Petitioner*, 31 Me. 506; *Detroit v. County Comrs.*, 35 Me. 373; *White v. County Comrs.*, 70 Me. 317; *Onset St. R. R. Co. v. County Comrs.*, 154 Mass. 395, 28 N. E. Rep. 286; *People v. Drain Comrs.*, 40 Mich. 745; *Ex parte Albany*, 23 Wend. 277; *Hancock v. Worcester*, 62 Vt. 106, 18 Atl. Rep. 1041.

³⁸ *Boston & M. R. R. Co. v. Folsom*, 46 N. H. 64; *Williams v. Judge*, 45 La. An. 1295, 14 So. Rep. 57; *Onset St. R. R. Co. v. County Comrs.*, 154 Mass. 395, 28 N. E. Rep. 286; *Hammond v. County Comrs.*, 154 Mass. 509, 28

where justice has been done.³⁹ In Alabama it is held that, where the proceedings are erroneous and the petitioner's property will be taken, a prima facie case is made for granting the writ.⁴⁰ In some cases mere delay, unexplained, has been held a sufficient reason for denying the writ.⁴¹ Other cases hold that laches will not bar the writ, unless something has been done on faith in the validity of the proceedings which would render it disastrous to have them declared void.⁴² Where the work has been done under the proceedings or money paid upon assessments of damages or benefits, any considerable delay will bar the writ, if the facts were known to the applicant or might have been known by the exercise of reasonable diligence.⁴³ But, if the prosecutor has not slept upon his rights, the fact that work has been done or money paid will not prejudice him.⁴⁴ And

N. E. Rep. 902; *Soller v. Brown Tp.*, 67 Mich. 422, 34 N. W. Rep. 888; and cases cited in note 37.

³⁹ *Petition of Landaff*, 34 N. H. 163; *Hancock v. Worcester*, 62 Vt. 106, 18 Atl. Rep. 1041; and cases cited in note 37.

⁴⁰ *Ex parte Keenan*, 21 Ala. 558. In *Bangor v. County Comrs.*, 30 Me. 270, it is held that where there was no jurisdiction the writ should be granted without regard to injury to the applicant.

⁴¹ *Hancock v. Boston*, 1 Met. 122; *Willcheck v. Edwards*, 42 Mich. 105; *Wilder v. Hubbell*, 43 Mich. 487. In the latter case a delay of fourteen months was held fatal in proceedings to establish a drain. The court say: "Public policy requires that these local business arrangements should be closed up speedily and that parties complaining should be prompt and consistent in their opposition." In California the writ was held to be barred in two years by analogy to the stat-

ute regulating appeals. *Keys v. Morin Co.*, 42 Cal. 252; and see *Moore v. McIntyre*, 110 Mich. 237; *Bandistet v. Jackson*, 110 Mich. 357.

⁴² *Hyslop v. Finch*, 99 Ill. 171; *Drainage Comrs. v. Volke*, 59 Ill. App. 283; *Drainage Comrs. v. Volke*, 163 Ill. 243, 45 N. E. Rep. 415.

⁴³ *Keys v. Morin Co.*, 42 Cal. 252; *Spofford v. Bucksport & Bangor R. R. Co.*, 66 Me. 26; *Noyes v. City Council of Springfield*, 116 Mass. 87; *Matter of Lautis*, 9 Mich. 324; *Bresler v. Ellis*, 46 Mich. 335; *State v. Ten Eyck*, 18 N. J. L. 373; *State v. Woodruff*, 36 N. J. L. 204; *State v. Clark*, 38 N. J. L. 102; *Rinehart v. Cowell*, 44 N. J. L. 360; *People v. Landreth*, 1 Hun 544; *People v. Drainage Comrs.*, 40 Mich. 745; *Carpenter v. Highway Comrs.*, 64 Mich. 476, 31 N. W. Rep. 460; *Elmendorf v. New York*, 25 Wend. 693.

⁴⁴ *State v. Green*, 18 N. J. L.

where the prosecutor was assured that a drain would not affect a lake upon his land, but it lowered it so as to render it a sickly mud-hole, it was held that a delay of a year, during which the drain had been constructed and paid for, would not bar the writ.⁴⁵ Where the ground of the application is a failure to give the notice required, the petition should show a want of actual notice as well as of the notice required by law, otherwise it will be insufficient.⁴⁶ Certiorari will not be granted to review proceedings in a road case after the prosecutor has had the benefit of an appeal,⁴⁷ or after he has proceeded for damages and failed.⁴⁸ It will not be granted to correct mere errors of judgment,⁴⁹ nor for objections which the petitioner might have had corrected in the inferior tribunal,⁵⁰ nor for errors produced by the prosecutor himself.⁵¹ An erroneous award of costs was held to be a sufficient ground for granting the writ.⁵² It has been held that the writ cannot properly be granted by a judge at chambers.⁵³ A statutory limitation of two years in which to issue the writ still leaves it discretionary with the court to issue it within the two years.⁵⁴ When the

179; *Drainage Comrs. v. Volke*, 59 Ill. App. 283.

⁴⁵ *Wright v. Rowley*, 44 Mich. 557.

⁴⁶ *Pagels v. Oaks*, 64 Ia. 198; *Hancock v. Boston*, 1 Met. 122; *Petition of Tucker*, 27 N. H. 405; *Boston & Maine R. R. Co. v. Folsom*, 46 N. H. 64. And see *Monson v. County Comrs.*, 84 Me. 99, 24 Atl. Rep. 672.

⁴⁷ *Burt v. Comrs. of Highways*, 32 Mich. 190; but see *Budd v. New Jersey R. R. Co.*, 14 N. J. L. 467.

⁴⁸ *Weaver's Road*, 45 Pa. St. 405.

⁴⁹ *Inhabitants of Vasselborough*, 19 Me. 338; *Kingman v. County Comrs. of Plymouth*, 6 Cush. 306.

⁵⁰ *Ipswich v. County Comrs.*, 10 Pick. 519; *People v. Covert*, 1 Hill 674; *Lisbon v. Merrill*, 12 Me. 210; *Ex parte Bennett*, 26 S. C. 317, 2 S. E. Rep. 389; *Trustees v. Metropolitan District R. R. Co.*, 19 L. T. N. S. 692.

⁵¹ *State v. Woodward*, 9 N. J. L. 21. And one who has known of all the proceedings to establish a drain, and who took the contract to dig it and has performed in part, will not be permitted to question the proceedings. *People v. Drain Commissioner*, 40 Mich. 745.

⁵² *Jordan et al., Petitioners*, 32 Me. 472.

⁵³ *People v. Cheritree*, 4 N. Y. Supm. Ct. 289.

⁵⁴ *Matter of Lautis*, 9 Mich. 324.

writ has been improperly granted, a motion to set aside the writ is proper.⁵⁵

§ 546. **Form and effect of the writ.**—The writ should be directed to the interior tribunal whose action is to be reviewed, and in effect commands that tribunal to certify the record of the proceedings specified.⁵⁶ If the record has been filed with some officer the writ may be directed to such officer.⁵⁷ If directed to the proper persons by name, describing them as “commissioners” instead of “appraisers,” will not vitiate.⁵⁸ As to matters which are not recorded, such as the rulings of the tribunal upon evidence and the like, it may command that the facts be certified.⁵⁹ When granted and served, the writ operates as a supersedeas, unless otherwise provided in the order or by statute.⁶⁰ It must correctly describe the proceedings to be removed, or it will be ineffectual.⁶¹

§ 547. **Return to the writ.**—The return to the writ should be co-extensive with the command contained in it. In a railroad condemnation case it is said that the return should contain the record, the proceedings in the nature of a record, the rulings upon testimony, the instructions and so much of the evidence as is necessary to show the bearing of the rulings and instructions.⁶² The return may be amended when

⁵⁵ *Loree v. Smith*, 100 Mich. 252, 58 N. W. Rep. 1015.

⁵⁶ See *Goodrich v. Comrs. of Highways*, 1 Mich. 385; *French v. Same*, 12 Mich. 267; *Matter of Mount Morris Square*, 2 Hill 14; *People v. Brooklyn*, 49 Barb. 136; *Bogart v. New York*, 7 Cow. 158.

⁵⁷ *People v. Gilon*, 121 N. Y. 551, 24 N. E. Rep. 944; *Morris Canal etc. R. R. Co. v. State*, 14 N. J. L. 411.

⁵⁸ *Morris Canal etc. Co. v. State*, 14 N. J. L. 411.

⁵⁹ *Mendon v. County Comrs.*, 2 Allen 463; and see cases in next section.

⁶⁰ *Patchin v. Brooklyn*, 10 Wend. 664; 1 Tidd's Practice 404; but see *Inhabitants of Adams, Petitioners*, 10 Rich. 270. Though the writ of certiorari is dismissed, the jurisdiction of the inferior tribunal is not restored unless a remittitur is ordered or the supersedeas discharged. *State v. Adams*, 54 N. J. L. 506, 24 Atl. Rep. 482.

⁶¹ *Road in Chester County*, 4 Yeats 433.

⁶² *Minnesota Central Ry. Co. v. McNamara*, 13 Minn. 508. See also *People v. Goodwin*, 5 N. Y. 568; *People v. Van Alstyne*, 32

it does not set forth the record or facts correctly.⁶³ Where a highway commissioner made a false return to a writ of certiorari whereby the proceedings were affirmed, it was held that an action would lie by one damnified against the officer to recover the damages sustained.⁶⁴

§ 548. **Proceedings on the return.**—The hearing in the superior court must be had upon the return, the writ and the papers upon which the writ was granted.⁶⁵ The validity of the proceedings must be determined from the return alone. Extraneous evidence cannot be received upon the hearing to aid or contradict the record, or to raise questions not apparent upon its face.⁶⁶ The only questions which will be considered are those which relate to the jurisdiction of the inferior tribunal and the regularity of its proceedings.⁶⁷ The decision of the lower tribunal upon questions of fact will not be reviewed.⁶⁸ It has been held

Barb. 131; *People v. First Judge of Columbia*, 2 Hill 398. And see *Traverse City etc. R. R. Co. v. Seymour*, 81 Mich. 378, 45 N. W. Rep. 826.

⁶³ *State v. City of Kansas*, 89 Mo. 34; *Traverse etc. R. R. Co. v. Seymour*, 81 Mich. 378, 45 N. W. Rep. 826.

⁶⁴ *Beardslee v. Dolge*, 143 N. Y. 160, 38 N. E. Rep. 205.

⁶⁵ *People v. Dains*, 38 Hun 43; *Drainage Comrs. v. Volke*, 163 Ill. 243, 45 N. E. Rep. 415. But see *State v. Larrabee*, 58 N. J. L. 314, 33 Atl. Rep. 216.

⁶⁶ *Mendon v. County Comrs.*, 5 Allen 13; *People v. Talmage*, 46 Hun 603; *Philadelphia & Trenton R. R. Co.*, 6 Wharton 25; *Road in Macunie Township*, 26 Pa. St. 221; *Church v. Northern Central Ry. Co.*, 45 Pa. St. 339; *Road Comrs. v. Fickinger*, 51 Pa. St. 48; *Duff Private Road*, 66 Pa.

St. 459; *Smith v. Commissioners*, 150 Ill. 385, 36 N. E. Rep. 967; *Brown v. Roberts*, 23 Ill. App. 461; *Randecker v. Commissioners*, 61 Ill. App. 426; *Beardslee v. Dolge*, 143 Ill. 160, 38 N. E. Rep. 205; *Ex parte Albany*, 23 Wend. 277; *Thirty-fourth St.*, 81 Pa. St. 27; *Road in McCandless*, 110 Pa. St. 605. The case of *Turnpike Road by Chad's Ford*, 5 Binney 481, appears to be an exception to the above cases.

⁶⁷ *Ibid.*; *Tiedt v. Carstensen*, 61 Ia. 334.

⁶⁸ *Law v. Galena etc. R. R. Co.*, 18 Ill. 324; *Schroeder v. Detroit etc. Ry. Co.*, 44 Mich. 387; *People v. Judge of Dutchess*, 23 Wend. 360; *Union Canal Co. v. Keiser*, 19 Pa. St. 134; *Kirk's Appeal*, 28 Pa. St. 185; *Spring Garden Road*, 43 Pa. St. 144; *In re Germantown Ave.*, 99 Pa. St. 479; *State v. Vandever*, 25 N.

that the only grounds which will be considered are those set up in the application for the writ.⁶⁹

§ 549. What are sufficient grounds for quashing the proceedings. The judgment to be entered.—The record certified must show that the inferior tribunal had jurisdiction, and that it has proceeded according to law.⁷⁰ The questions of jurisdiction and procedure have been discussed in previous chapters, and the discussion need not be repeated here. If the petition is insufficient,⁷¹ or the notice required by law or the constitution has not been given,⁷² the proceed-

J. L. 233, 669; *Harris v. Board of Supervisors*, 88 Ia. 219, 55 N. W. Rep. 324; *State v. Everitt*, 23 N. J. L. 378; *Hampton v. Poland*, 50 N. J. L. 367, 13 Atl. Rep. 174; *Appeal of Benzenhoefer*, 154 Pa. St. 547, 25 Atl. Rep. 814; *Biggert's Appeal*, 1 Monaghan (Pa. Supm. Ct.) 365.

⁶⁹ *Grand Rapids etc. R. R. Co. v. Weiden*, 69 Mich. 572, 37 N. W. Rep. 872.

⁷⁰ *Commissioners' Court v. Traber*, 25 Ala. 480; *Savage v. Board of Comrs.*, 10 Ill. App. 204; *Brown v. Roberts*, 23 Ill. App. 461; *Bangor v. County Comrs.*, 30 Me. 270; *Donnell v. Commissioners*, 87 Me. 223, 32 Atl. Rep. 884; *Chambers v. Carteret*, 54 N. J. L. 85, 22 Atl. Rep. 995; *Fredricks v. Hoffmeister*, 62 N. J. L. 565.

⁷¹ *Richman v. Board of Supervisors*, 70 Ia. 627; *Fox v. Holcomb*, 34 Mich. 298; *Ayres v. Richards*, 38 Mich. 214; *Null v. Tierle*, 52 Mich. 540; *Frost v. Leatherman*, 55 Mich. 33; *Bennett v. Drain Comrs.*, 50 Mich. 634; *Manistee etc. R. R. Co. v. Fowler*, 73 Mich. 217, 41 N. W. Rep. 261; *Hall v. Pettit*, 88 Mich. 158, 50 N. W. Rep. 117; *Chicago*

etc. R. R. Co. v. Young, 96 Mo. 39, 8 S. W. Rep. 776; *Godchaux v. Carpenter*, 19 Nev. 415, 14 Pac. Rep. 140; *Walker v. Winkler*, 60 N. J. L. 105.

⁷² *Stone v. Boston*, 2 Met. 220; *Dupont v. Highway Comrs.*, 28 Mich. 362; *Purdy v. Martin*, 31 Mich. 455; *Brush v. Detroit*, 32 Mich. 43; *Detroit Sharpshooters' Assn. v. Highway Comrs.*, 34 Mich. 36; *Morgan v. Chicago & North Eastern Ry. Co.*, 36 Mich. 428; *Dickinson v. Van Wormer*, 39 Mich. 141; *Strachan v. Brown*, 39 Mich. 168; *Moetter v. Comrs. of Highways*, 39 Mich. 726; *Lane v. Burnap*, 39 Mich. 736; *People v. Highway Comrs.*, 40 Mich. 165; *People v. Ruthruff*, 40 Mich. 175; *Milton v. Wacker*, 40 Mich. 229; *Willcheck v. Edwards*, 42 Mich. 105; *Nielson v. Wakefield*, 43 Mich. 434; *Wilder v. Hubbell*, 43 Mich. 487; *Wright v. Rowley*, 44 Mich. 557; *Dunlap v. Toledo & C. Ry. Co.*, 46 Mich. 190; *Whiteford Township v. Probate Judge*, 53 Mich. 130; *Bixby v. Goss*, 54 Mich. 551; *Bettis v. Geddes*, 54 Mich. 608; *Coray v. Probate Judge*, 56 Mich. 524; *State v. Shreeve*, 15 N. J. L. 57; *People v. Smith*, 7 Hun 17; *Johnson v.*

ings will be quashed. But, if the party complaining has had actual notice, or the benefit of actual notice, the proceedings will not be quashed for lack of legal notice.⁷³

If the record shows that the inferior tribunal had jurisdiction, it is then to be considered whether it has proceeded according to law. If the commissioners were incompetent,⁷⁴ or did not take the oath required,⁷⁵ or otherwise qualify as required by law; or if they have failed to conform to the statute in any substantial particular,⁷⁶ the proceedings will be invalid. Where the record showed that William Rad was appointed a commissioner but that Robert Rad acted and signed the report, the proceedings were quashed.⁷⁷ But in another case where the appointment was of Jesse Williams and the report was signed by Jesse Williamson, it was presumed that the court in which the proceedings were had, was satisfied that the person acting was the person intended to be appointed.⁷⁸ Erroneous rulings upon evidence which are material have been held to be sufficient ground for relief upon certiorari.⁷⁹ So is the adoption of an erroneous principle in the assessment of damages.⁸⁰ But

Stephenson, 39 Ill. App. 88; Chicago etc. R. R. Co. v. Young, 96 Mo. 39, 8 S. W. Rep. 776; People v. Mosier, 56 Hun 64, 29 N. Y. St. Rep. 128, 8 N. Y. Supp. 621; People v. Stedman, 57 Hun 280, 10 N. Y. Supp. 787.

⁷³ Sumner v. County Comrs., 37 Me. 112; Dunning v. Township Drain Comrs., 44 Mich. 518; Pickford v. Lyon, 98 Mass. 491. In the last case the applicant for certiorari, who was a woman, was represented by her father, who had notice and took an active part in the proceedings. For a discussion of other jurisdictional facts the reader is referred to previous chapters. As to what will be considered on certiorari generally, see Everett v. Cedar Rapids etc. R. R. Co., 28 Ia. 417.

⁷⁴ Ex parte Hinchby, 8 Me. 146, and see ante, §§ 405-407.

⁷⁵ Keenan v. Commissioners' Court, 26 Ala. 568; Bowler v. Drain Comrs., 47 Mich. 154; and see ante, §§ 411-414.

⁷⁶ Kroop v. Forman, 31 Mich. 144; Milton v. Wacker, 40 Mich. 229; Trainer v. Lawrence, 36 Ill. App. 90; Pingree v. County Comrs., 30 Me. 351; Furman v. Furman, 86 Mich. 391, 49 N. W. Rep. 147; State v. Everett, 23 N. J. L. 378.

⁷⁷ Bench v. Otis, 25 Mich. 29.

⁷⁸ Case of Road, 4 S. & R. 106.

⁷⁹ Petition of Landaff, 34 N. H. 163.

⁸⁰ Readington v. Dilley, 24 N. J. L. 209; State v. Lord, 26 N. J. L. 140.

a mere error in the amount of damages cannot be reached in this way.⁸¹ But where the relator's land was taken and no damages awarded and the local law did not permit the consideration of benefits, the proceedings were quashed.⁸² If the order made exceeds the jurisdiction of the inferior tribunal, it will be quashed on certiorari.⁸³ The proceedings will not be quashed for errors or defects which have produced no substantial injury,⁸⁴ or which have been waived by the party complaining.⁸⁵ As has already been observed, the decision of the inferior tribunal upon the merits cannot be reviewed.⁸⁶ The only order which can be entered upon the hearing is that the proceedings be quashed or that they be affirmed.⁸⁷ But, where the statute provided for a bill of exceptions in the inferior court, it was held that the same relief could be given upon certiorari as upon a writ of error.⁸⁸ But where a part only of the order of the inferior tribunal is erroneous, and the remainder would be complete and valid if the erroneous part was stricken out, it has been held that the proceedings might be quashed as to the erroneous part and affirmed as to the remainder.⁸⁹ Where the condemnor offered to abandon the proceedings,

⁸¹ *McCrory v. Griswold*, 7 Ia. 248; *Detroit & Bay City R. R. Co. v. Graham*, 46 Mich. 642; *Paine v. Leicester*, 22 Vt. 44.

⁸² *Commissioners of Highways v. Newby*, 31 Ill. App. 78; *Drainage Commissioners v. Volke*, 59 Ill. App. 283.

⁸³ *Brown's Petition*, 57 N. H. 367.

⁸⁴ *Johnson v. Supervisors of Clayton County*, 61 Ia. 89; *Wayne v. County Comrs.*, 37 Me. 558; *Smith v. Commissioners of Cumberland*, 42 Me. 395; *Davison v. Otis*, 24 Mich. 23; *State v. Blauvelt*, 34 N. J. L. 261.

⁸⁵ *Long v. Commissioners' Court*, 18 Ala. 482.

⁸⁶ *Brooks v. Kirby*, 19 Ala. 72;

but see *White's Case*, 2 Overton 109.

⁸⁷ *Commissioners etc. v. Supervisors of Carthage*, 27 Ill. 140; *People v. Ferris*, 36 N. Y. 218; *Steele v. County Comrs.*, 83 Ala. 304. In *Grand Rapids etc. R. R. Co. v. Weiden*, 69 Mich. 572, 37 N. W. Rep. 872, they were quashed in part, and in *Mt. Olive v. Hunt*, 51 N. J. L. 274, 17 Atl. Rep. 291, the record was remitted for correction.

⁸⁸ *Haywood v. Bath*, 35 N. H. 514.

⁸⁹ *Commonwealth v. Blue Hill Turnpike*, 5 Mass. 420; *Commonwealth v. West Boston Bridge*, 13 Pick. 195; and see *Westport v. County Comrs.*, 9 Allen 203.

the writ was dismissed, as this was all that could be gained by its prosecution.⁹⁰

§ 550. **Appeals to Appellate or Supreme Court.**—Where the proceedings are commenced in, or come by appeal or certiorari before a court from whose decisions an appeal lies to the Supreme Court of the State, then whether an appeal will lie in the class of cases under consideration will depend upon the constitution and statutes of the State. As a rule, such appeals are entertained, in the absence of words in the law which express or clearly imply a contrary intent.⁹¹ An appeal will lie from a final decision upon certiorari, as this is a jurisdiction exercised according to the course of the common law.⁹²

§ 551. **What is a Final Order From Which an Appeal Lies.**—As a general rule appeals for the correction of errors can only be made from final orders.¹ An order confirming the report of commissioners is a final order from which an appeal will lie.² But where the award had to be approved by the Governor as well as confirmed by the court, the confirmation of the court was held not to be a final order until approved by him.³ The dismissal of a cross petition setting

⁹⁰ Goodell v. Kalamazoo, 63 Mich. 416, 29 N. W. Rep. 880.

⁹¹ Jacksonville etc. R. R. Co. v. Adams, 29 Fla. 260, 11 So. Rep. 169; S. C. 33 Fla. 608, 15 So. Rep. 257. But one not a party cannot prosecute such an appeal. Irwin v. Armuth, 129 Ind. 340, 28 N. E. Rep. 702.

⁹² Baltimore & Havre-de-Grace Turnpike Co. v. Northern Central R. R. Co., 15 Md. 193. See Cameron v. Wasco County, 27 Or. 318, 41 Pac. Rep. 160; Metropolitan W. S. El. R. R. Co. v. Siegel, 161 Ill. 638, 44 N. E. Rep. 276.

¹ St. Louis v. Thomas, 100 Mo. 223, 13 S. W. Rep. 685; Steubenville etc. R. R. Co. v. Patrick, 7 Ohio St. 170; Toledo etc. R. R.

Co. v. Toledo etc. R. R. Co., 6 Ohio C. C. 521; Appeal of Receivers of Pennsylvania Steel Co., 161 Pa. St. 561, 29 Atl. Rep. 294; District of Columbia v. Prospect Hill Cemetery, 5 App. Cas. D. C. 497.

² San Francisco & San Jose R. R. Co. v. Mahoney, 29 Cal. 112; Morris v. Chicago, 11 Ill. 650; Rice v. Danville etc. Turnpike Co., 7 Dana 81; Tracy v. Elizabethtown etc. R. R. Co., 78 Ky. 309; In re St. Paul & Northern Pacific Ry. Co., 34 Minn. 227; St. Louis & San Francisco Ry. Co. v. Evans & Howard Fire Brick Co., 85 Mo. 307; Phillips v. Pease, 39 Cal. 582; Adams v. Newfane, 8 Vt. 271.

³ People v. Pfeiffer, 59 Cal. 89.

up a claim for damages not recognized by the petition is also a final order.⁴ The order appointing commissioners is not a final one, and not appealable unless by express provision of the statute;⁵ nor is an order denying a motion to vacate the appointment and dismiss the petition;⁶ nor is an order setting aside the report of commissioners,⁷ or sustaining exceptions to the same,⁸ or confirming it except as to the damages awarded,⁹ or quashing an inquisition under a writ of *ad quod damnum*.¹⁰ Where the statute provides first for a determination by the county court to lay out a road, then an assessment of damages, and lastly an order laying out the road upon the payment of the damages, no appeal will lie from an order determining to lay out the road.¹¹ The denial of a motion to set aside a confirmation is an appealable order.¹² So is the dismissal of the petition,¹³ and any order which in legal effect terminates the proceedings.¹⁴ A refusal to dismiss an appeal from commissioners to the district court is not such an order.¹⁵

⁴ *Johnson v. Freeport & Miss. River Ry. Co.*, 116 Ill. 521.

⁵ *Williams v. Hartford & New Haven R. R. Co.*, 13 Conn. 110; *Freshour v. Logansport & Northern Turnpike Co.*, 104 Ind. 463; *Comrs. v. Cook*, 86 N. C. 18; *Crompton Carpet Co. v. Worcester*, 119 Mass. 375; *Ludlow v. Norfolk*, 87 Va. 349, 12 S. E. Rep. 612; *Matter of Grab*, 157 N. Y. 69; *Luxton v. North River Bridge Co.*, 147 U. S. 337, 13 S. C. Rep. 356; *American Union Tel. Co. v. Wilmington etc. R. R. Co.*, 83 N. C. 420; *Forest Cemetery Ass. v. Constans*, 70 Minn. 436, 73 N. W. Rep. 153. But see *State v. Oshkosh etc. R. R. Co.*, 100 Wis. 538.

⁶ *Turner v. Holleran*, 11 Minn. 253; *In re Minnesota etc. R. R. Co.*, 103 Wis. 191.

⁷ *Road in Kiskiminitas Township*, 32 Pa. St. 9.

⁸ *Tucker v. Mass. Central R. Co.*, 116 Mass. 124.

⁹ *Evans v. Shields*, 3 Head 70.

¹⁰ *Allison v. Taylor*, 3 T. B. Monroe 7.

¹¹ *Roosa v. Henderson County*, 59 Ill. 446; see also *Koenig v. County of Winona*, 10 Minn. 238; *Wheeling Bridge & T. R. R. Co. v. Wheeling S. & I. Co.*, 41 W. Va. 747, 24 S. E. Rep. 651.

¹² *Denver etc. R. R. Co. v. Jackson*, 6 Col. 340; contra: *California Southern R. R. Co. v. Southern Pacific R. R. Co.*, 65 Cal. 295.

¹³ *Warren v. First Division of the St. Paul & Pacific R. R. Co.*, 18 Minn. 384.

¹⁴ *Smith v. Searce*, 34 Ind. 285; *Clark v. Water Comrs.*, 148 N. Y. 1, 42 N. E. Rep. 414; *Wisconsin Central R. R. Co. v. Cornell University*, 49 Wis. 162.

¹⁵ *Minnesota Central R. R. Co.*

§ 552. **Construction of statutes as to when an appeal will lie to a court of appellate jurisdiction.**—Where the proceedings are before a court which appoints the commissioners and acts upon the report, an appeal will lie from the final order in the proceedings, under a general provision of the statutes giving an appeal from all final orders, judgments and decrees.¹⁶ Some courts hold that the jurisdiction exercised in such cases is a special and limited statutory jurisdiction, and that no appeal lies unless expressly given by the statute conferring the jurisdiction, or by some statute clearly referring to the class of cases in question.¹⁷ Where such jurisdiction was conferred upon the county court, which acted upon a petition, it was held a general statute giving a right of appeal from that court to either plaintiff or defendant did not cover the case in question.¹⁸ A statute allowed appeals to the supreme court in certain enumerated common law actions “and all other actions in which the title to real estate may be concerned.” Held not to embrace condemnation cases.¹⁹ A statute giving an appeal in any “action or special proceeding,”²⁰ or in any “civil action, suit or proceeding whatever,”²¹ was held to apply to condemnation cases.²²

§ 553. **Practice in the Supreme or Appellate Court.**—It is hardly necessary to say that the practice in the Supreme

v. Patterson, 31 Minn. 42.

¹⁶ North Missouri R. R. Co. v. Reynal, 25 Mo. 534; Same v. Lackland, 25 Mo. 515, 529; Baltimore & Ohio R. R. Co. v. Pittsburgh etc. R. R. Co., 17 W. Va. 812; Jacksonville etc. R. R. Co. v. Adams, 29 Fla. 260, 11 So. Rep. 169; S. C. 33 Fla. 608, 15 So. Rep. 257.

¹⁷ Wilmington & Susquehanna R. R. Co. v. Condon, 8 G. & J. 443; Raleigh & Gaston R. R. Co. v. Jones, 1 Ired. L. 24; McNamara v. Minn. Cent. R. R. Co., 12 Minn. 388; Conter v. St. Paul etc. R. R. Co., 24 Minn. 313.

¹⁸ Hawkins v. County of Randolph, 1 Murphy, 118.

¹⁹ Valentine v. Boston, 20 Pick. 201.

²⁰ Sacramento, Placer & Nevada R. R. Co. v. Harlan, 24 Cal. 334.

²¹ Lanesborough v. County Comrs., 22 Pick. 278.

²² Statutes are construed as to the right of appeal in the following cases: Louisville etc. R. R. Co. v. People's St. R. R. Co., 101 Ala. 331, 13 So. Rep. 308; In re Conant, 83 Me. 42, 21 Atl. Rep. 172; Dyer v. Belfast, 88 Me. 140, 33 Atl. Rep. 790; County of Ram-

or Appellate Court is the same as in other cases.²³ Where the case was tried *de novo* in the court from which the proceedings have been appealed, errors committed anterior to the trial in the former court, as to matters which have been retried in that court, will not be considered in the Appellate Court.²⁴ Where the amount of damages is open to review, the Appellate Court is reluctant to disturb the award or verdict and will not do so unless the amount is grossly and manifestly excessive or inadequate.²⁵ When the evidence is conflicting and there is evidence to support

sey v. Stees, 27 Minn. 14; Richmond etc. R. R. Co. v. Knopf, 86 Va. 981, 11 S. E. Rep. 881; Memphis etc. R. R. Co. v. Hopkins, (Ala.) 18 So. Rep. 845.

²³ Matter of Thompson, 121 N. Y. 277, 24 N. E. Rep. 472.

The following miscellaneous cases as to jurisdiction and practice are referred to: New Orleans etc. R. R. Co. v. Southern etc. Tel. Co., 53 Ala. 211; Spring Valley Water Works v. Drinkhouse, 95 Cal. 220, 30 Pac. Rep. 218; Chicago etc. R. R. Co. v. Pigg, 63 Ill. App. 163; Midland R. R. Co. v. Galey, 141 Ind. 483, 39 N. E. Rep. 940; Ball v. Keokuk etc. R. R. Co., 71 Ia. 306; Fusilier v. Police Jury, 6 La. An. 670; St. Louis v. Lanigan, 97 Mo. 175, 10 S. W. Rep. 475; Mitchell v. Metropolitan El. R. R. Co., 132 N. Y. 552, 30 N. E. Rep. 385; Trustees etc. v. Clark, 137 N. Y. 95, 32 N. E. Rep. 1054; Matter of Metropolitan El. R. R. Co., 128 N. Y. 600, 27 N. E. Rep. 1076; Nutting v. Kings County El. R. R. Co., 91 Hun 251, 36 N. Y. Supp. 142; Pridgen v. Bannerman, 8 Jones L. 53; Hooker v. Montpelier & W. R. R. Co., 62 Vt. 47, 19 Atl. Rep. 775; Noel v.

Sale, 1 Call 495; Northern Pac. etc. R. R. Co. v. Coleman, 3 Wash. 228, 28 Pac. Rep. 514.

²⁴ Williamson v. County of Cass, 84 Ill. 361; Patton v. Clark, 9 Yerg. 268.

²⁵ Postal Tel. Cable Co. v. Louisville etc. R. R. Co., 43 La. An. 522, 9 So. Rep. 119; Metropolitan W. S. El. R. R. Co. v. Springer, 171 Ill. 170; Adkins v. Smith, (Ia.) 64 N. W. Rep. 761; New Orleans etc. R. R. Co. v. Morese, 48 La. An. 1273, 20 So. Rep. 733; Carroll v. New York El. R. R. Co., 14 App. Div. 278, 43 N. Y. Supp. 524; Phillips v. New York El. R. R. Co., 14 App. Div. 595, 44 N. Y. Supp. 28.

This is especially true where the jury have viewed the premises. Pittsburgh etc. R. R. Co. v. Lyons, 159 Ill. 576, 43 N. E. Rep. 377; Metropolitan W. S. El. R. R. Co. v. Dickinson, 161 Ill. 22, 43 N. E. Rep. 706; Boecker v. Naperville, 166 Ill. 151, 48 N. E. Rep. 1061; Braun v. Met. W. S. El. R. R. Co., 166 Ill. 434, 46 N. E. Rep. 974; Lyon v. Hammond etc. R. R. Co., 167 Ill. 527, 47 N. E. Rep. 775; Chicago etc. R. R. Co. v. Pontiac, 169 Ill. 155; Davis v. N. W. El. R. R. Co.,

the verdict, it will not be disturbed.²⁶ A verdict contrary to all the evidence will be set aside, though the jury have viewed the premises.²⁷ The same rules in general apply to

170 Ill. 595; Forsythe v. Wilcox, 143 Ind. 144, 41 N. E. Rep. 371; Hancock v. Philadelphia, 175 Pa. St. 124, 34 Atl. Rep. 570.

²⁶ Georgia Southern etc. R. R. Co. v. Jones, 90 Ga. 292, 15 S. E. Rep. 824; Chicago etc. R. R. Co. v. Bowman, 122 Ill. 595; Calumet Riv. etc. R. R. Co. v. Moore, 124 Ill. 329; Becker v. Chicago etc. R. R. Co., 126 Ill. 436, 18 N. E. Rep. 564; Stockton v. Chicago, 136 Ill. 434, 26 N. E. Rep. 1095; Chicago etc. R. R. Co. v. Wolf, 137 Ill. 360, 27 N. E. Rep. 78; O'Hare v. Chicago etc. R. R. Co., 139 Ill. 151, 28 N. E. Rep. 923; Lieberman v. Chicago etc. R. R. Co., 141 Ill. 140, 30 N. E. Rep. 544; Sanitary Dist. of Chicago v. Cullerton, 147 Ill. 385, 35 N. E. Rep. 723; Snodgrass v. Chicago, 152 Ill. 600, 38 N. E. Rep. 790; Allmon v. Chicago etc. R. R. Co., 155 Ill. 17, 39 N. E. Rep. 569; Goudy v. Lake View, 33 Ill. App. 245; Toledo etc. R. R. Co. v. Darst, 61 Ill. App. 231; Harts-horn v. B. C. R. & N. R. R. Co., 52 Ia. 613; New Orleans etc. R. R. Co. v. Frank, 39 La. An. 707, 2 So. Rep. 310; New Orleans etc. R. R. Co. v. Rabasse, 44 La. An. 178, 10 So. Rep. 708; Detroit v. Bruder, 104 Mich. 221, 62 N. W. Rep. 350; Levee Comrs. v. Dancy, 65 Miss. 335, 3 So. Rep. 568; Postal Tel. Cable Co. v. Ala. & V. R. R. Co., 68 Miss. 314, 8 So. Rep. 375; Louisville etc. R. R. Co. v. Postal Tel. Cable Co., 68 Miss. 806, 10 So. Rep. 74; St. Louis v. Lanigan, 97 Mo. 175, 10

S. W. Rep. 475; Doyle v. Kansas City etc. R. R. Co., 113 Mo. 280, 20 S. W. Rep. 970; Sioux City etc. R. R. Co. v. Weimer, 16 Neb. 272, 40 N. W. Rep. 134; North-eastern Neb. R. R. Co. v. Frazier, 25 Neb. 42, 40 N. W. Rep. 604; Nebraska etc. R. R. Co. v. Scott, 31 Neb. 571, 48 N. W. Rep. 390; Welsh v. Metropolitan El. R. R. Co., 57 N. Y. Supr. Ct. 408, 8 N. Y. Supp. 492; Jones v. Met. El. R. R. Co., 59 N. Y. Supr. Ct. 437, 14 N. Y. Supp. 632; Betje-man v. New York El. R. R. Co., 1 Misc. 138, 20 N. Y. Supp. 628; In re Carpenter, 11 Misc. 690, 32 N. Y. Supp. 826; Richmond & M. R. R. Co. v. Humphreys, 90 Va. 425, 18 S. E. Rep. 901; Ohio Riv. R. R. Co. v. Blake, 38 W. Va. 718, 18 S. E. Rep. 957; Canada Southern R. R. Co. v. Norvall, 41 U. C. Q. B. 195; West Chicago St. R. R. Co. v. Chicago, 172 Ill. 198, 50 N. E. Rep. 185; Rock Island etc. R. R. Co. v. Leisy Brewing Co., 174 Ill. 547; Illinois Central R. R. Co. v. Normal, 175 Ill. 562; Board of Trade Tel. Co. v. Blume, 176 Ill. 247, 52 N. E. Rep. 258; Kansas City etc. R. R. Co. v. Smith, 51 La. An. 1079, 25 So. Rep. 955; Morgan's La. & Tex. R. R. Co. v. Barton, 51 La. An. 1338, 26 So. Rep. 271; Chicago etc. R. R. Co. v. George, 145 Mo. 38, 47 S. W. Rep. 11; Howard v. Board of Supervisors, 54 Neb. 443, 74 N. W. Rep. 953; Helme v. Kingston, 191 Pa. St. 191, 43 Atl. Rep. 1102.

²⁷ Atchison etc. R. R. Co. v.

all questions of fact as to the amount of damages.²⁸ A judgment may be set aside as to one and affirmed as to others.²⁹

§ 554. **Writs of error.**—In the absence of any statutory provision, a writ of error will not lie, except to a court of record in a proceeding according to the course of the common law.³⁰ Where, therefore, condemnation proceedings are conducted before a non-judicial body or a court not of record, or in a court of record, but not according to the course of the common law, it follows that a writ of error will not lie to review them, and so it is usually held.³¹ In Kentucky it is held that a person over whose land a road is laid out is entitled to a writ of error as a matter of right.³² A statute gave an appeal from county commissioners to the circuit court in road cases and made the decision of the latter court final. It was held the court of appeals could inquire into the jurisdiction of the circuit court on a writ of error but could not correct errors committed by it if it had jurisdiction.³³

§ 555. **Limitations as to the time in taking an appeal or certiorari.**—Where a city charter gives the same right of appeal from the action of the city council, in laying out streets, as is given in the general road law from the action of selectmen, the limitations of the latter statute apply.³⁴ A petition for review was required to be presented within one year after the laying out of a road; it was held that the year commenced with the entry of the order laying out the

Schneider, 127 Ill. 144, 20 N. E. Rep. 41; Bigelow v. Draper, 6 N. D. 152.

²⁸ Commonwealth v. Bainbridge, 6 J. J. Marsh. 436; Bryant v. Robbins, 74 Wis. 608, 43 N. W. Rep. 507.

²⁹ Bigelow v. Draper, 6 N. D. 152.

³⁰ 2 Tidd's Prac., * 1134 et seq. and cases cited.

³¹ Hill v. Bridges, 6 Porter 197; Hannibal & St. Joseph R. R. Co. v. Morton, 20 Mo. 70; Dorchester v. Wentworth, 31 N. H. 451. And

see Cincinnati etc. R. R. Co. v. Barcelow, 4 Ohio C. C. 49.

³² Peck v. Whitney, 6 B. Mon. 117. The right is also implied in the following cases, though refused to the parties applying, for want of sufficient interest: Taylor v. Black, 3 Bibb 78; Commonwealth v. Dudley, 5 T. B. Mon. 22; Cole v. Shannon, 1 J. J. Marsh. 218.

³³ Greenland v. County Comrs., 68 Md. 59, 11 Atl. Rep. 581.

³⁴ Bennett v. County Comrs., 4 Gray 359.

road.³⁵ In another case it was to be presented within sixty days after the highway was laid open to be worked; it was held to mean sixty days from the time work was actually commenced.³⁶ A statute provided that damages should be assessed by a committee appointed by the court of common pleas, and that any party aggrieved might apply for a jury at the same term of said court at which the report of said committee should be returned and acted upon, or at the next regular term thereafter. This refers to the term at which the report is finally accepted,³⁷ and, where final action was delayed for four years by an appeal to the Supreme Court, it was held not to bar the right to a jury.³⁸ An appeal was required to be taken within sixty days after the return was recorded, if the party had actual notice of the decision. It was held that a statement by selectmen of what they intended to decide was not such notice.³⁹ An appeal was given from county commissioners within ten days from time their report was made; they were required to file their report with the county clerk. It was held the ten days did not begin to run until the report was filed.⁴⁰ Limitations, as to an appeal, are usually held to be mandatory.⁴¹ Where a statute required a petition for review to be presented to the county commissioners at the next term after filing the report, unless a good cause was shown for the delay, it was held the county commissioners were sole judges of what was good cause.⁴² The limitation upon appeals to the Supreme Court from the confirmation of awards in road cases, cannot be avoided by filing a petition

³⁵ Wood v. Quincy, 11 Cush. 487.

³⁶ Myers v. Pownal, 16 Vt. 415.

³⁷ Dodge v. Acworth, 32 N. H. 474.

³⁸ Concord Railroad v. Greely, 20 N. H. 157.

³⁹ Freeman v. Cornish, 52 N. H. 141.

⁴⁰ Kansas City etc. R. R. Co. v. Hurst, 42 Kan. 462, 22 Pac.

Rep. 618. To same effect, Butter v. Parker, 9 Ind. 534.

⁴¹ Cambridge v. County Comrs., 6 Allen 134; Roberts v. Boston & Lowell R. R. Co., 115 Mass. 57; Appeal of Pittsburgh etc. R. R. Co., 130 Pa. St. 190, 18 Atl. Rep. 600; Bowers v. Braddock, 172 Pa. St. 596, 33 Atl. Rep. 759.

⁴² Portland & Ogdensburg R. R. Co. v. County Commissioners, 64 Me. 505.

to strike out the order of confirmation, after the time to appeal has expired, and then appealing from a denial of the petition to strike out.⁴³ Nor can the right of appeal be cut off by entering the final order *nunc pro tunc*.⁴⁴ Where county line roads were laid out by the concurrent action of the two counties, it was held that the proceedings in each county were separate and distinct and that an appeal from the order of one board must be taken within the time limited, without regard to the proceedings in the other county.⁴⁵

§ 556. **Estoppel to prosecute an appeal or certiorari.**—If the owner accepts the damages which have been awarded him, this will operate as a waiver and release of errors and estop him from prosecuting an appeal or certiorari.⁴⁶ But, where damages awarded to the city of New York for land taken were deposited with the city chamberlain for the use of the city, pursuant to an order of court, but were not used or appropriated by the city, it was held the city was not thereby estopped from having its appeal.⁴⁷ Where an appeal was taken by the owner, pursuant to statute, from the order appointing commissioners, but the petitioner went on and had damages assessed and the owner appeared in such

⁴³ Appeal of Pittsburgh etc. R. R. Co., 130 Pa. St. 190, 18 Atl. Rep. 600.

⁴⁴ Miller v. Board, 3 Ohio C. C. 617.

⁴⁵ Rennick v. Board of County Comrs., 45 Kan. 442, 25 Pac. Rep. 856. See also on the subject McNichols v. Wilson, 42 Ia. 385; Shute v. Boston, 99 Mass. 236; Moores v. Bel Air W. & L. Co., 79 Md. 391, 29 Atl. Rep. 1033.

⁴⁶ Baltimore etc. R. R. Co. v. Johnson, 84 Ind. 420; Mississippi & Missouri R. R. Co. v. Byington, 14 Ia. 572; Rentz v. Detroit, 48 Mich. 544. Where the owner received the compensation awarded, but agreed to refund the same if judgment was reversed, it was no bar to the pros-

ecution of his appeal. Chicago etc. R. R. Co. v. Phelps, 125 Ill. 482, 17 N. E. Rep. 769. It has been held that the withdrawal by the owner of an award deposited by the condemnor on order to obtain possession, does not estop him from prosecuting an appeal or objections to the award. St. Louis etc. R. R. Co. v. Donovan, 149 Mo. 93, 50 S. W. Rep. 286; St. Louis etc. R. R. Co. v. Russell, 150 Mo. 453. See Burns v. Chicago etc. R. R. Co., 102 Ia. 7.

⁴⁷ Matter of New York & Harlem R. R. Co., 98 N. Y. 12, overruling S. C. in 39 Hun 338. The statute in this case also recognized the right, notwithstanding the receipt or payment of damages.

subsequent proceedings, it was held that such appearance did not prejudice his appeal.⁴⁸ And, where the owner appealed from an assessment of damages in a highway case, but altered his fences to conform to the lay-out, it was held this did not affect his appeal.⁴⁹ If the petitioner pays the damages awarded, this will, in the absence of any statute, waive an appeal, but the deposit of damages for the purpose of obtaining possession will not deprive the petitioner of the right of appeal.⁵⁰ Where a railroad company paid the damages awarded pending a petition by it for certiorari, but it was obliged to pay in order to get possession and was obliged to get possession and construct its road in order to save its franchises, it was held to be no waiver.⁵¹ The fact that one stands by and sees a ditch constructed over the land of others will not bar his right to a writ of error to quash the proceedings for laying it out as to his own land.⁵² The pendency of a petition to set aside a default does not bar an appeal from the award of commissioners in the same case.⁵³

§ 557. When an appeal or certiorari is the proper remedy. —An appeal or writ of certiorari is the proper remedy for the correction of errors in the proceedings.⁵⁴ The owner cannot maintain a bill to prevent by injunction the occupation of his land on account of such errors.⁵⁵ Where the

⁴⁸ Matter of New York Central etc. R. R. Co., 60 N. Y. 116.

⁴⁹ Endicott, Petitioner, 24 Pick. 339.

⁵⁰ Indianapolis & Cincinnati R. R. Co. v. Brower, 12 Ind. 374; St. Louis & San Francisco Ry. Co. v. Evans & Howard Fire Brick Co., 85 Mo. 307, overruling S. C. 15 Mo. App. 152; Fort St. Union Depot Co. v. Peninsular Stove Co., 103 Mich. 637, 61 N. W. Rep. 1007.

⁵¹ Commonwealth v. Hall, 8 Pick. 440.

⁵² Rice v. Wellman, 5 Ohio C. C. 334.

⁵³ In re Minneapolis Terminal Co., 38 Minn. 157.

⁵⁴ State v. Hanna, 97 Ind. 469; Brown v. Beatty, 34 Miss. 227; Buckley v. Drake, 41 Hun 384; Board of Comrs. v. State, 38 Ind. 193; Dunlap v. Pulley, 28 Ia. 469; Loble v. Philadelphia, 174 Pa. St. 111, 34 Atl. Rep. 554.

⁵⁵ Same; also Thorp v. Wit- ham, 65 Ia. 566; Phifer v. Carolina Central R. R. Co., 72 N. C. 433; Frovert v. Finrock, 31 Ohio St. 621; Keigwin v. Drainage Comrs., 115 Ill. 347; Hopkins v. Keller, 16 Neb. 569.

commissioners assess the damages upon a mistaken idea as to the amount of land taken, the only remedy is by appeal, and mandamus will not lie to compel the appointment of new commissioners to assess the value of the part omitted.⁵⁶ So when an item of damage is omitted.⁵⁷

§ 558. **Statutes opening proceedings for review after final judgment.** —It is competent for the legislature, by a statute passed after the final termination of proceedings for condemnation, to provide for an appeal or for setting aside the confirmation or judgment for error or good cause shown.⁵⁸ In *Garrison v. New York*⁵⁹ the court say: "In the proceeding to condemn the property of the plaintiff for a public street, there was nothing in the nature of a contract between him and the city. The State, in virtue of her right of eminent domain, had authorized the city to take his property for a public purpose, upon making to him just compensation. All that the constitution or justice required was that a just compensation should be made to him, and his property would then be taken whether or not he assented to the measure.

"The proceeding to ascertain the benefits or losses which will accrue to the owner of the property when taken for public use, and thus the compensation to be made to him, is in the nature of an inquest on the part of the State, and is necessarily under her control. It is her duty to see that the estimates made are just, not merely to the individual whose property is taken, but to the public which is to pay for it. And she can to that end vacate or authorize the vacation of any inquest taken by her direction, to ascertain peculiar facts for her guidance, where the proceeding has been irregularly or fraudulently conducted, or in which error has intervened, and order a new inquest, provided such methods

⁵⁶ *State v. Longstreet*, 38 N. J. L. 312.

⁵⁷ *Bass v. Ft. Wayne*, 121 Ind. 389, 23 N. E. Rep. 259, 1 Am. R. R. & Corp. Rep. 173.

⁵⁸ *Henderson & Nashville R. Co. v. Dickerson*, 17 B. Mon.

173; *Matter of Widening Broadway*, 61 Barb. 483; S. C. 49 N. Y. 150; *Baltimore & Susquehanna R. R. Co. v. Nesbitt*, 10 How. U. S. 395; *Garrison v. New York*, 21 Wall. 196.

⁵⁹ 21 Wall. 196, 203, 204.

of procedure be observed as will secure a fair hearing from the parties interested in the property."

§ 558a. Review by Supreme Court of the United States. Federal Questions. —The fourteenth amendment of the federal constitution prohibits the States from depriving a person of his property without due process of law. To take property for public use without compensation or to take it for private use with or without compensation, violates this provision of the federal constitution and enables any case in the State courts to be reviewed in the Supreme Court of the United States when the question is involved and the point has been properly preserved.⁶⁰ A plaintiff sued for damages to his property by reason of a railroad on the property of the company across the street from the plaintiff. The State court decided that the plaintiff's property, though depreciated, was not taken, injured or destroyed within the meaning of the constitution. The same court had held that for abutting property injured by a railroad in the street, a recovery could be had. It was held that the plaintiff's property was not taken without due process of law, and that he was not denied the equal protection of the laws.⁶¹ A taking might also be without due process of law if no sufficient provision was made for notice, or if the procedure was otherwise radically defective and against common right.⁶²

⁶⁰ *Kaukauna Water Power Co. v. Green Bay & M. Canal Co.*, 142 U. S. 254, 12 S. C. Rep. 173; *Yesler v. Wash. Harbor Line Comrs.*, 146 U. S. 646, 13 S. C. Rep. 190; *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112, 17 S. C. Rep. 56; *Chicago etc. R. R. Co. v. Chicago*, 166 U. S. 226, 17 S. C. Rep. 581; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 17 S. C. Rep. 718; *St. Anthony Falls Water Power Co. v. St. Paul Water*

Comrs., 168 U. S. 349; *Bachus v. Fort St. Union Depot Co.*, 169 U. S. 557; *Norwood v. Baker*, 172 U. S. 269.

⁶¹ *Marchant v. Pennsylvania R. R. Co.*, 153 U. S. 380, 14 S. C. Rep. 894.

⁶² *Baltimore Traction Co. v. Baltimore Belt R. R. Co.*, 151 U. S. 137, 14 S. C. Rep. 294. And see *Electric Co. v. Dow*, 166 U. S. 489, 17 S. C. Rep. 647.

CHAPTER XXIII.

COSTS.

§ 559. General principles in regard to costs in condemnation cases.—At common law no costs could be recovered by either party.¹ The whole subject of costs in common law actions is regulated by statutes, which, in England, extend back to the thirteenth century.² In equity, costs are discretionary with the court which awards or apportions costs upon equitable principles.³ In the matter of costs, condemnation proceedings are usually likened to common law actions, and costs are made to depend entirely upon the statute.⁴ It seems to us that courts should be guided by the following principles and considerations in the matter: By the constitution the owner is entitled to just compensation for his property taken for public use. He is entitled to receive this compensation before his property is taken or his possession disturbed. If the parties cannot agree upon the amount, it must be ascertained in the manner provided by law. As the property cannot be taken until the compensation is paid, and as it cannot be paid until it is ascertained, the duty of ascertaining the amount is necessarily cast upon the party seeking to condemn the property, and he should pay all the expenses which attach to the process.⁵ Any law which casts this burden upon the owner should, in our opinion, be held to be unconstitutional and void.⁶ The

¹ 2 Tidd's Prac. 945; State v. Kinne, 41 N. H. 238; Greenville & Columbia R. R. Co. v. Partlow, 6 Rich. 286.

² Ibid.

³ 2 Dan. Ch. Pr. p. 1376.

⁴ Hamlin v. New Bedford, 143 Mass. 192; Williams v. Taunton, 126 Mass. 287; Huntington County v. Kaufman, 126 Pa. St. 305, 17 Atl. Rep. 595; Wisconsin Cent.

R. R. Co. v. Kneale, 79 Wis. 89, 48 N. W. Rep. 248.

⁵ Toledo etc. Ry. Co. v. Dunlap, 47 Mich. 456, 464; Ulster & Delaware R. R. Co. v. Gross, 31 Hun 83.

⁶ The views here expressed are quoted and approved in City and County of San Francisco v. Collins, 98 Cal. 259, 33 Pac. Rep. 56, 8 Am. R. R. & Corp. Rep. 88,

court may, of course, in all cases determine what are proper and what are improper items of costs, and may disallow such as are improper.⁷ When the compensation has once been ascertained by a competent tribunal, at the expense of the condemning party, the law has done all for the owner which the constitution requires. If the owner is given a right of appeal or review, it may be upon such terms as to costs as the legislature may deem just.⁸ But, if the statute

See also *San Diego L. & T. Co. v. Neale*, 88 Cal. 50, 25 Pac. Rep. 977; *Dolores No. 2 Land & Canal Co. v. Hartman*, 17 Col. 138, 29 Pac. Rep. 378; *Southwestern Land Co. v. Hickory Jackson Ditch Co.*, 18 Col. 489, 33 Pac. Rep. 275; *St. Louis etc. R. R. Co. v. Lewright*, 113 Mo. 660, 21 S. W. Rep. 210; *Epling v. Dickson*, 170 Ill. 329; *Adams County v. Dobschlag*, 19 Wash. 356, 53 Pac. Rep. 339; *Perkins v. St. Louis etc. R. R. Co.*, 143 Mo. 513. In the case from 17 Col. 138, the court, after referring to the constitutional provision, says: "The undeniable intent of this provision is to secure the land owner, whose property is taken against his will, a fair compensation therefor. It cannot have been the purpose of the constitutional convention to require payment by the owner of costs reasonably incurred in the proceeding whereby his premises are taken. In some instances such costs will amount to nearly or quite as much as the compensation awarded. But, if the owner must disburse for costs the money received for his land, the compensation cannot be regarded as 'just,' within the meaning of the constitutional guaranty. However it might be as to attorneys'

fees and other like expenses, we do not hesitate to say that the spirit of the constitution clearly covers the class of expenses usually taxed as costs. Hence, though it be conceded that the statute relating to costs in ordinary civil actions cannot apply, courts should nevertheless award them to respondents in condemnation proceedings. We do not assert that if respondent appeals from the award, the legislature or the court may not make a reasonable regulation or order requiring him, under proper circumstances, to bear the whole or a part of the costs of the appeal. Nor does the foregoing view burden petitioner with the payment of costs contumaciously or unreasonably incurred by a respondent during the progress of the proceedings. Such costs are not legitimately a part of the constitutional compensation, and trial courts possess discretionary power to refuse a taxation thereof."

⁷ *City and County of San Francisco v. Collins*, 98 Cal. 259, 33 Pac. Rep. 56, 8 Am. R. R. & Corp. Rep. 88; *Dolores No. 2 Land & Canal Co. v. Hartman*, 17 Col. 138, 29 Pac. Rep. 378.

⁸ *Los Angeles etc. R. R. Co. v.*

gives the condemning party a right of appeal, it cannot cast the costs upon the owner if the assessment is reduced.⁹

§ 560. **Costs in the absence of special statutory provisions relating to eminent domain proceedings.**—As stated in the last section, the doctrine of the courts has generally been that costs could not be awarded in condemnation cases in the absence of a statute authorizing it.¹⁰ And it is the prevailing doctrine that the general statutory provisions in regard to costs do not apply to condemnation proceedings.¹¹ In a proceeding to establish a public road which was successfully resisted by the owners of property to be taken, it was held in Tennessee that they were entitled to recover costs under the general law in regard to costs in civil suits.¹² A similar decision was made in Alabama in a proceeding to erect a dam, the general statute being in reference to costs in civil actions.¹³ Sometimes the language of the general statutes is much broader than in the cases just cited. In New Hampshire the general statute in question provided "that costs should follow the event of every action or petition unless otherwise directed by law or by the court." Under this provision it has been held that costs should be allowed the prevailing party in highway cases.¹⁴ A statute

Rump, 104 Cal. 20, 37 Pac. Rep. 859.

⁹ Matter of New York, West Shore & Buffalo R. R. Co., 94 N. Y. 287; Southwestern Land Co. v. Hickory Jackson Ditch Co., 18 Col. 489, 33 Pac. Rep. 275. And see Burlington etc. R. R. Co. v. Spere, 24 Neb. 125, 38 N. W. Rep. 35; Atchison etc. R. R. Co. v. Plant, 24 Neb. 127, 38 N. W. Rep. 33.

¹⁰ Hawkins v. Robinson, 5 J. J. Marsh 9; Commonwealth v. Carpenter, 3 Mass. 268; Gifford v. Dartmouth, 129 Mass. 135; Dickinson v. Amherst Water Co., 139 Mass. 210; Philadelphia German-town & Norristown R. R. Co. v.

Johnson, 2 Whart. 275; Herbein v. Railroad Co. 9 Watts 272; Greenville & Columbia R. R. Co. v. Partlow, 6 Rich. 286.

¹¹ Dickinson v. Amherst Water Co., 139 Mass. 210, and cases cited; Cherokee v. Town Lot and Land Co., 52 Ia. 279; Johnson v. Sutliff, 17 Neb. 423. But there is some dissent from this view.

¹² Senaker v. Justices of Sullivan, 4 Sneed 116.

¹³ Folmar v. Folmar, 71 Ala. 136; see also Williams v. Jackman, 2 J. J. Marsh. 352.

¹⁴ Hanson v. Effingham, 20 N. H. 460; Knowles Petition, 23 N. H. 193; Currier v. Grafton, 28 N. H. 73,

of Iowa provided that, in an action for the recovery of money only, the defendant might offer to submit to a judgment for a certain sum, and, if such offer was rejected and a less sum recovered, the plaintiff should pay the costs; it was held not to apply to condemnation proceedings.¹⁵ A similar conclusion was reached by the Supreme Court of Nebraska under a very similar statute.¹⁶ In the absence of any statute the condemning party cannot recover costs on the ground of having offered to pay a sum which is more than the damages awarded.¹⁷ A general statute, limiting the number of witnesses for which costs might be taxed, was held to apply to condemnation proceedings in Illinois.¹⁸

§ 561. **Costs under particular statutes.**—Condemnation cases are special proceedings within the New York code, as to costs.¹⁹ In such proceedings costs are in the discretion of the court, and it was held proper to award costs against the defendants in a proceeding to obtain the right to cross a railroad where the application was resisted for the purpose of preventing any crossing.²⁰ Under a statute which pro-

¹⁵ *Cherokee v. Town Lot and Land Co.*, 52 Ia. 279.

¹⁶ *Johnson v. Sutliff*, 17 Neb. 423. Contra: *Chicago etc. R. R. Co. v. Townsden*, 45 Kan. 771, 26 Pac. Rep. 427. In *Southwestern Land Co. v. Hickory Jackson Ditch Co.*, 18 Col. 489, 33 Pac. Rep. 275, it was held that such a rule applied to condemnation proceedings would be unconstitutional.

¹⁷ *Ulster & Delaware R. R. Co. v. Gross*, 31 Hun 83.

¹⁸ *Chicago etc. R. R. Co. v. Bowman*, 122 Ill. 595.

¹⁹ *Rensselaer & Saratoga R. R. Co. v. Davis*, 55 N. Y. 145; *Matter of New York etc. Ry. Co.*, 26 Hun 592; *In re South Market St.*, 80 Hun 246, 29 N. Y. Supp. 1030.

For various rulings as to costs under the code see *City of Brook-*

lyn v. Long Island Water Supply Co., 148 N. Y. 107, 42 N. E. Rep. 413; *S. C.* 88 Hun 176, 34 N. Y. Supp. 991; *Matter of Lake Shore etc. R. R. Co.*, 65 Hun 538, 48 N. Y. St. Rep. 485, 20 N. Y. Supp. 458; *Manhattan R. R. Co. v. Taber*, 78 Hun 434, 29 N. Y. Supp. 220; *Manhattan R. R. Co. v. Kent*, 80 Hun 557, 30 N. Y. Supp. 957; *Dole v. Manhattan R. R. Co.*, 70 Hun 374, 24 N. Y. Supp. 422; *Dansville etc. R. R. Co. v. Hammond*, 77 Hun 39; *Manhattan R. R. Co. v. Kent*, 80 Hun 559, 30 N. Y. Supp. 959; *Syracuse v. Benedict*, 86 Hun. 343, 33 N. Y. Supp. 944; *Israel v. Metropolitan El. R. R. Co.*, 10 Misc. 722, 31 N. Y. Supp. 816; *Johnstown v. Frederick*, 35 N. Y. App. Div. 44.

²⁰ *Matter of Cortland & Homer Horse R. R. Co.*, 98 N. Y. 336.

vided that the cost and expenses of the jury should be paid by the party condemning, it was held the owner could have an allowance for witness fees.²¹ Under a statute which allows the owner his costs, charges and expenses, the expense of a former inquisition which has been set aside may be included.²² So in Massachusetts the plaintiff in a complaint for flowage, who finally prevailed, was allowed to recover the expense of several mistrials.²³ Where the owner is entitled to costs and expenses, he may recover for serving on viewers a notice of their appointment, for subpoenaing witnesses, for witness fees, and for mileage in making service of notices and subpoenas.²⁴ It was held in Illinois that it was error to award execution for costs, that the proper order to be entered was that, upon payment of the damages awarded and costs of proceedings, the company might take possession of the land.²⁵

§ 562. *Costs in case of appeals, reviews, etc.*—Where the owner is dissatisfied with the amount of damages awarded him in the first instance, and takes an appeal or other proceedings to have a re-assessment of the damages, it is usual to provide that he shall pay the costs of the appeal if he fails to secure an increase of damages, and such provisions are proper and valid.²⁶ To exempt the owner from costs in such cases, the increase must be exclusive of interest.²⁷ Where the award of commissioners was \$500, and that the railroad company build a certain culvert, and on appeal to a jury an award of \$600 was obtained, a decision refusing the owner costs was sustained.²⁸ A statute

²¹ Philadelphia, Germantown & Norristown R. R. Co. v. Johnson, 2 Whart. 275.

²² Owners of Ground v. Albany, 15 Wend. 374.

²³ Fitch v. Stevens, 2 Met. 506.

²⁴ Pennsylvania R. R. Co. v. Keiffer, 22 Pa. St. 356.

²⁵ Chicago etc. R. R. Co. v. Bull, 20 Ill. 218.

²⁶ Leak v. Selma, Rome & Dalton R. R. Co., 47 Ga. 345; Atchi-

son & Denver Ry. Co. v. Lyon, 24 Kan. 745; Morse Petitioner, 18 Pick. 443; First Baptist Society v. Fall River, 119 Mass. 95; Metler v. Easton & Amboy R. R. Co., 37 N. J. L. 222; Paris v. Coltraine, 3 Hawks. (N. C.) 312.

²⁷ First Baptist Society v. Fall River, 119 Mass. 95; Metler v. Easton & Amboy R. R. Co., 37 N. J. L. 222.

²⁸ Morse Petitioner, 18 Pick. 443.

of Massachusetts provided that a party who was dissatisfied with the award of commissioners might apply for a jury to re-assess the damages, and that "upon any application for a jury to assess such damages the prevailing party shall be entitled to his legal costs," etc. Under this provision it is held that, if the owner obtains any damages, whether more or less than the sum awarded by the commissioners, and whether the application for a jury is made by him or the party condemning, he is the prevailing party and entitled to costs.²⁹ Another statute of the same State provided that, if a railroad company applied for a jury and failed to reduce the damages, it should pay the costs, but was silent as to costs in the event it succeeded in reducing the damages. It was held that in the latter event it could not recover costs, but each party would have to pay his own costs.³⁰ An appeal from county commissioners to the circuit court in a railroad condemnation proceeding was held to become a "civil action," within the statute allowing the defendant to make tender of a sum and obtain costs if this sum was not exceeded.³¹

Statutes which provide that, if the party condemning appeals and recovers a reduction of damages, it shall have costs, have been sustained in some of the States, but without a discussion of the constitutional questions involved.³² But it seems to us that such statutes are a clear violation of the spirit of the constitution. The owner should receive his just compensation clear of any expense of the proceedings. He is presumptively entitled to the amount of the first award. No act of his forces the condemning party to appeal, and, if

²⁹ *New Haven & Northampton Co. v. Northampton*, 102 Mass. 116; *Childs v. New Haven & Northampton Co.*, 135 Mass. 570. See also *Marshall Fishing Co. v. Hadley Falls Co.*, 5 Cush. 602. To the same effect, *Burrill v. Martin*, 12 Me. 345.

³⁰ *Commonwealth v. Boston & Maine R. R. Co.*, 3 Cush. 25, 56; *Harvard Branch R. R. Co. v. Rand*, 8 Cush. 218.

³¹ *Chicago etc. R. R. Co. v. Townsden*, 45 Kan. 771, 26 Pac. Rep. 427.

³² *Leak v. Selma, Rome & Dalton R. R. Co.*, 47 Ga. 345; *Washburn v. Milwaukee & Lake Winnebago R. R. Co.*, 59 Wis. 364. And see *Chicago etc. R. R. Co. v. Elliott*, 117 Mo. 549, 24 S. W. Rep. 53.

such party chooses to appeal, the appeal becomes merely another step in the process of ascertaining the just compensation, the total expense of which it should bear.³³ In the case first cited the court say: "The only point remaining to be considered is the appeal from the judgment for costs rendered by the General Term against the land owners, on reversing the order of confirmation and appointing new commissioners amounting to \$120.70. We are of opinion that the General Term had no power to award these costs. If the appeal to the General Term had been taken by the land owners, and they had been defeated, it may be that the court could, in its discretion, have compelled them to pay the costs to which they had subjected the company by such an appeal. But the appeal was taken by the company because it was dissatisfied with the amount awarded, and was a continuation of the proceeding instituted by it to ascertain the compensation payable to the land owners, and to acquire their land against their will. In such a case, to compel the land owners to pay any part of the expenses incurred by the company for the purpose of ascertaining the compensation, which proceedings were an indispensable condition of its right to take the land, would conflict with the constitutional right of the land owners to just compensation. They are entitled to the full amount of their damages when finally ascertained, and this amount cannot be diminished by allowing to the company its own expenses incurred in ascertaining it, or in endeavoring to reduce it. In the present case the costs allowed are small compared with the amount of the award, which was \$35,500, but that can make no difference in the principle. If the company can recover against the land owner the expenses of proceedings carried on by it for its own benefit, where the award is large, it may do the same when the award is small; and a case may be supposed where the costs and expenses of the company would

³³ Matter of New York, West Shore & Buffalo R. R. Co., 94 N. Y. 287, 294; Schuylkill Navigation Co. v. Kittera, 2 Rawle 438; Johnson v. Sutliff, 17 Neb. 423;

And see Burlington etc. R. R. Co. v. Spere, 24 Neb. 125, 38 N. W. Rep. 35; Atchison etc. R. R. Co. v. Plant, 24 Neb. 127, 38 N. W. Rep. 33.

absorb a large part, or even the whole, of the award. There is no warrant in the statute for awarding such costs, and if there were, it would be a violation of the constitutional right of the land owner."

In certiorari costs are taxed in favor of the prevailing party.³⁴ Where the owner appealed, and the petitioner dismissed the proceedings in the upper court, it was held proper to give judgment for costs against the petitioner.³⁵ Where several appeals were heard together before the same referee, who was allowed two dollars a day, it was held that he could not have two dollars a day for each appeal.³⁶ A railroad company appealed from an assessment of \$1,500, and obtained a verdict for \$1,414.83, and the court apportioned the costs of appeal.³⁷ Where the owner took two appeals, one from the order establishing a road and one from the finding as to damages, and succeeded in the latter but not in the former, the costs of appeal were taxed according to the result, though both appeals were tried together.³⁸ Where the prevailing party was allowed costs by statute, it was held that he was entitled to recover all taxable costs in all the courts and tribunals.³⁹

§ 562a. **Items of costs. Attorney's fees, expert witnesses, etc.**—The number of witnesses whose fees may be properly taxed rests in the sound discretion of the court.⁴⁰ An act for the taking of land for a park provided for the payment of "the expense of inquiry, survey, assessment, cost of lands taken, and all other necessary expenses incidental thereto." It was held to allow for the taxation of a reasonable compensation for a reasonable number of expert witnesses, called by the owner to prove deposits of gold in the land

³⁴ *State v. Blake*, 36 N. J. L. 442.

³⁵ *St. Louis, Ft. Scott & Wichita R. R. Co. v. Martin*, 29 Kan. 750.

³⁶ *Disosway v. Winant*, 34 Barb. 538.

³⁷ *Noble v. Des Moines & St. Louis Ry. Co.*, 61 Ia. 637.

³⁸ *Jamieson v. Board of Comrs.*, 56 Ind. 466.

³⁹ *Abbott v. County of Penobscot*, 52 Me. 584.

⁴⁰ *Chicago etc. R. R. Co. v. Aldrich*, 134 Ill. 9, 24 N. E. Rep. 763; *Chicago etc. R. R. Co. v. Eaton*, 136 Ill. 9, 26 N. E. Rep. 535; *Chandler v. Beale*, 132 Ind. 596, 32 N. E. Rep. 597.

taken, including their traveling expenses.⁴¹ A city charter provided that, in condemnation proceedings, "the costs of proceedings, up to and including the filing the report of the commissioners, shall be paid by the city." In such a proceeding an owner incurred an expense of more than \$1,200 for expert witnesses and services in endeavoring to demonstrate that his land was underlaid by valuable deposits of clay. He moved to have taxed as costs, the fees of his expert witnesses and \$300 attorney's fees. The court allowed the usual per diem fees of witnesses and rejected the other claims and this action was affirmed. The court held that neither counsel fees nor extra allowances for expert witnesses could be made in the absence of express provisions of the statute permitting it to be done.⁴² In Massachusetts, under a statute which provided that all expenses of the application to ascertain damages should be borne by the condemnor, it was held that attorney's fees were not included.⁴³ But a statute requiring the condemnor to pay the cost and expense of the proceeding, was held, in Wisconsin, to include attorney's fees.⁴⁴ A statute providing that it should be lawful for the judge to order the payment of a reasonable attorney's fee by the condemnor, was held to leave it entirely discretionary with the judge whether to make such allowance or not.⁴⁵

§ 563. **Miscellaneous cases.** —Mandamus will not lie to county commissioners to compel them to change their allowance of costs.⁴⁶ Where proceedings were commenced in the county court, which only had jurisdiction in cases not exceeding two thousand dollars in amount, and a verdict was rendered for three thousand dollars compensation, the court

⁴¹ *United States v. Cooper*, 21 Supm. Ct. D. C. 491.

⁴² *City of St. Louis v. Meintz*, 107 Mo. 611, 18 S. W. Rep. 30.

⁴³ *Marshall Fishing Co. v. Hadley Falls Co.*, 5 Cush. 602.

⁴⁴ *Taylor v. Chicago etc. R. R. Co.*, 83 Wis. 645, 53 N. W. Rep. 855.

⁴⁵ *Donald v. Judge*, 78 Mich. 182, 44 N. W. Rep. 52. *North Carolina R. R. Co. v. Goodwin*, 110 N. C. 175, 14 S. E. Rep. 687, construes a statute as to allowance of attorney's fees.

⁴⁶ *Woodman v. County Comrs.*, 24 Me. 151.

set aside the verdict and dismissed the proceedings at the cost of the petitioner, and this was held correct.⁴⁷ Where proceedings were dismissed before the confirmation of the report of commissioners, it was held improper to allow costs to the owners.⁴⁸ In Iowa a suit in chancery to make the costs a lien upon the land taken was sustained.⁴⁹ It has been held that there should be a personal judgment for costs, though not for the compensation.⁵⁰ Some miscellaneous cases are cited in the margin.⁵¹

⁴⁷ *Denver & Rio Grande Ry. v. Otis*, 7 Col. 198.

⁴⁸ *Matter of Syracuse etc. R. R. Co.*, 4 Hun 311. But see *St. Louis, Ft. Scott & Wichita R. R. Co. v. Martin*, 29 Kan. 750; see also *Miller v. Junction Canal Co.*, 41 N. Y. 98.

⁴⁹ *Frankel v. Chicago, B. & P. Ry. Co.*, 70 Ia. 424. But see *Ferrus v. Stafford etc. R. R. Co.*, 41 L. J. Eq. 362.

⁵⁰ *Wichita etc. R. R. Co. v. Kuhn*, 38 Kan. 104, 16 Pac. Rep. 75.

⁵¹ *Perkins v. Haywood*, 132 Ind. 95, 31 N. E. Rep. 670; *Jewett v. County of Somerset*, 1 Me. 125; *Atlantic etc. R. R. Co. v. Cum-*

berland Co. Comrs., 28 Me. 112; *Baker v. Thayer*, 3 Met. 312; *Hall v. Palmer*, 54 Mich. 270; *Green v. St. Louis*, 106 Mo. 454, 17 S. W. Rep. 496; *Hamilton v. Manhattan R. R. Co.*, 57 N. Y. Supr. Ct. 491, 8 N. Y. Supp. 546; *Harris v. Coltraine*, 3 Hawks, N. C. 312; *Davis v. Hill*, 11 Ired. L. 9; *Léiper v. B. & O. R. R. Co.*, 5 Pa. Co. Ct. 60; *Senaker v. Justices*, 4 Sneed 116; *State v. Garch*, 9 Wash. 226, 37 Pac. Rep. 427; *Taylor v. Chicago etc. R. R. Co.*, 81 Wis. 82, 51 N. W. Rep. 93; *United States v. Engeman*, 46 Fed. Rep. 898; *Manhattan R. R. Co. v. McKee*, 1 App. Div. 488, 37 N. Y. Supp. 269.

CHAPTER XXIV.

THE DAMAGES PRESUMED TO BE INCLUDED IN THE AWARD OR JUDGMENT.

§ 564. **Statement of the question.**—Where the whole of a tract is taken, no interest remains in the owner with respect to which he can be damaged by any subsequent use of the property, and consequently no question can arise with respect to the right to recover for such subsequent damages. But, where part of a tract is taken, it not infrequently happens that a claim for further damages is made by the owner or those who succeed to his rights, on account of injuries resulting from the construction or operation of the works, or from changes in the works, or on account of alleged mistakes, errors or omissions in estimating the damages. Some of these claims commend themselves to one's sense of what is fair and just, while others do not. The treatment which they have received from the courts is very unsatisfactory, and the principles upon which they have been allowed or disallowed are, for the most part, as it seems to the writer, entirely erroneous.

§ 565. **General doctrine of the decisions.**—It is a doctrine often repeated in the decisions, that the damages must be assessed once for all, and that when once assessed according to law they include all the injuries resulting from the particular appropriation and from the construction and operation of the works in a reasonable and proper manner for all time to come.¹ In one case, where the taking was for

¹ Kimball v. White Water Valley Canal Co., 1 Ind. 285; Montmorency Gravel Road Co. v. Stockton, 43 Ind. 328; Elizabethtown etc. R. R. Co. v. Combs, 10 Bush 382; Gordon v. Tucker, 6 Me. 247; Chesapeake & Ohio Canal Co. v. Grove, 11 G. & J. 398; Fowle v. New Haven etc. R. R.

Co., 112 Mass. 334; Bailey v. Woburn, 126 Mass. 416; McCormick, v. Kansas City etc. R. R. Co., 57 Mo. 433; Dearborn v. Boston etc. R. R. Co., 24 N. H. 179; Perley v. B. C. & M. R. R. Co., 57 N. H. 212; Trenton Water Power Co. v. Chambers, 13 N. J. Eq. 199; Van Schoick v. Delaware & Hud-

a canal, the language of the court is that the assessment is final and conclusive for "all damages accruing to the owner of lands from any and every physical effect produced by the construction and use of the canal; whether the same were clearly to be seen and easily to be estimated before the construction of the canal or whether they were uncertain and doubtful results from such construction."² In another case, where property was taken for a railroad, the court says: "He whose land is taken for a railroad is to be equally protected. He is to receive all that equity and justice require, when the nature and extent of the property and rights to be affected are considered. The corporation acquire the right to construct their road in any suitable and proper manner, for their own convenience and public accommodation, and the right to vary and change that construction, within the established limits of the road, from time to time, forever, until the State resume the right and privilege of the corporation, or until the charter be altered, repealed or annulled. Accordingly, the commissioners or jury should take into consideration and appraise all damages, direct or consequential, present and prospective, certain and contingent, which may be judged by them fairly to result to the land-owner by the loss of his property and rights, and the injuries done thereto. * * * And, for any loss or injury which results from building the road in a suitable and proper manner, the land-owner can maintain no action against the company; the whole matter is concluded by the

son Canal Co., 20 N. J. L. 249; Furniss v. Hudson R. R. Co., 5 Sandf. 551; Tucker v. Erie etc. R. R. Co., 27 Pa. St. 281; Pittsburgh, Ft. Wayne & Chicago Ry. Co. v. Gilleland, 56 Pa. St. 445; Denver City Irr. & W. Co. v. Middaugh, 12 Col. 434, 21 Pac. Rep. 565; Joy v. Grindstone Neck Water Co., 85 Me. 109, 26 Atl. Rep. 1052; Beseman v. Pennsylvania R. R. Co., 50 N. J. L. 235, 13 Atl. Rep. 164; S. C. affirmed, 52 N. J. L. 221, 20 Atl.

Rep. 169; Kyle v. Auburn etc. R. R. Co., 2 Barb. 489; Denniston v. Philadelphia Co., 1 Pa. Supr. Ct. 599; Churchill v. Beethe, 48 Neb. 87, 66 N. W. Rep. 992; Hamor v. Bar Harbor Water Co., 92 Me. 364, 42 Atl. Rep. 790; People's R. R. Co. v. Grand Ave. R. R. Co., 149 Mo. 245, 50 S. W. Rep. 829; Hanelson v. Kansas City etc. R. R. Co. 151 Mo. 482.

² Van Schoick v. Delaware & Hudson Canal Co., 20 N. J. L. 249.

award of the commissioners or the verdict of the jury on appeal; for, where the legislature authorizes an act the necessary consequence of which is to damage the property of another, and at the same time prescribes the particular mode in which the damage shall be ascertained and compensated, he who does the act cannot be liable as a wrong-doer.

"The damages awarded by the commissioners must be regarded as a full compensation for all the injury which the land-owner may sustain, then or at any future time, from any cause which the commissioners were bound, or had a right to consider; so that it can never afterwards be made a question whether, in fact, the commissioners have or have not considered any particular cause of damage legitimate for their consideration. It must be taken that they have done their duty in considering all such causes, and that the party who has acquiesced in their decision, without appeal, is satisfied that they have done so. Or in case of a submission to a jury, it must be understood that they have been governed by the same principles."³ Similar language will be found in many of the cases cited in this chapter.

§ 566. The doctrine of the cases criticised.—As most of the cases for subsequent damages arise out of a taking for railroad purposes, we may use those for illustration, though the same principles apply to all. The theory or principle upon which the decisions go is that, when land is taken for a railroad, the absolute right is acquired to construct the road according to the most approved methods of engineering, provided no unnecessary injury is done to adjacent property, and provided a reasonable degree of skill, ability and forethought is exercised to prevent such injury.⁴ If the required degree of skill, ability and forethought has been exercised, and still damage results, then it is presumed to have been considered and estimated in the original assessment of damages, although it may be apparent to the court and to everybody that the injuries in question were not dreamed of and could not have been considered at the time

³ Dearborn v. Boston etc. R. R. Co., 24 N. H. 179, 186.

⁴ Cases cited in the last section.

the damages were assessed. The practical operation of the rule, therefore, is that injuries of the class last referred to are only paid for "in contemplation of law" and not in fact. Underlying the decisions referred to is an erroneous assumption as to the rights acquired by the purchase or condemnation of property for public use. This assumption is that there is acquired, not only all the ordinary proprietary rights in the property taken,* but also certain proprietary rights which pertain to the property not taken. If a right of way is taken through a tract for railroad purposes, it is assumed, for instance, that the railroad acquires not only the land constituting the right of way with all the rights and incidents which attach to it as land, but also the right of the owner of the remainder of the tract to have the adjacent soil supported, the right of such owner to have a stream flow as it has been wont to flow by nature, and, generally, his right not to be injured by an unreasonable use of the adjacent land in so far as the taking of such rights may at any time in the future prove to be necessary for the construction and operation of the road in the most approved manner. There is no warrant for this assumption, either in reason or authority, outside of the particular cases referred to. There is no reason why a railroad, in purchasing or condemning property for its use, should be held to acquire anything more than would be acquired by a private individual purchasing the same property for the same use. A man may build and operate a railroad without any authority from the legislature, if he does so upon his own land, and he may purchase land for that purpose. If one individual should convey to another a strip of land to be used for a railroad, there would be a release of all damages resulting from the operation of the road in a reasonable and proper manner. But in constructing the road the purchaser would be bound at his peril not to do any actionable injury to the adjacent land, either by depriving the soil of its support, by interfering with the flow of running streams, or otherwise. The purchaser would in all respects be subject to the law of adjoining proprietors and of the maxim, *sic utere tuo ut alienum non laedas*. So with a railroad when it acquires a right of way through a tract of land; it becomes an adjoin-

ing proprietor with the owner of the tract, with precisely the same rights and duties with respect to such owner as though the strip of land had been acquired by an individual for ordinary use, except the unqualified right of operating the road in a reasonable and proper manner. And so with every description of taking for public use. In adapting the property taken to the use proposed, the public or its agent is subject to the law of adjoining proprietors, and to the maxim, *sic utere tuo ut alienum non laedas*. If, in such adaptation, the adjacent owner's rights of property are violated, he is entitled to compensation, not on the ground of a want of skill or diligence in constructing the works, but because his constitutional rights of property have been violated.⁵

This principle affords in all cases a clear and definite rule, both for the assessment of damages in the first instance and for the determination of claims for subsequent injuries. It is in harmony with the law of real estate in other transactions, and is capable of being administered with a nearer approach to equality and justice to all parties than is possible under the other system.

Suppose a right of way is taken for a railroad through a farm for, say, a distance of half a mile. Suppose the surface is diversified and that one or two streams are intersected. The railroad may condemn its right of way before it has adopted any grade or plan of construction.⁶ A tribunal is constituted for the purpose of assessing the owner's damages. It is not difficult to imagine the speculations which may be indulged in as to the manner in which the road will probably be constructed; the volume of evidence which might be introduced for the purpose of showing what the demands of good engineering would require, and the prob-

⁵ These views are quoted and approved in *Staton v. Norfolk & C. R. R. Co.*, 111 N. C. 278, 16 S. E. Rep. 181. And see *Fleming v. Wilmington & W. R. R. Co.*, 115 N. C. 676, 20 S. E. Rep. 714; *Parker v. Norfolk etc. R. R. Co.*, 123 N. C. 71, 31 S. E. Rep. 381,

⁶ Or, if it has surveyed a grade, it is not bound to follow it, and even after it has once constructed its road it may change its grade and mode of construction in the most material manner at any time in the future,

able effects resulting from the road as so constructed. And, after all, it would all be speculation. The road might not be constructed in the manner testified to by witnesses or supposed by the tribunal, and if it was the consequences might in fact be very different from those predicted. The evidence might show, and the tribunal conclude, that a stream could be bridged without interference with its current to the injury of the owner's remaining land. The fact might turn out to be otherwise. The owner would then sustain an injury for which he had not been and could not be compensated, except "in contemplation of law." On the other hand, if the evidence showed and the tribunal concluded that the bridge would interfere with the current of the stream to the detriment of the owner and made an allowance for this in their estimate of damages, and the fact proved to be otherwise, then the company would have to pay for injuries never sustained. But, adopting the principle here contended for, the tribunal would not concern itself with speculations as to bridging the stream, but would assume that no right would be acquired by the condemnation to interfere with its current to the detriment of the owner's remaining land. If, in constructing the bridge, such interference should result, the owner would then have his action for damages according to the actual facts, and justice would be done to both and wrong to neither.

§ 567. **Damages arising from construction of the works.**—The authorities undoubtedly hold that the assessment of damages will be presumed to include all damages which arise from constructing the works in a reasonable and proper manner, having regard to the efficiency of the works on the one hand and the interest of the land-owner on the other. Where a subsequent claim for damages is made, arising from the construction of works, the question will be whether the works have been constructed in a proper manner, and whether the damage necessarily results from the works as so constructed. If these questions are answered in the affirmative, then the damages complained of will be presumed to have been considered in estimating the dam-

ages, and no further recovery can be had.⁷ If they are answered in the negative, then a recovery can be had in an appropriate common law action.⁸ If the damages are assessed after the works have been constructed, all damages occasioned by such construction and by the use and maintenance of the works in their then condition, will be presumed to have been included and no subsequent action will lie therefor.⁹

§ 568. **Damages from works on land to which the assessment does not relate.**—The rule stated in the foregoing section applies only to damages from the construction of works upon the land to which the assessment relates. If parts of black acre and white acre are taken, and if the works as constructed upon black acre produce damage to white acre, then there is no presumption that these were included in the

⁷ Ante, §§ 471a, 480a, 481, 565; McGillis v. Willis, 39 Ill. App. 311; Titus v. Boston, 149 Mass. 164, 21 N. E. Rep. 310; Barnes v. Mich. Air Line R. R. Co., 65 Mich. 251, 32 N. W. Rep. 426; Atchison & N. R. R. Co. v. Forney, 35 Neb. 607, 53 N. W. Rep. 585; Atchison & N. R. R. Co. v. Boener, 45 Neb. 453, 63 N. W. Rep. 787; Hoffeditz v. South Penn. etc. Co., 129 Pa. St. 264, 18 Atl. Rep. 125; Denniston v. Phila. Co., 161 Pa. St. 41, 28 Atl. Rep. 1007; Hodge v. Lehigh Valley R. R. Co., 39 Fed. Rep. 449; Caledonia R. R. Co. v. Lockhart, 3 Macqueen 808. "In the absence of any negligence, unskillfulness, or mismanagement in the construction of the embankment or the road bed, the injury thereby done to the plaintiff's property must be considered as the natural and necessary consequence of what the corporation had acquired the lawful right to do;

and such damages must be taken to have been included in the compensation assessed, or it was *damnum absque injuria*." Clark's Admx. v. Hannibal & St. Joseph R. R. Co., 36 Mo. 202, 224.

⁸ Clark's Admx. v. Hannibal & St. Joseph R. R. Co., 36 Mo. 202; McCormick v. Kansas City etc. R. R. Co., 57 Mo. 433; Van Schoick v. Delaware & Hudson Canal Co., 20 N. J. L. 249; Dearborn v. Boston etc. R. R. Co., 24 N. H. 179; Furniss v. Hudson R. R. Co., 5 Sandf. 551; Pittsburgh, Fort Wayne & Chicago Ry. Co. v. Gilleland, 56 Pa. St. 445; Spencer v. Hartford etc. R. R. Co., 10 R. I. 14; I. & G. N. Ry. Co. v. Pape, 62 Tex. 313.

⁹ Barnes v. Mich. Air Line R. R. Co., 65 Mich. 251, 32 N. W. Rep. 426; Hoffeditz v. South Penn. etc. Co., 129 Pa. St. 264, 18 Atl. Rep. 125; and cases cited in § 481.

assessment to the proprietor of white acre, and he may recover therefor the same as though no land of his had been taken for the work.¹⁰ This is in accordance with the rule for the assessment of just compensation when part of a tract is taken, which is that such just compensation includes the value of the part taken and damages to the remainder caused by the taking and use of the part for the purpose proposed.¹¹ Damages to the remainder by what is done elsewhere than on the part taken are not to be considered. Thus where parts of certain lots were taken for a railroad and damages assessed therefor, and the parts not taken were damaged by the railroad crossing and obstructing a street upon which the lots abutted at some distance from the lots, it was held that the latter damages were not included in the assessment and that an action would lie to recover the same.¹² So where the part not taken is injured by the cutting through a natural barrier against flood waters, situated upon the land of an adjoining proprietor.¹³ Many of the

¹⁰ Alabama Midland R. R. Co. v. Williams, 92 Ala. 277, 9 So. Rep. 203; Longworth v. Meriden & W. R. R. Co., 61 Conn. 451, 23 Atl. Rep. 827; Tinker v. Rockford, 137 Ill. 123, 27 N. E. Rep. 74; S. C. 36 Ill. App. 460; Egbert v. Lake Shore etc. R. R. Co., 6 Ind. App. 350, 33 N. E. Rep. 659; Lamm v. Chicago etc. R. R. Co., 45 Minn. 71, 47 N. W. Rep. 455; Republican Valley R. R. Co. v. Fellows, 16 Neb. 169; Atchison etc. R. R. Co. v. Boerner 34 Neb. 240, 51 N. W. Rep. 842; S. C. reaffirmed 45 Neb. 453, 63 N. W. Rep. 787; Eaton v. Boston & Me. R. R. Co., 51 N. H. 504 (for an account of this case see ante § 58); Delaware Canal v. Lee, 22 N. J. L. 243; In re New York etc. R. R. Co., 101 N. Y. 685, 5 N. E. Rep. 769; High Bridge Lumber Co. v. United

States, 69 Fed. Rep. 320, 16 C. C. A. 460. Compare Sioux City etc. R. R. Co. v. Weimer, 16 Neb. 272. The section is quoted, approved and followed in Longworth v. Meriden & W. R. R. Co., 61 Conn. 451, 23 Atl. Rep. 827.

¹¹ Ante, §§ 471a, 480a.

¹² Atchison etc. R. R. Co. v. Boerner, 34 Neb. 240, 51 N. W. Rep. 842; S. C. reaffirmed 45 Neb. 453, 63 N. W. Rep. 787. Similar and to the same effect are Longworth v. Meriden & W. R. R. Co., 61 Conn. 451, 23 Atl. Rep. 827; Tinker v. Rockford, 137 Ill. 123, 27 N. E. Rep. 74; Egbert v. Lake Shore etc. R. R. Co., 6 Ind. App. 350, 33 N. E. Rep. 659; Alabama Mid. R. R. Co. v. Williams, 92 Ala. 277, 9 So. Rep. 203.

¹³ Eaton v. Boston & M. R. R. Co., 51 N. H. 504; ante, §§ 58, 91.

cases which have been cited are where the plaintiff had conveyed or released the part appropriated, but the effect of a conveyance or release as to future damage is the same as a condemnation.¹⁴

§ 568a. **Damage to a distinct tract.**—The assessment and payment of damages for the taking of a tract, or part of a tract, of land, are no bar to a subsequent suit for damages to a distinct tract of land belonging to the same proprietor.¹⁵ This is but the converse of the rule that, in estimating compensation for property taken, damage to an entirely distinct and separate tract of land cannot be considered.¹⁶

§ 569. **By interfering with the support of the adjacent soil.**—It not infrequently happens that, in the construction or improvement of highways and railroads, excavations are made so that the soil of the adjoining owner gives away and slides into the excavation. Some cases, and perhaps a majority, hold that there can be no recovery in such cases.¹⁷ These cases proceed upon the theory that the right so to undermine the soil at any time when necessary to the proper constructing of the works was acquired and paid for at the time of the original taking. On the other hand, there are a number of cases which hold that, where land is taken for public use, the right of support for the adjoining soil is not taken, but the owner retains such right and the works must be constructed so as not to interfere with that right, or further compensation must be made.¹⁸ For reasons already

¹⁴ Ante, § 293.

¹⁵ *Beaver v. Harrisburg*, 156 Pa. St. 547, 27 Atl. Rep. 4. In this case the city took part of a lot of land belonging to plaintiff for widening a street for the purpose of erecting a bridge over the same. The compensation was settled by agreement. It was held by a divided court, that this was no bar to a suit for damages to plaintiff's property on the opposite side of the street by the erection of the bridge.

See also *Illinois Cent. R. R. Co. v. Wilbourne*, 74 Miss. 284.

¹⁶ Ante, §§ 474, 475.

¹⁷ *Rome v. Omberg*, 28 Ga. 46; *Mitchell v. Rome*, 49 Ga. 19; *Hortsmann v. Covington & Lexington R. R. Co.*, 18 B. Mon. 218; *Boothby v. Androscoggin & Kennebec R. R. Co.*, 51 Me. 318; *Calendar v. Marsh*, 1 Pick. 418; *Radcliff's Executors v. Brooklyn*, 4 N. Y. 195; *Cheever v. Shedd*, 13 Blatch. 258.

¹⁸ *Quincy v. Jones*, 76 Ill. 231;

stated in a prior section, it seems to us that the latter cases are founded upon the better reason, and upon a more just and correct appreciation of the rights of the respective parties.¹⁹

§ 570. **By grading and changing the grade of streets.**—Where a street is widened, it is held that the damages assessed should include any damages that will be occasioned by bringing the new part to the proper grade.²⁰ So in a proceeding to condemn land for opening a street, if the grades have already been established it has been held proper to show how the street is to be constructed and to give compensation for any damages that will result from such construction.²¹ Where part of a lot or tract of land is taken for a railroad and the road is so constructed as to necessitate a change of grade in the street upon which the remainder abuts, the damage thereby caused to such remainder is not presumed to have been included in the compensation made, and a separate action will lie therefor.²²

§ 571. **By interfering with running streams.**—Claims for subsequent damages from interferences with running

Aurora v. Fox, 78 Ind. 1; *Dyer v. St. Paul*, 27 Minn. 457; *Armstrong v. Same*, 30 Minn. 299; *Keating v. Cincinnati*, 38 Ohio St. 141; *Metropolitan Board of Works v. Metropolitan Ry. Co.*, 37 L. J. C. P. 281; *S. C.*, 38 L. J. C. P. 172; *Nichols v. Duluth*, 40 Minn. 389, 42 N. W. Rep. 84; *Kopp v. Northern Pac. R. R. Co.*, 41 Minn. 310, 43 N. W. Rep. 73; *McCullough v. St. Paul etc. R. R. Co.*, 52 Minn. 12, 53 N. W. Rep. 802; *Stearn's Exrs. v. Richmond*, 88 Va. 992, 14 S. E. Rep. 847, 6 Am. R. R. & Corp. Rep. 247; *New Westminster v. Brighthouse*, 20 Duvall 520.

¹⁹ Ante, §§ 101, 151, 566. The later cases are more and more in favor of the doctrine approved in the text.

²⁰ *Van Riper v. Essex Road Board*, 38 N. J. L. 23. But does not include damages for a change of grade. *Rodgers v. Phila.* 181 Pa. St. 243.

²¹ *Portland v. Kamm*, 10 Or. 383; *Pusey v. Allegheny*, 98 Pa. St. 522. Contra: *In re Ridge Street, Allegheny City*, 29 Pa. St. 391. See, generally, for damages by a change of grade, ante, §§ 92-109, 494, 495.

²² *Alabama Midland R. R. Co. v. Williams*, 92 Ala. 277, 9 So. Rep. 203; *Tinker v. Rockford*, 137 Ill. 123, 27 N. E. Rep. 74; *Egbert v. Lake Shore etc. R. R. Co.*, 6 Ind. App. 350, 33 N. E. Rep. 659. But see *Sioux City etc. R. R. Co. v. Weimer*, 16 Neb. 272.

streams usually arise with respect to railroads. In bridging streams the company must exercise due diligence to avoid injury to adjacent property. If it does not, it will be liable on the ground of negligence.²³ If it does exercise such diligence, any resulting damage will be presumed to have been included in the assessment.²⁴ By merely condemning a right of way the company acquires no right to dam²⁵ or divert²⁶ a stream, and any damages produced thereby may be recovered in a subsequent action.²⁷

§ 572. By interfering with surface or subterranean waters.—The doctrine with respect to these waters is discussed in a previous chapter.²⁸ It will there be seen that the rights of adjoining owners in respect to surface water differ in the different States, and that claims for subsequent damages by reason of interference with such waters are sometimes made to turn upon the question of negligence or lack of skill in the construction of the works,²⁹ and some-

²³ Pittsburgh, Fort Wayne & Chicago Ry. Co. v. Gilleland, 56 Pa. St. 445; Spencer v. Hartford, Providence & Fishkill R. R. Co., 10 R. I. 14; Ohio etc. R. R. Co. v. Thillman, 43 Ill. App. 78; Ohio etc. R. R. Co. v. Neutzel, 43 Ill. App. 108; Chicago etc. R. R. Co. v. Willi, 53 Ill. App. 603; Ferguson v. Formenich Mfg. Co., 77 Ia. 576, 42 N. W. Rep. 448; Stone v. Augusta, 46 Me. 127; Byrne v. Minn. etc. R. R. Co., 38 Minn. 212, 36 N. W. Rep. 339; Emry v. Raleigh etc. R. R. Co., 102 N. C. 209, 9 S. E. Rep. 139; Knight v. Albemarle etc. R. R. Co., 111 N. C. 80, 15 S. E. Rep. 929; Fleming-ton v. Wilmington & W. R. R. Co., 115 N. C. 676, 20 S. E. Rep. 714; Georgia R. & B. Co. v. Bohler, 98 Ga. 184.

²⁴ Ibid.

²⁵ Selma etc. R. R. Co. v. Keith, 53 Ga. 178.

²⁶ Stodghill v. Chicago, Burlington & Quincy R. R. Co., 43 Ia. 26; Jackman v. Missouri Pac. R. R. Co., 15 Neb. 524; Ward v. Albemarle etc. R. R. Co., 112 N. C. 168, 16 S. E. Rep. 921. See Baltimore & Ohio R. R. Co. v. Magruder, 34 Md. 79.

²⁷ See ante, chap. iv.

²⁸ Ante, §§ 88-90.

²⁹ Canniff v. San Francisco, 67 Cal. 45; Drake v. Chicago, Rock Island & Pacific Ry. Co., 63 Ia. 302; Miller v. Keokuk & Des Moines Ry. Co., 63 Ia. 680; Clark's Admx. v. Hannibal & St. Joseph R. R. Co., 36 Mo. 202; McCormick v. Kansas City etc. R. R. Co., 57 Mo. 433; Nason v. Woonsocket Union R. R. Co., 4 R. I. 377; Carriger v. Railroad Co., 7 Lea 388; Miller v. Chicago etc. R. R. Co., 60 Ill. App. 51; Canton etc. R. R. Co. v. Paine, (Miss.) 19 So. Rep. 199; See Magee Furnace Co. v. Common-

times such interference is regarded as a new taking, for which additional compensation must be made.³⁰ An award for land taken for a ditch was held not to bar an action for percolation from the ditch.³¹

§ 573. **Damages by blasting, trespass and the like.**—The rights of the party condemning are confined to the land taken, and for any damages done to adjoining land by blasting,³² by occupation or encroachments,³³ by depositing debris upon it,³⁴ or by using it as a roadway,³⁵ a recovery may be had.³⁶ Where by statute railroad companies had

wealth, 166 Mass. 480, 44 N. E. Rep. 610.

³⁰ *Tearney v. Smith*, 86 Ill. 391; *Texas Central Ry. Co. v. Clifton*, 2 Tex. App. Civil Cases, p. 433; *St. Louis etc. R. R. Co. v. Hurst*, 25 Ill. App. 98; S. C. 14 Ill. App. 419; *Staton v. Norfolk & C. R. R. Co.*, 111 N. C. 278, 16 S. E. Rep. 181; *Gordon v. Penn. R. R. Co.*, (Penn.) 6 The Reporter, 727; *Norfolk & W. R. R. Co. v. Carter*, 91 Va. 587, 22 S. E. Rep. 517; ante, §§ 88-90.

³¹ *Consolidated Home etc. D. & R. R. Co. v. Hamlin*, 6 Col. App. 341, 40 Pac. Rep. 582.

³² *Eaton v. European & North American Ry. Co.*, 59 Me. 520; *Tibbetts v. Knox & Lincoln R. R. Co.*, 62 Me. 437; *Hay v. Cohoes Co.*, 3 Barb. 42; S. C. 2 N. Y. 159; *Tremain v. Same*, 2 N. Y. 163; *Carman v. Stubenville & Indiana R. R. Co.*, 4 Ohio St. 399; *Sabine v. Vermont Central R. R. Co.*, 25 Vt. 363; *Blackwell v. Lynchburg etc. R. R. Co.*, 111 N. C. 151, 16 S. E. Rep. 12; ante, § 146. But see *Booth v. Rome etc. R. R. Co.*, 140 N. Y. 267, 35 N. E. Rep. 592, 9 Am. R. R. & Corp. Rep. 92. In this case it is held that a railroad company

which, having to do blasting on its own land in order to lay its tracks, exercises due care in doing it, and uses charges of no greater force than are necessary for the purpose, is not liable for injury to adjoining property arising merely from the incidental jarring, but if the damage in such case results from the failure of the railroad company to use due care, it will be liable. See also *Watts v. Norfolk & W. R. R. Co.*, 39 W. Va. 196, 19 S. E. Rep. 521.

³³ *Doud v. Mason City etc. R. R. Co.*, 76 Ia. 438, 41 N. W. Rep. 65; *Leavenworth etc. R. R. Co. v. Usher*, 42 Kan. 637, 22 Pac. Rep. 734; *Chicago etc. R. R. Co. v. Willets*, 45 Kan. 110, 25 Pac. Rep. 576; *Bridgers v. Dill*, 97 N. C. 222; *Martini v. Gzonski*, 13 U. C. Q. B. 298. See *Lauderbrun v. Duffy*, 2 Pa. St. 398, where such occupation was allowed by statute.

³⁴ *Norfolk etc. R. R. Co. v. Carter*, 91 Va. 587, 22 S. E. Rep. 517.

³⁵ *Sabine v. Vt. Cent. R. R. Co.*, 25 Vt. 363.

³⁶ See ante, § 482a. As to whether the damages for a

authority to cut down trees within six rods of their right of way, it was held that damages from the exercise of this right should be included in the assessment of compensation.³⁷

§ 574. The assessment does not include damages resulting from the improper construction or negligent use of the works.—This is implied in the preceding sections, and has already been referred to in the chapter upon damages.³⁸ If such damages arise at any time, the owner at the time may have his common law remedy therefor.

§ 575. Claims based upon changes in the works or plan of construction, or upon the increased use of the property.—This question has already been considered in the chapter upon damages.³⁹ The condemnor may bind itself to a speci-

wrongful entry upon the property taken are to be recovered in a separate action or included in the assessment of damages, see ante § 507; also *Grand Rapids etc. R. R. Co. v. Chesebro*, 74 Mich. 466, 42 N. W. Rep. 66; *Canton etc. R. R. Co. v. French*, 68 Miss. 22, 8 So. Rep. 512; *Hopson v. Louisville etc. R. R. Co.*, 71 Miss. 503, 15 So. Rep. 37.

³⁷ *Evans v. Atlantic etc. R. R. Co.*, 6 Montreal Supr. Ct. 493.

³⁸ Ante, §§ 154, 482; *Rodemacher v. Milwaukee & St. Paul R. R. Co.*, 41 Ia. 297; *Steele v. Western Inland-Lock Navigation Co.*, 2 Johns. 283; *New York v. Bailey*, 2 Denio, 433; S. C., 3 Hill 531; *Pittsburgh, Ft. Wayne & Chicago Ry. Co. v. Gilleland*, 56 Pa. St. 445; *Clothier v. Webster*, 12 C. B. N. S. 790; S. C., 104 E. C. L. R. 789; 31 L. J. C. P. 316; 10 W. R. 624; *St. Louis etc. R. R. Co. v. Morris*, 35 Ark. 622; *Hunt v. Iowa Cent. R. R. Co.*, 86 Ia. 15, 52 N. W. Rep. 668; *St. Louis etc. R. R. Co. v. Jacobs*, 44 La.

An. 922, 11 So. Rep. 571; *Kansas City etc. R. R. Co. v. Lackey*, 72 Miss. 881, 16 So. Rep. 909; *Morris Canal etc. Co. v. Ryerson*, 27 N. J. L. 457; *Silsby Mfg. Co. v. State*, 104 N. Y. 562; *Knowles v. Norfolk etc. R. R. Co.*, 102 N. C. 381, 9 S. E. Rep. 4; *Schuylkill Nav. Co. v. McDonough*, 33 Pa. St. 73; *McMinn v. Pittsburgh etc. R. R. Co.*, 147 Pa. St. 5, 23 Atl. Rep. 325; *Denniston v. Philadelphia Co.*, 161 Pa. St. 41, 28 Atl. Rep. 1007, 1 Pa. Supr. Ct. 599; *Gulf etc. R. R. Co. v. Pool*, 70 Tex. 713, 8 S. W. Rep. 535; *Stewart v. Rutland*, 58 Vt. 12; *Page v. Belvin*, 88 Va. 985, 14 S. E. Rep. 843; *Porterfield v. Bond*, 38 Fed. Rep. 391; *Brine v. Great Western R. R. Co.*, 31 L. J. Q. B. 101; *Freemont etc. R. R. Co. v. Harlin*, 50 Neb. 698; *Chesapeake etc. R. R. Co. v. Chambero*, 95 Va. 503; *Sanitary District v. Ray*, 85 Ill. App. 115.

³⁹ Ante, § 481. See also §§ 140-141a.

fied plan of construction or specified use of the property and have the damages assessed upon that basis. In that case an action can be maintained for any damage caused by a subsequent change in the works or use.⁴⁰ But if there has been no such limitation in the condemnation, the condemnor acquires the right to change its works, or increase or change the use of the property as it may deem best, so long as it exercises due care and skill in so doing, and keeps within the purpose of the original appropriation, and no action will lie for damages caused by such changes.⁴¹

§ 576. **Items or claims omitted by mistake or otherwise.**—If the commissioners or jury make a mistake in the assessment of damages, by omitting an item of damages which ought to have been allowed, by proceeding upon erroneous principles, or otherwise, the remedy must be sought in the proceedings themselves. Such mistake cannot be made the basis of an independent suit.⁴²

§ 577. **Statutes giving a remedy for damages not fore-**

⁴⁰ Ibid.

⁴¹ *Cassidy v. Old Colony R. R. Co.*, 141 Mass. 174; *Moss v. St. Louis, Iron Mountain & Southern Ry. Co.*, 85 Mo. 86; *Butman v. Vermont Central R. R. Co.*, 27 Vt. 500; *Hodge v. Lehigh Val. R. R. Co.*, 39 Fed. Rep. 449; *Perry v. Lehigh Val. R. R. Co.*, 9 Misc. 515, 30 N. Y. Supp. 140; *Pennsylvania R. R. Co. v. Friday*, 4 Penny, 158; *Hammel v. Cumberland Valley R. R. Co.*, 175 Pa. St. 537, 34 A. 848; *Hans v. Jeffersonville etc. R. R. Co.*, 138 Ind. 307, 37 N. E. Rep. 805; *White v. Chicago etc. R. R. Co.*, 122 Ind. 317, 23 N. E. Rep. 782, 2 Am. R. R. & Corp. Rep. 138. Where property was conveyed for a main line of railroad and was afterwards used for side tracks, it was held that an action would

lie for the damage to the grantor's remaining property caused by the side tracks. *Donisthorpe v. Fremont etc. R. R. Co.*, 30 Neb. 142, 46 N. W. Rep. 240, 3 Am. R. R. & Corp. Rep. 172.

⁴² *Spaulding v. Arlington*, 126 Mass. 492; *Butman v. Vermont Central R. R. Co.*, 27 Vt. 500; *Fleming v. Wilmington & W. R. R. Co.*, 115 N. C. 676, 20 S. E. Rep. 714; *Armstrong v. Cincinnati*, 5 Ohio 138. See *Morris Canal etc. Co. v. Seward*, 23 N. J. L. 219; *Baldwin v. Buffalo*, 29 Barb. 396; *Wells v. Bridgeport Hydraulic Co.*, 30 Conn. 316; *Van Wagner v. Central N. E. & W. R. R. Co.*, 80 Hun 278, 30 N. Y. Supp. 165; *Otero Canal Co. v. Fosdick*, 20 Col. 552, 39 Pac. Rep. 332; *Schuchardt v. New York*, 53 N. Y. 202.

seen and estimated.—Virginia has a statute which provides that the inquisition or judgment shall not be a bar to a further action for injuries not actually foreseen and estimated. Several cases have arisen under this statute, but they do not appear to have adjudicated anything of general interest.⁴³ Iowa has a similar statute.⁴⁴ If the injury was foreseen and nothing awarded for it, it was foreseen and estimated within the meaning of the statute.⁴⁵ It cannot be presumed that damages to fence and timber a mile from a railroad, by fire from a locomotive, were taken into account and estimated when the road was laid out.⁴⁶

⁴³ Commonwealth v. Favis, 5 Rand. 691; Whitworth v. Puckett, 2 Gratt. 531; Calhoun v. Palmer, 8 Gratt. 88; Southside R. Co. v. Daniel, 20 Gratt. 344.

⁴⁴ Watson v. Van Meter, 43 Ia. 76.

⁴⁵ Ibid.

⁴⁶ Rodemacher v. Milwaukee & St. Paul R. R. Co., 41 Ia. 297.

CHAPTER XXV.

RIGHTS OF THE RESPECTIVE PARTIES IN THE PROPERTY CONDEMNED.

§ 578. **General principles as to obtaining possession.**—It has already been shown that, upon a proper construction of the constitution, the owner's possession cannot be disturbed until his just compensation has been paid or tendered.¹ Many cases, however, hold a contrary doctrine, and some constitutions provide for possession by the party condemning upon giving security. The only general rule which can be laid down is that possession cannot be lawfully taken without a strict compliance with the statute which applies to the particular case.² This rule applies to all the States. But what the legislature may lawfully authorize in this respect will depend upon the constitution of the State as interpreted by the courts. If compensation need not be first made, then the whole matter rests in the discretion of the legislature and the right to possession is complete when the conditions precedent imposed by statute have been complied with. If compensation must be first made, then there can be no right to possession until such compensation has been ascertained according to law and payment or its equivalent made or performed. Where the statute requires certain notice to be given the owner before entry is made, an entry without giving such notice is a trespass.³ Where

¹ Ante, §§ 456-459, post 631-634.

² Coburn v. Ames, 52 Cal. 385; San Diego L. & T. Co. v. Neale, 78 Cal. 80, 20 Pac. Rep. 380; Chicago etc. R. R. Co. v. Watkins, 43 Kan. 50, 22 Pac. Rep. 985; Carrico v. Colvin, 92 Ky. 342, 17 S. W. Rep. 854; Hennessy v. St. Paul, 44 Minn. 306, 46 N. W. Rep. 353; Wistar v. Philadelphia, 71 Pa. St. 44; Wheeling etc. R. R. Co. v. Warrell, 122 Pa. St.

613; Thompsons v. Augusta etc. R. R. Co., 37 S. C. 382, 16 S. E. Rep. 149; Johnson v. Baltimore etc. R. R. Co., 45 N. J. Eq. 454, 17 Atl. Rep. 574; Giles v. London etc. R. R. Co., 1 Drewry & Smale, 406; Ranken v. East & West India Docks, 12 Beav. 298; Cherokee Nation v. Southern Kansas R. R. Co., 135 U. S. 641, 10 S. C. Rep. 965.

³ Taylor v. Marcy 25 Ill. 518;

proceedings are instituted to lay out a highway, no entry can be made until such proceedings are fully completed.⁴ In the absence of statutory authority, the court cannot authorize possession pending proceedings.⁵

§ 579. **Statutes permitting possession upon a tender or deposit of the damages awarded.**—Where the damages have been duly ascertained, there is no valid objection to a statute which permits the condemning party to have possession upon a tender of the amount to the owner, or upon making a deposit of the same for his benefit.⁶ A tender to the owner or a deposit for his benefit pursuant to a statute permitting it, is equivalent to payment.⁷ The tender or deposit cannot be made until the award or verdict is approved by the court. In a proceeding to condemn for railroad purposes, the company, pending a motion for new trial, deposited the amount of the verdict and took possession. Afterwards a new trial was granted. The company was enjoined from further interference.⁸ To be effectual the tender or deposit should be made in accordance with the statute and unconditionally.⁹ In New Jersey it has been held,

Dunbar v. Wightman, 51 Mo. 432.

⁴ Linblom v. Ramsey, 75 Ill. 246; Road in Bucks county, 3 Whart. 105; Patchin v. Doolittle, 3 Vt. 457; Patchin v. Morrison, 3 Vt. 590; Pomona Branch R. R. Co. v. Camden etc. R. R. Co., (N. J.) 20 Atl. Rep. 350; Matter of North Thirteenth Street, 5 Hun 175.

⁵ Coburn v. Pacific Lumber & Mill Co., 46 Cal. 31; Loomis v. Andrews, 49 Cal. 239; San Mateo Water Works v. Sharpstein, 50 Cal. 284; Matter of Saratoga & Schenectady R. R. Co., 66 How. Pr. 43.

⁶ St. Louis etc. R. R. Co. v. Clark, 119 Mo. 357, 24 S. W. Rep. 157; Johnson v. Baltimore etc. R. R. Co., 45 N. J. Eq. 454, 17 Atl. Rep. 574; Packard v. Ber-

gen Neck R. R. Co., 48 N. J. Eq. 281, 22 Atl. Rep. 227; Ackerman v. Huff, 71 Tex. 317, 9 S. W. Rep. 236; Montgomery etc. R. R. Co. v. Walton, 14 Ala. N. S. 207; Kansas etc. R. R. Co. v. Phipps, 4 Kan. App. 252, 45 Pac. Rep. 926; Chicago etc. R. R. Co. v. Selders, 4 Kan. App. 497, 44 Pac. Rep. 1012; Rudd v. Farmville etc. R. R. Co., (Va.) 24 S. E. Rep. 386.

⁷ Johnson v. Baltimore etc. R. R. Co., 45 N. J. Eq. 454, 17 Atl. Rep. 574; Ackerman v. Huff, 71 Tex. 317, 9 S. W. Rep. 236; Oliver v. Union Point etc. R. R. Co., 83 Ga. 257, 9 S. E. Rep. 1086.

⁸ Wagner v. Railway Co., 38 Ohio St. 32.

⁹ Arnold v. Covington & Cin-

construing the statutes of that State, that the deposit cannot be made until the owner has had a reasonable time to appeal,¹⁰ and that an appeal cuts off the right to obtain possession by a deposit of the award.¹¹ Where notice of the deposit was required to be given to the owner knowledge on his part was held to dispense with notice.¹² A tender of the damages has been held to perfect the right to enter and that the right was not affected by a subsequent refusal to pay the damages on demand.¹³ When the right to possession depends upon a deposit by the condemnor, the deposit must be kept good.¹⁴

§ 580. Possession pending an appeal upon depositing the damages awarded. —Statutes permitting the party condemning to take possession pending an appeal by either party, upon making a deposit of the damages awarded, are uniformly upheld by the courts.¹⁵ But, in the absence of a statute permitting it, the party condemning cannot obtain the right to possession pending an appeal by tendering or

cinnati Bridge Co., 1 Duvall 372; Lull v. Curry, 10 Mich. 397; Kanne v. Minneapolis & St. Louis Ry. Co., 30 Minn. 423; Murphy v. Groot, 44 Cal. 51; National Docks etc. R. R. Co. v. United N. J. R. etc. Co., 52 N. J. Eq. 366, 28 Atl. Rep. 673; Consumers' Gas Trust Co. v. Harless, 131 Ind. 446, 29 N. E. Rep. 1062.

¹⁰ Currie v. Jersey City etc. R. R. Co., unreported but affirmed by court of errors and appeals as appears from the following cases: Pomona Branch R. R. Co. v. Camden & A. R. R. Co., 20 Atl. Rep. 350; Waite v. Port Reading R. R. Co., 48 N. J. Eq. 346, 22 Atl. Rep. 261.

¹¹ Ibid.; Johnson v. Baltimore etc. R. R. Co. 45 N. J. Eq. 454, 17 Atl. Rep. 574. So in Pennsylvania: Harrisburg etc. Road Co.

v. Harrisburg etc. R. R. Co. 177 Pa. St. 585 35 Atl. Rep. 850.

¹² Hopkins v. Cravey, 85 Tex. 189, 19 S. W. Rep. 1067.

¹³ Rossiter v. Russell, 18 N. H. 73. After tender the company made a contract for the construction of the road. After the contract was made but before entry by the contractor, the owner demanded his damages and was refused. The contractor then entered and the owner brought trespass against him. Held that the defendant was not liable.

¹⁴ Clelland v. McCumber, 15 Col. 355, 25 Pac. Rep. 700.

¹⁵ Baltimore etc. R. R. Co. v. Johnson, 84 Ind. 420; Lake Erie & Western R. R. Co. v. Kinsey, 87 Ind. 514; Peterson v. Ferreby, 30 Ia. 327; Hastings v. Burlington etc. R. R. Co., 38 Ia. 316; Downing v. Des Moines North-

depositing the damages awarded.¹⁶ If on the appeal the damages are increased, the whole amount must be paid or tendered, or the right to possession will cease¹⁷ and the property may be recovered in ejectment,¹⁸ or its further use prevented by injunction.¹⁹ Where in a railroad case the deposit was made with the sheriff pending an appeal, and the money was lost through his insolvency, it was held to be the loss of the company, and that the owner could recover possession unless the full amount of damages awarded on

western Ry. Co., 63 Ia. 177; Central Branch Union Pacific R. R. Co. v. Atchison etc. R. R. Co., 28 Kan. 453; Arnold v. Covington & Cincinnati Bridge Co., 1 Duvall 372; State v. Dickson, 3 Mo. App. 464; St. Louis & San Francisco Ry. Co. v. Evans & Howard Fire Brick Co., 85 Mo. 307; S. C. 15 Mo. App. 152; Cooper v. Chester R. R. Co., 19 N. J. Eq. 199; Doughty v. Somerville etc. R. R. Co., 21 N. J. L. 442; Mercer & Somerset R. R. Co. v. Delaware & Bound Brook R. R. Co., 26 N. J. Eq. 464; Matter of New York Central R. R. Co., 60 N. Y. 116; Matter of New York & Harlem River R. R. Co., 98 N. Y. 12; S. C. 39 Hun 338; Schuller v. Northern Liberties etc. R. R. Co., 3 Whart. 555; Railroad Co. v. Foreman, 24 W. Va. 662; Oliver v. Union Point etc. R. R. Co., 83 Ga. 257, 9 S. E. Rep. 1086; Consumers' Gas Trust Co. v. Harless, 131 Ind. 446, 29 N. E. Rep. 1062; Rothan v. St. Louis etc. R. R. Co., 113 Mo. 132, 20 S. W. Rep. 892; St. Louis etc. R. R. Co. v. Clark, 119 Mo. 357, 24 S. W. Rep. 157; Snyder v. Cowan, 120 Mo. 389, 25 S. W. Rep. 382; State v. McHatton, 15 Mon. 159, 38 Pac. Rep.

711. Compare Johnson v. Baltimore etc. R. R. Co., 45 N. J. Eq. 454, 17 Atl. Rep. 574, where it is held that an appeal vacates the award and leaves the compensation undetermined so that no deposit can be made. In case of a street it was held no objection that the money deposited by the city was contributed by private parties. Chicago etc. R. R. Co. v. Naperville, 169 Ill. 25.

¹⁶ Colville v. Langdon, 22 Minn. 565; Browning v. Camden etc. R. R. Co., 4 N. J. Eq. 47; Mobile etc. R. R. Co. v. Ala. Midland R. R. Co., 87 Ala. 520, 6 So. Rep. 407.

¹⁷ Lake Erie & Western R. R. Co. v. Kinsey, 87 Ind. 514; Peterson v. Ferreby 30 Ia. 327; Downing v. Des Moines Northwestern Ry. Co., 63 Ia. 177; White v. Wabash etc. Ry. Co. 64 Ia. 281; Levering v. Philadelphia etc. R. R. Co. 8 W. & S. 459; Railroad Co. v. Foreman 24 W. Va. 662; Steubenville etc. R. R. Co. v. Patrick, 7 Ohio St. 170.

¹⁸ Lake Erie & Western R. R. Co. v. Kinsey, 87 Ind. 514; Levering v. Philadelphia etc. R. R. Co., 8 W. & S. 459.

¹⁹ Peterson v. Ferreby, 30 Ia. 327.

appeal was paid to him.²⁰ Where possession has been lawfully taken upon a deposit or tender of damages, a subsequent appeal will not affect the right of possession.²¹ When the condemnor is in possession under a lease it may retain possession pending the appeal without depositing the damages.²²

§ 581. **Right of the owner to the damages deposited in such cases.** —The only serious question with respect to the statutes considered in the foregoing section is the right of the owner to the money deposited, immediately upon possession being taken of his property. The right of the owner to appeal may be subjected to such conditions as the legislature sees fit to impose. When the damages have once been ascertained by a competent tribunal, the constitution is satisfied and the legislature is under no necessity of allowing any appeal therefrom. As it may withhold the appeal altogether, it may annex such conditions as it pleases.²³ The right of the owner to appeal, therefore, may be made conditional upon the party condemning being let into possession upon such terms as the legislature deem equitable, such as the deposit of the damages awarded, or the giving of security therefor, or the like. The first award is the just compensation to which the owner is entitled until it is revised on appeal or otherwise. If he is satisfied with the amount, the legislature cannot authorize an entry upon his property until this amount is paid, or such a disposition made of it as is equivalent to payment. If it is deposited, it must be deposited subject to the order of the owner. This being so, a law which permits the party condemning to take

²⁰ *White v. Wabash, St. Louis & Pacific Ry. Co.*, 64 Ia. 281. To same effect, *Clelland v. McCumber*, 15 Col. 355, 25 Pac. Rep. 700.

²¹ *Mercer etc. R. R. Co. v. Delaware etc. R. R. Co.*, 26 N. J. Eq. 464; *Packard v. Bergen Neck R. R. Co.*, 48 N. J. Eq. 281, 22 Atl. Rep. 227; *Jeffries v. MacCown*, 30 Ind. 226.

²² *Ashland Coal & I. R. R. Co. v. Davidson*, (Ky.) 20 S. W. Rep. 270. See generally *Manhattan R. R. Co. v. O'Sullivan*, 8 App. Div. 320, 40 N. Y. Supp. 937; *Canandaigua v. Benedict*, 8 App. Div. 475 40 N. Y. Supp. 707.

²³ *Central Branch U. P. R. R. Co. v. Atchison etc. R. R. Co.*, 28 Kan. 453.

possession pending an appeal by him, upon depositing the amount of the first award to be held until the appeal is determined, would be unconstitutional and void, at least so far as it withheld the money deposited from the owner.²⁴ This conclusion is based upon the assumption that there is no special constitutional provision covering the matter, and that a proper interpretation of the general constitutional provision requires that compensation shall be paid before the property is entered upon.²⁵ When the constitution expressly requires prepayment or is so interpreted as to require it, the owner is entitled to the award deposited, if possession has been taken, and may enforce such right by appropriate proceedings.²⁶

§ 582. **Possession upon giving security for the compensation.**—The constitutions of some of the States recognize the right to enter upon property upon giving security for the payment of the just compensation.²⁷ The constitution of Colorado provides, "That private property shall not be taken or damaged for public or private use, without just compensation. Such compensation shall be ascertained by a board of commissioners, of not less than three free-holders, or by a jury, when required by the owner of the property, in such manner as may be prescribed by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be needlessly disturbed, or the propri-

²⁴ *Meilly v. Zurmehly* 23 Ohio St. 627; *Redman v. Philadelphia etc. R. R. Co.*, 33 N. J. Eq. 165; *Consumers' Gas Trust Co. v. Harless* 131 Ind. 446, 29 N. E. Rep. 1062; *St. Louis etc. R. R. Co. v. Clark*, 119 Mo. 357, 24 S. W. Rep. 157; *Snyder v. Cowan*, 120 Mo. 389, 25 S. W. Rep. 382; *State v. McHatton*, 15 Mon. 159, 38 Pac. Rep. 711. Consult also *State v. Lubke*, 15 Mo. App. 152; *S. C.*, 85 Mo. 307; *Matter of New York & Harlem River R. R. Co.*, 98 N. Y. 12.

²⁵ *Ante*, §§ 456-459.

²⁶ *St. Louis etc. R. R. Co. v. Clark*, 119 Mo. 357, 24 S. W. Rep. 157; *Chicago etc. R. R. Co. v. Eubanks*, 130 Mo. 270, 32 S. W. Rep. 658; and see cases cited in note 24.

²⁷ See *Weir v. St. Paul etc. R. R. Co.*, 18 Minn. 155; *Rippe v. Chicago etc. R. R. Co.*, 22 Minn. 44; *Woodruff v. Glendale*, 26 Minn. 78; *Hennessy v. St. Paul*, 44 Minn. 306, 46 N. W. Rep. 353.

etary rights of the owner therein divested." This was held to recognize the fact that there might be needful interference, and to imply that such interference might be authorized. A law authorizing an entry pending proceedings, upon the deposit with the clerk of the court of a sum sufficient to pay the damages which would probably be awarded, such sum to be ascertained by the judge before whom the proceedings are pending, was held valid under this provision.²⁸ The constitution of Pennsylvania requires compensation to be first made or secured. A statute permitting an entry upon giving bond with surety in an amount to be fixed by the court, has been repeatedly upheld.²⁹ The right of possession is not affected by the bond being or becoming worthless.³⁰ In other States laws permitting an entry upon giving security are upheld upon the ground that the payment of the compensation need not precede the entry.³¹ Where, under such statutes, the practice is not prescribed, it is proper for the court to hear evidence for the purpose of fixing the amount of the bond.³² Where the bond presented is first rejected by the court and afterwards approved, an entry in the meantime is a trespass.³³ But, ac-

²⁸ McClain v. People, 9 Col. 190, 11 Pac. Rep. 85; San Luis Land etc. Co. v. Kenilworth Canal Co., 3 Col. App. 244, 32 Pac. Rep. 860. To same effect under a similar constitution: Ex parte Reynolds, 52 Ark. 330, 12 S. W. Rep. 570.

²⁹ Hoffman's Appeal, 118 Pa. St. 512, 12 Atl. Rep. 57; Wallace v. New Castle Northern R. R. Co., 138 Pa. St. 168, 22 Atl. Rep. 95; Matter of Opening 25th Street, 18 Phil. 461; Bate v. Philadelphia etc. R. R. Co., 1 Mont. Co. L. R. 47.

³⁰ Wallace v. New Castle Northern R. R. Co., 138 Pa. St. 168, 22 Atl. Rep. 95.

³¹ Wellington etc. R. R. Co. v. Cashie etc. Co., 116 N. C. 924,

20 S. E. Rep. 964; Matter of St. Lawrence etc. R. R. Co. 66 Hun 306, 21 N. Y. Supp. 131; Manhattan R. R. Co. v. Taber, 78 Hun 434, 29 N. Y. Supp. 220; Chicago etc. R. R. Co. v. Phelps, 125 Ill. 482, 17 N. E. Rep. 769; Atchison etc. R. R. Co. v. Schneider, 127 Ill. 144; Johnson v. Met. W. S. El. R. R. Co., 160 Ill. 477; Davis v. N. W. El. R. R. Co., 170 Ill. 595. See Wadhams v. Lackawana etc. R. R. Co., 42 Pa. St. 303; Slingluff v. Wissahickon Turnpike Co., 1 Phila. 379; Application of Philadelphia etc. R. R. Co., 7 Phila. 461.

³² Ibid.

³³ Dimmick v. Broadhead, 75 Pa. St. 464.

ording to principles already discussed, where the constitution does not provide for possession upon giving security, such laws are invalid.³⁴ If the constitution, in express terms, requires the compensation to be first made, a statute permitting the condemnor to take possession upon giving bond or security is void.³⁵

§ 583. **What constitutes an entry.**—An entry is some act of possession by authority of the party condemning.³⁶ The mere fact that contractors, without authority or consent of the party condemning, take their tools and wagons upon the property is not an entry.³⁷ Where a small part of plaintiff's lot was embraced in the location for the right of way of a railroad, but the road was constructed without disturbing his lot, which was fenced, and afterwards a telegraph wire was stretched over it by a company authorized to string a line of wire by the railroad company, it was held there had been no entry on the lot by the railroad company, and that the award could not be recovered.³⁸ Under a statute which required that possession should be taken of property condemned for a street within two years from the time the right of possession accrued, it was held that any entry upon any part was an entry upon all the lots and lands embraced in the same petition.³⁹ But the erection of permanent stone bounds at the angles and termini of the road was held not, as matter of law, such a possession as would prevent the running of the statute.⁴⁰ The fact that the public pass over land con-

³⁴ Ante, §§ 456-459; *Davis v. San Lorenzo R. R. Co.*, 47 Cal. 517; *Moody v. Jacksonville etc. R. R. Co.*, 20 Fla. 597; *State ex rel. Moody v. Same*, 20 Fla. 616.

³⁵ *Covington Short Route Transfer R. R. Co. v. Piel*, 87 Ky. 267, 8 S. W. Rep. 449; *Asher v. Louisville & N. R. R. Co.*, 87 Ky. 391, 8 S. W. Rep. 854.

³⁶ Where possession of land condemned for a street was taken by an officer pursuant to a

void order of city council it was held not to bind the city. *Evanston v. O'Leary*, 70 Ill. App. 124.

³⁷ *Standish v. Liverpool*, 1 Drewry 1.

³⁸ *Dimmick v. Council Bluffs etc. R. R. Co.*, 58 Ia. 637.

³⁹ *Poor v. Blake*, 123 Mass. 543; *Wheeler v. Fitchburg*, 150 Mass. 350, 23 N. E. Rep. 207.

⁴⁰ *Parker v. Norfolk County*, 150 Mass. 489, 23 N. E. Rep. 231.

demned for a street, does not constitute possession by the municipality.⁴¹ As to any separate tract or parcel of land described in the proceedings, the actual possession of part is constructive possession of all.⁴²

§ 583a. **Remedy of condemnor to obtain possession when opposed by owner.**—Such remedy must be had in the proceedings themselves or by an independent action or proceeding. Whether it can be had in the condemnation proceedings will depend upon the nature of the tribunal and the statute. If the proceedings are before a non-judicial tribunal, no aid can be had from such tribunal, except such as may be expressly provided for by statute. When the proceedings are in a court, the jurisdiction is often special, so that no orders can be made, except such as are authorized by the statute. If the statute gives no power to grant a writ of assistance or other like process, the court has no power to do so.⁴³ Where the court was given power to make all such orders as might be necessary to carry into effect the objects and intention of the general railway act, as well in the proceedings, before or after the appraisal of damages, it was held that the court might make an order in the nature of a writ of assistance to put the condemnor in possession.⁴⁴ It has been held that a railroad company entitled to possession, may maintain ejectment therefor.⁴⁵ But a bill will not lie to restrain the owner from acts of violence towards the agents of the company.⁴⁶

§ 583b. **Remedy of owner to prevent an unlawful possession.**—The remedies for this purpose, outside of the proceedings, are treated of in a subsequent chapter.⁴⁷ The court in which the proceedings are pending cannot make

⁴¹ Rice v. Chicago, 57 Ill. App. 558.

⁴² Cogsbill v. Mobile etc. R. R. Co., 92 Ala. 252, 9 So. Rep. 512.

⁴³ Niagara Falls R. R. Co. v. Hotchkiss, 16 Barb. 271.

⁴⁴ Armstrong v. New York Central etc. R. R. Co., 2 Hun

482. And see Chicago etc. R. R. Co. v. Chicago, 148 Ill. 141, 35 N. E. Rep. 881.

⁴⁵ New York etc. R. R. Co. v. Trimmer, 53 N. J. L. 1, 20 Atl. Rep. 761.

⁴⁶ Montgomery etc. R. R. Co. v. Walton, 14 Ala. N. S. 207.

⁴⁷ Post, chapter xxviii.

any order, either to restrain the taking of possession or to restore possession, unless authorized to do so by statute.⁴⁸

§ 583c. **Miscellaneous cases, as to obtaining or keeping possession.** —Where a railroad company takes possession to construct its road, it is to be considered as continuously in possession, though the work of construction is suspended from time to time.⁴⁹ Where a statute provides that the court may authorize the petitioner, if in possession of the property sought to be condemned, to continue in possession, it was held to apply only to a possession lawfully begun and not to one which originated in trespass.⁵⁰ The fact that the right of the proper public authorities to take possession of land condemned for a street has been perfected, does not justify a private citizen in entering on the property, and tearing down fences for the purpose of passage over it.⁵¹ An order of possession, improvidently made, may be vacated for good cause, and the fact that the petition is demurrable is such cause.⁵²

§ 583d. **The estate acquired in lands taken for public use.** —This subject has been treated elsewhere and the discussion need not be repeated.⁵³

§ 584. **Rights of company in land taken for railroad right of way.** —Where land is taken for a right of way for a railroad, the company may make any use of the land which, directly or indirectly, contributes to the safe, economical and efficient operation of the road, and which does not interfere with the rights of property pertaining to the adjacent lands.⁵⁴ The company may place its tracks on any part of

⁴⁸ San Diego L. & T. Co. v. Neale, 78 Cal. 80, 20 Pac. Rep. 380. See Neale v. Superior Court, 77 Cal. 28.

⁴⁹ Georgia Pac. R. R. Co. v. Strickland, 80 Ga. 776.

⁵⁰ In re St. Lawrence & A. R. R. Co., 133 N. Y. 270, 31 N. E. Rep. 218.

⁵¹ State v. Stoke, 80 Ia. 68, 45 N. W. Rep. 542; Loker v. Damon, 17 Pick. 284.

⁵² People v. District Court, 11 Col. 147.

⁵³ Ante, §§ 277, 278, 291.

⁵⁴ Brainard v. Clapp, 10 Cush. 6; Curtis v. St. Paul etc. R. R. Co., 20 Minn. 28; Waffle v. New York Cent. R. R. Co., 53 N. Y. 11. Quoted and followed in Elyton Land Co. v. South & North Ala. R. R. Co., 95 Ala. 631, 10 So. Rep. 270; Carson v. Western R. R. Co., 8 Gray 423; Birrell v.

the right of way,⁵⁵ and may change their location at pleasure.⁵⁶ It may lay additional tracks, switch and side tracks, as it may deem necessary and proper.⁵⁷ It may construct its road-bed in any way it pleases and change the mode of construction at any time,⁵⁸ provided always that it does not interfere with the rights of adjoining proprietors. It may dig a well on the right of way for the purpose of securing a supply of water, though the effect may be to drain a spring on adjoining land,⁵⁹ or construct a line of telegraph for use in connection with operating the road.⁶⁰ But it may not permit the construction of a telegraph line, which is to be used exclusively for commercial purposes.⁶¹ It has been held that a railroad company may grant the joint use of its tracks to another company,⁶² but it may not permit another company to construct independent tracks on its right of way or grant a portion of its right of way for that purpose.⁶³ A

New York etc. R. R. Co., 41 N. Y. App. Div. 506. As to what is an interference with the rights of property pertaining to adjacent lands, see ante, chapters iii, iv, vi and xxiv.

⁵⁵ State v. Sioux City & Pacific R. R. Co., 43 Ia. 501; Commonwealth v. Haverhill, 7 Allen 523; Delsol v. Spokane etc. R. R. Co., (Idaho), 40 Pac. Rep. 59.

⁵⁶ Dougherty v. Wabash, St. Louis & Pacific Ry. Co., 19 Mo. App. 419; Commonwealth v. Haverhill, 7 Allen 523.

⁵⁷ Flinn v. New York Central etc. R. R. Co., 58 Hun 230; Pottsville v. People's R. R. Co., 148 Pa. St. 175, 23 Atl. Rep. 900; East Tenn. etc. R. R. Co. v. Telford's Ex'rs, 89 Tenn. 293, 14 S. W. Rep. 776, 3 Am. R. R. & Corp. Rep. 364; Chicago etc. R. R. Co. v. O'Connor, 42 Neb. 90, 60 N. W. Rep. 326; White v. Chicago etc. R. R. Co., 122 Ind. 317, 23 N. E. Rep. 782, 2 Am. R. R. &

Corp. Rep. 138; Illinois Central R. R. Co. v. Anderson 73 Ill. App. 621.

⁵⁸ Cassidy v. Old Colony R. R. Co., 141 Mass. 174; Moss v. St. Louis, Iron Mountain & Southern Ry. Co., 85 Mo. 86; I. G. & N. R. R. Co. v. Bost, 2 Tex. App. Civil Cas. p. 334.

⁵⁹ Houghan v. Milwaukee & St. Paul Ry. Co., 35 Ia. 558.

⁶⁰ Western Union Tel. Co. v. Rich, 19 Kan. 517; see ante, §§ 140, 141, 141a.

⁶¹ American Tel. & Tel. Co. v. Smith, 71 Md. 535, 18 Atl. Rep. 910, 1 Am. R. R. & Corp. Rep. 73; ante, § 141a.

⁶² Miller v. Green Bay etc. R. R. Co., 59 Minn. 169, 60 N. W. Rep. 1006, 11 Am. R. R. & Corp. Rep. 246.

⁶³ Platt v. Pennsylvania Co., 43 Ohio St. 228; S. C. Second Appeal, 47 Ohio St. 366, 25 N. E. Rep. 1028; Ft. Worth etc. R. R. Co. v. Jennings, 76 Tex. 373, 13

combined railroad and wagon bridge is not within the right acquired by a condemnation for railroad purposes.⁶⁴

A railroad company may place upon its right of way all such buildings and structures, as are necessary and proper to facilitate the business of the company, such as depots, freight houses, elevators, coal sheds, turntables, water tanks, etc.⁶⁵ The fact that a depot building is used in part for hotel purposes and that the depot master was allowed to use the right of way for a barn and garden, was held not to give the owner of the fee a right to recover possession of the premises so used.⁶⁶ Some cases hold that the railroad company may, by lease or license, authorize private parties to erect and maintain buildings, yards and structures, for the purpose of receiving, shipping, storing and selling merchandise transported, or to be transported, over the road.⁶⁷ But this is denied in other cases and the rule maintained that the company cannot use or authorize the use of the

S. W. Rep. 270, 2 Am. R. R. & Corp. Rep. 121; *Blakely v. Chicago etc. R. R. Co.*, 34 Neb. 284, 51 N. W. Rep. 767, 6 Am. R. R. & Corp. Rep. 262; S. C. affirmed on rehearing, 46 Neb. 272, 64 N. W. Rep. 972.

⁶⁴ *Payne v. Kansas etc. R. R. Co.*, 46 Fed. Rep. 546; *Kansas etc. R. R. Co. v. Payne*, 49 Fed. Rep. 114, 1 C. C. A. 183; *Kansas etc. R. R. Co. v. Le Flore*, 49 Fed. Rep. 119, 1 C. C. A. 192.

⁶⁵ *Worcester v. Western R. R. Co.*, 4 Met. 564; *Boston Gas Light Co. v. Old Colony etc. R. R. Co.*, 14 Allen 444; *Railroad v. French*, 100 Tenn. 209; *Gurney v. Minneapolis Union Elevator Co.*, 63 Minn. 70, 65 N. W. Rep. 136. But it cannot be compelled to permit the use of its right of way for elevators without compensation. *Missouri Pac. R. R. Co. v. Nebraska*, 164 U. S. 403,

17 S. C. 130; *Chicago etc. R. R. Co. v. State*, 50 Neb. 399.

⁶⁶ *Pierce v. Boston & L. R. R. Co.*, 141 Mass. 481.

⁶⁷ *Illinois Central R. R. Co. v. Walthen*, 17 Ill. App. 582; *Grand Trunk R. R. Co. v. Richardson*, 91 U. S. 454. What is said in the last case upon the point is rather dictum than otherwise. The action was to recover for the destruction by fire, communicated by defendant's locomotives of a saw-mill, shed and store which stood in part upon the right of way, by express license of the company. It would not seem that the company should be permitted to escape liability in such a case by setting up that it had no right to grant the permission to so use its right of way. See also *Roby v. New York Central etc. R. R. Co.*, 142 N. Y. 176, 36 N. E. Rep.

land for any purpose for which it could not condemn.⁶⁸ Where a railroad was built on arches it was held that the space under the arches could be let for private use.⁶⁹ If the right of the company is restricted by deed or stipulations in the condemnation proceedings, it must conform to such restrictions.⁷⁰

1053; S. C. 65 Hun 532, 48 N. Y. St. Rep. 201, 20 N. Y. Supp. 551; *Evans v. McLucas*, 15 S. C. 67; *Carolina Central R. R. Co. v. McCaskill*, 94 N. C. 746.

⁶⁸ *Wilzinsky v. Louisville etc. R. R. Co.*, 66 Miss. 595, 6 So. Rep. 709; *Lyon v. McDonald*, 78 Tex. 71, 14 S. W. Rep. 261; *Proprietors of Locks & Canals v. Nashua & L. R. R. Co.*, 104 Mass. 1; *Lance's Appeal*, 55 Pa. St. 16; *Roby v. Yates*, 70 Hun 35, 23 N. Y. Supp. 1108; *Cincinnati etc. R. R. Co. v. Geisel*, 119 Ind. 77, 21 N. E. Rep. 470. In *Lance's Appeal*, 55 Pa. St. 16, 25 the court says: "The right of the commonwealth to take private property without the owner's assent on compensation made, or authorize it to be taken, exists in her sovereign right of eminent domain, and can never be lawfully exercised but for a public purpose—supposed and intended to benefit the public either mediately or immediately. The power arises out of that natural principle which teaches that private convenience must yield to the public wants. This public interest must lie at the basis of the exercise, or it would be confiscation and usurpation to exercise it. This being the reason for the exercise of such a power, it requires no argument to prove that after the right has been

exercised the use of the property must be held in accordance with and for the purposes which justified its taking. Otherwise it would be a fraud upon the owner, and an abuse of power. Hence it is that no one can pretend that a railroad company may build private houses and mills, or erect machinery, not necessarily connected with the use of their franchise, within the limits of their right of way. If it could, stores, taverns, shops, groceries and dwellings might be made to line the sides of the road outside the track—a thing not to be thought of under the terms of the requisition of the right of way." *Lance's App.* 55 Pa. St. 16.

⁶⁹ *Foster v. London etc. R. R. Co.*, L. R. (1895) 1 Q. B. 711. But see *Mulliner v. Midland R. R. Co.*, L. R. 11 Ch. Div. 611.

⁷⁰ *Wysor v. Lake Erie etc. R. R. Co.*, 143 Ind. 6, 42 N. E. Rep. 353; ante, § 481.

See also on the subject of the section: *Pacific Postal Tel. Cable Co. v. Western Union Tel. Co.*, 50 Fed. Rep. 493; *Koch v. Delaware etc. R. R. Co.*, 53 N. J. L. 256, 21 Atl. Rep. 284; *Perry v. Lehigh Valley R. R. Co.*, 9 Misc. 515, 30 N. Y. Supp. 140; *Fletcher v. Great Western R. R. Co.*, 29 L. J. Eq. 253.

§ 585. The company an adjoining proprietor, and limited by the maxim, *sic utere tuo ut alienum non laedas*.—The rights of the company in constructing and using its road are limited by its obligations to the adjoining proprietors, which are the same as between individuals whose premises are contiguous.⁷¹ It must not take away the support of the adjacent soil,⁷² or interfere with the adjoining owner's rights respecting surface water⁷³ or running streams.⁷⁴ It cannot, therefore, either divert or dam a stream on its right of way to the injury of the adjacent owner,⁷⁵ or interfere with the flow of surface water in a way which would be actionable as between private individuals.⁷⁶ A railroad cannot take, from a stream which it crosses, water for its locomotives beyond the quantity which an individual might take as a riparian proprietor.⁷⁷ If it needs more, it must obtain it by condemnation.⁷⁸

§ 586. Whether the company's possession is exclusive. **Rights of fee owner.**—There is no question but that the company is entitled to the exclusive possession of the right of way, if such possession is necessary to the proper operation of the road. Some courts hold that the company is entitled to such exclusive possession from the nature of the case and as matter of law.⁷⁹ Other courts hold that it is a

⁷¹ Ante, § 566; *Booth v. Rome* etc. R. R. Co., 140 N. Y. 267, 35 N. E. Rep. 592, 9 Am. R. R. & Corp. Rep. 92; *Fleming v. Wilmington & W. R. R. Co.*, 115 N. C. 676, 20 S. E. Rep. 714.

See generally: *Roushlang v. Chicago & A. R. R. Co.*, 115 Ind. 106, 17 N. E. Rep. 198; *Herbert v. Pennsylvania R. R. Co.*, 43 N. J. Eq. 21; *Beseman v. Pennsylvania R. R. Co.*, 50 N. J. L. 235, 13 Atl. Rep. 164; *S. C. affirmed* 52 N. J. L. 221, 20 Atl. Rep. 169; *Costigan v. Pennsylvania R. R. Co.*, 54 N. J. L. 233, 23 Atl. Rep. 810; *Blackwell v. Lynchburg etc. R. R. Co.*, 111 N. C. 151, 16 S. E. Rep. 12.

⁷² Ante, §§ 151, 569.

⁷³ Ante, §§ 89, 572.

⁷⁴ Ante, §§ 60 et seq., 571.

⁷⁵ *Selma, Raleigh & Dalton R. Co. v. Keith*, 53 Ga. 178; *Stodghill v. Chicago, Burlington & Quincy R. R. Co.*, 43 Ia. 26; *Union Pacific Ry. Co. v. Dyche*, 31 Kan. 120. See *Baltimore & Ohio R. R. Co. v. Magruder*, 34 Md. 79.

⁷⁶ *Payne v. Morgan's Louisiana & Texas R. R. Co.*, 38 La. An. 164.

⁷⁷ *Pennsylvania R. R. Co. v. Miller*, 112 Pa. St. 34; ante, § 62.

⁷⁸ *Ibid.*

⁷⁹ *Lake Superior & Mississippi R. R. Co. v. Greve*, 17 Minn. 322;

question of fact whether the necessities of the company require the exclusive occupancy of the right of way, and what use of the same by the owner of the fee is not inconsistent with the company's rights.⁸⁰ The Supreme Court of Connecticut, after referring to the latter doctrine, says: "Our statutes that require all railroad companies (under certain qualifications) to build continuous fences on both sides of their roads, imply that their possession is exclusive, and that adjoining land owners have no greater rights than others; for, if the law is as claimed, then the right of the land owner to make entry on the track would not be confined to regular places, but he might cross anywhere along the line of his land, and might travel lengthwise as well as crosswise, unless, indeed, the court should first determine, as matter of fact, that the proposed use would interfere with the operation of the railroad. It cannot be that the question is one of fact. If so, there would be no rule at all that could be relied upon. It would vary as often as a case arose with the adjoining owner. In view of the responsibility of railroad companies for safely carrying persons and property, and the great hazard to human life and property from obstructions on the track, the power to exclude everyone from the railroad limits must be left, as matter of law, absolutely with the officers of the company, who are immediately responsible, subject only to such State supervision as may be deemed expedient, and such is the established doctrine, as declared by a general consensus of legal author-

Jackson v. Rutland & Burlington R. R. Co., 25 Vt. 150; Connecticut & Passumpsic Rivers R. R. Co. v. Holton, 32 Vt. 43; Troy & Boston R. R. Co. v. Potter, 42 Vt. 265; Brainard v. Clapp, 10 Cush. 6; Fayetteville etc. R. R. Co. v. Combs, 51 Ark. 324, 11 S. W. Rep. 418; New York etc. R. R. Co. v. Comstock, 60 Coun. 200, 22 Atl. Rep. 511; Roby v. New York Central etc. R. R. Co., 142 N. Y. 176, 36 N. E. Rep. 1053; Cedar Rapids etc. R. R. Co.

v. Raymond, 37 Mian. 204, 33 N. W. Rep. 704; St. Louis etc. R. R. Co. v. Clark, 121 Mo. 169, 25 S. W. Rep. 192; Chicago etc. R. R. Co. v. George, 145 Mo. 38, 47 S. W. Rep. 11.

⁸⁰ Kansas Central R. R. Co. v. Allen, 22 Kan. 285; Kansas City & Emporia R. R. Co. v. Kregelo, 32 Kan. 608; East Tenn. etc. R. R. Co. v. Telford's Ex'rs 89 Tenn. 293, 14 S. W. Rep. 776, 3 Am. R. R. & Corp. Rep. 364. And

ity.”⁸¹ It has been held that the owner of the fee has the right to cross the right of way, for purposes connected with the use of his remaining land, and in a manner which will not interfere with the operation of the road,⁸² but that he may lay pipes across underneath the surface for carrying oil,⁸³ and that he may use the right of way for agricultural purposes.⁸⁴ But he may not permanently occupy the surface, as with buildings,⁸⁵ a levee,⁸⁶ or other work or structure.

§ 587. **Right to trees, herbage, minerals, materials, buildings, etc.**—Most of the earlier authorities and some of the later ones apply the same rules to railroads as to highways, in determining the respective rights of the owner of the easement and the owner of the fee. It has been held that the company has a right to use the timber and materials so far as necessary for the construction and repair of its roadway,⁸⁷ but that it cannot sell or otherwise dispose of them

see cases cited in the next section.

⁸¹ New York etc. R. R. Co. v. Comstock 60 Conn. 200, 22 Atl. Rep. 511. In support of its position the court cites the following authorities, in addition to those given in note 79 above: *Proprietors v. Railroad Co.*, 104 Mass. 1, 9; *Hayden v. Skillings*, 78 Me. 413, 6 Atl. Rep. 830; *Boston Gas Light Co. v. Old Colony R. R. Co.*, 14 Allen 444; *Presbrey v. Railroad Co.*, 103 Mass. 1; *Williams v. Railroad Co.*, 2 Mich. 259; *Burnett v. Railroad Co.*, 4 Sneed 528; *Mills, Em. Dom.* § 208; *Pierce on R. R.*, 159, 160; 3 Wood R. R. 1544.

⁸² *Mississippi etc. R. R. Co. v. Wooten*, 36 La. An. 441; *Contra: New York etc. R. R. Co. v. Comstock*, 60 Conn. 200, 22 Atl. Rep. 511. See post, § 588a.

⁸³ *Hasson v. Oil Creek etc. R. Co.*, 8 Phil. 556.

⁸⁴ *East Tenn. etc. R. R. Co. v. Telford's Ex'rs*, 89 Tenn. 293, 14 S. W. Rep. 776, 3 Am. R. R. & Corp. Rep. 364; *Raleigh etc. R. R. Co. v. Sturgeon*, 120 N. C. 225.

⁸⁵ *Cunningham v. Rome R. R. Co.*, 27 Ga. 499. See *East Tenn. etc. R. R. Co. v. Sellers*, 85 Ga. 853, 11 S. E. Rep. 543; *Olive v. Sabine etc. R. R. Co.*, 11 Tex. Civ. App. 208, 33 S. W. Rep. 139.

⁸⁶ *Cairo etc. R. R. Co. v. Bre-vort*, 62 Fed. Rep. 129.

⁸⁷ *Preston v. Dubuque & Pacific R. R. Co.*, 11 Ia. 15; *Chapin v. Sullivan R. R. Co.*, 39 N. H. 564; *Taylor v. New York & Long Branch R. R. Co.*, 38 N. J. L. 28; *Aldrich v. Drury*, 8 R. I. 554; *Earlywine v. Topeka etc. R. R. Co.*, 43 Kan. 746, 23 Pac. Rep. 940. In *Evans v. Haefner*, 29 Mo. 141, it is held that the title to the minerals and materials above the grade of the

merely for profit.⁸⁸ The company may remove timber or materials in so far as may be necessary to construct or to safely and conveniently operate the road.⁸⁹ But the company may not sell or otherwise appropriate to its own use such materials, except for the construction and repair of its road.⁹⁰ But it doubtless might do so, after giving the owner notice and reasonable opportunity to remove them.⁹¹ The owner has a right to the herbage growing on the right of way,⁹² and may remove timber and materials not needed by the company and which can be removed without detriment to the safe and proper operation of the road.⁹³ But the owner may not remove the turf, as that would tend to incommode travelers by dust.⁹⁴ Where compensation is allowed for buildings or other improvements, they become the property of the company and it may sell or remove them.⁹⁵ Where there was a valuable spring on the right of way which was

road is in the company, while below the grade of the road they remain in the owner of the fee.

⁸⁸ *Blake v. Rich*, 34 N. H. 282; *Aldrich v. Drury*, 8 R. I. 554.

⁸⁹ *Toledo etc. Ry. Co. v. Green*, 67 Ill. 199; *Brainard v. Clapp*, 10 Cush. 6; *Northern Pacific R. R. Co. v. Forbes*, 15 Mon. 452, 39 Pac. Rep. 571.

⁹⁰ So held in respect to coal severed from the right of way and sold by the company. *Lyon v. Gormley*, 53 Pa. St. 261. See also *Britton v. Dubuque & Pacific R. R. Co.*, 11 Ia. 15; *Blake v. Rich*, 34 N. H. 282; *Aldrich v. Drury*, 8 R. I. 554; *Earlywine v. Topeka etc. R. R. Co.*, 43 Kan. 746, 23 Pac. Rep. 940; *Rock Island etc. R. R. Co. v. Leisy Brewing Co.*, 174 Ill. 547.

⁹¹ See *Clark v. Dasso*, 34 Mich. 86.

⁹² *Blake v. Rich*, 34 N. H. 282; *Bailey v. Sweeney*, 64 N. H. 296; *Cincinnati etc. R. R. Co. v. Gei-*

sel, 119 Ind. 77, 21 N. E. Rep. 470. Contra: *Troy & Boston R. R. Co. v. Potter*, 42 Vt. 265.

⁹³ *Britton v. Dubuque & Pacific R. R. Co.*, 11 Ia. 15; *Vermilya v. Chicago, Milwaukee & St. Paul Ry. Co.* 66 Ia. 606; *Blake v. Rich*, 34 N. H. 282; *Northern Pac. etc. R. R. Co. v. Forbes*, 15 Mon. 452, 39 Pac. Rep. 571. As to mining coal see *Philadelphia & Reading R. R. Co. v. Lawrence*, 10 Phila. 604.

⁹⁴ *Connecticut & Passumpsic Rivers R. R. Co. v. Holton*, 32 Vt. 43.

⁹⁵ *Forney v. Fremont etc. R. R. Co.*, 23 Neb. 465, 36 N. W. Rep. 806; *Chicago etc. R. R. Co. v. Knuppke*, 36 Kan. 367. In *Odum v. Rutledge etc. R. R. Co.*, 94 Ala. 488, 10 So. Rep. 222, it was held that the property in the buildings and the right to remove them would remain in the owner. See ante, § 486.

not interfered with by the construction of the road, it was held that the owner of the fee would have the right to the water and to conduct it off by pipes or otherwise, and that damages should be assessed on that basis.⁹⁶

In the absence of any limitations in the statute or in the condemnation proceedings, the tendency of the later authorities is to hold that a railroad company, in the condemnation of a right of way, although it takes only an easement, acquires the right to exclusive possession so long as the easement continues and the absolute right to all buildings or improvements upon the surface and to so much of the timber, earth and materials as it may be necessary or convenient to remove in constructing and repairing its road bed.⁹⁷ This is in accordance with the rules for

⁹⁶ *Beacon v. Pittsburgh etc. R. R. Co.*, 1 Pa. Dist. Ct. 618.

⁹⁷ *Ante*, § 586, note 79, *Lime Rock R. R. Co. v. Farnsworth*, 86 Me. 127, 29 Atl. Rep. 957; *Forney v. Fremont etc. R. R. Co.*, 23 Neb. 465, 36 N. W. Rep. 806. In the latter case plaintiff's land was condemned, including a barn and he was allowed full compensation for the barn. To clear the land the company sold the barn and it was removed and used by the purchaser. The plaintiff sued the company for the value of the barn, claiming that it could only use it for railroad purposes. The court held that he could not recover and, its opinion says: "Where, however, it is necessary to condemn real estate for public use, there being buildings on the property, the buildings thereon are a mere incident to the right to condemn the real estate; that is, as the public necessity requires the real estate for public use, it must take it

encumbered with the buildings thereon, and the owner must be paid full compensation for the land and the buildings, before he can be divested of his right to the same. And the corporation cannot apply the buildings to any purpose inconsistent with their condemnation. Where, however, it is necessary to remove the buildings in order to clear the right of way for the construction of the railroad, and this fact was well known to the corporation and to the owner of the buildings where the condemnation proceedings took place, and the owner was allowed full compensation for such buildings, the fact that the buildings were sold by the corporation for the purpose of clearing the right of way and having such buildings removed from the same, will not entitle the owner to claim them as his own. The reason is, such removal was in the contemplation of the parties where the condemnation

estimating the just compensation to be paid the owner.⁹⁸

§ 588. **Property taken for other railroad uses.**—Where land was conveyed to a railroad company for railroad and depot purposes, it was held not improper to permit the erection thereon by private parties of elevators, corn-cribs, lumber-yards, lime-houses and the like for the purpose of facilitating business with the road.¹ So, where land is taken for depot purposes and is actually used for such purposes, it is no objection that, as incidental to such use, the station-master is permitted to cultivate a part of the ground or keep a boarding-house, or carry on a mercantile business thereon.²

§ 588a. **Right of owner of fee to cross right of way of railroad. Matter of private crossings generally.**—The prevailing doctrine is that the owner of the fee of a railroad right of way has not, by virtue of such ownership merely, the right to cross the right of way generally, that is when and where and as often as he pleases, nor the right to construct, use and maintain private crossings.³ The matter of private crossings is usually regulated by statute, and, in the absence of any agreement between the parties or stipulations in the proceedings, the damages are assessed on the basis of the rights and obligations created by the statute.⁴ Where the company is required to construct necessary or suitable crossings, the convenience of both parties will be considered as well as the safety of the traveling public. Where a com-

took place, and was necessary to the construction of the public improvement and it can make no difference to the owner what disposition is made of the buildings.”

⁹⁸ Ante, §§ 471a, 486, 502.

¹ Illinois Central R. R. Co. v. Wathen, 17 Ill. App. 582.

² Hoggatt v. Vicksburg etc. R. R. Co., 34 La. An. 624; Pierce v. Boston & Lowell R. R. Co., 141 Mass. 481; Hamilton v. Annapolis & Elk Ridge R. R. Co., 1 Md. 553; S. C., 1 Md. Ch. 107. And see Fort Worth St. R. R.

Co. v. Queen City R. R. Co., 71 Tex. 165, 9 S. W. Rep. 94.

³ New York etc. R. R. Co. v. Comstock, 60 Conn. 200, 22 Atl. Rep. 511; Presbrey v. Old Colony R. R. Co., 103 Mass. 1, 5; Cedar Rapids etc. R. R. Co. v. Raymond, 37 Minn. 204, 33 N. W. Rep. 704; St. Louis etc. R. R. Co. v. Clark, 121 Mo. 169, 25 S. W. Rep. 192, 906; Kyle v. Auburn etc. R. R. Co., 2 Barb. 489. But see Mississippi etc. R. R. Co. v. Wooten, 36 La. An. 441.

⁴ Ante, § 496; Chalcraft v.

pany was proposing to construct a surface crossing over a high embankment with steep assents, it was compelled to construct an undercrossing.⁵ The fact that plaintiff would otherwise have to go half a mile out of his way, was held to make a private crossing necessary.⁶ Where the owner may construct a crossing in default of the company doing so, he will be enjoined from so locating it as to interfere with the safe operation of the road.⁷ Where the land upon each side had passed to different owners, it was held that the company was not bound to keep up a crossing made where the land on both sides belonged to the same owner.⁸ Stipulations as to crossings made a part of the record in the condemnation proceedings, form a valid agreement between the parties, which runs with the land and binds the assignees of the company.⁹ Some miscellaneous cases as to the right and remedy are referred to in the margin.¹⁰

§ 589. *Property taken for highways and streets.*—Where an easement only is taken for a public highway, the public acquire a paramount right to use and improve the land taken for highway purposes, which includes not only the right of passage, but such other incidental uses as have been immemorially accustomed to be made of public highways, such as the laying of sewers, gas and water pipes, and

Louisville etc. R. R. Co., 113 Ill. 86.

⁵ Beardsley v. Lehigh Valley R. R. Co., 65 Hun 502, 48 N. Y. St. Rep. 485, 20 N. Y. Supp. 458.

⁶ Dubbs v. Philadelphia etc. R. R. Co., 148 Pa. St. 66, 23 Atl. Rep. 883.

⁷ Chalcraft v. Louisville etc. R. R. Co., 113 Ill. 86.

⁸ Stumpe v. Missouri Pac. R. R. Co., 61 Mo. App. 357.

⁹ Huston v. Cincinnati etc. R. R. Co., 21 Ohio St. 235; Buffalo Stone & Cement Co. v. Delaware etc. R. R. Co., 130 N. Y. 152, 29 N. E. Rep. 121; Peckham v. Dutchess County R. R. Co., 145

N. Y. 385, 40 N. E. Rep. 15. Contra: Rathbun v. New York etc. R. R. Co., 20 R. I. 61, 37 Atl. Rep. 300.

¹⁰ Illinois Cent. R. R. Co. v. Willenburg, 117 Ill. 203; Davis v. Cleveland etc. R. R. Co. 140 Ind. 468, 39 N. E. Rep. 495; State v. Chicago etc. R. R. Co., 86 Ia. 304, 53 N. W. Rep. 253; Fitzpatrick v. Boston etc. R. R. Co., 84 Me. 33, 24 Atl. Rep. 432; Wells v. Northern R. R. Co., 14 Ontario 594; Kirk v. Kansas City etc. R. R. Co., 51 La. An. 664, 25 So. Rep. 463; New York etc. R. R. Co. v. Miller, 165 Mass. 514, 43 N. E. Rep. 499; Hamlin v. New

the like.¹¹ The uses which can be made of a highway without further compensation to the owner of the fee, and the uses which cannot be so made, have been discussed at length in a former chapter.¹² Subject to the paramount right of the public, the rights of the owner of the fee remain the same as though the public easement did not exist. As against a stranger not using the land as a highway, his rights are the same as though the highway had never been established, and he may maintain his rights against such stranger by the usual remedies.¹³ As against the public; he may make any use of the land which does not interfere with the use and enjoyment of the same as a highway. These general principles are established by numerous decisions extending back to the earliest times.¹⁴

From this statement of general principles it is evident that the rights which the owner of the fee may exercise must depend upon the extent of the use which the public needs require. This is very different in remote and sparsely-settled country districts from what it is in populous cities and villages. Moreover, the rights of the owner of the fee in the same highway are liable to be curtailed by changes in the surroundings which increase the use of the highway by the public. That which is laid out as a country road may

York etc. R. R. Co., 166 Mass. 462, 44 N. E. Rep. 444; Hardy v. Ala. etc. R. R. Co., 73 Miss. 719; Chicago etc. R. R. Co. v. Moore, 60 Kan. 107.

¹¹ Ante §§ 91b-91l, 126-132.

¹² Chap. v.

¹³ Taylor v. Armstrong, 24 Ark. 102; Peck v. Smith, 1 Conn. 103; Reed v. Leeds 19 Conn. 182; Thomas v. Ford, 63 Md. 346; Gidney v. Earl, 12 Wend. 98; Piollet v. Simmons, 106 Pa. St. 95; Bolling v. Petersburg, 3 Rand. 563; Louisville etc. R. R. Co. v. Liebfried, 92 Ky. 407, 17 S. W. Rep. 870; Cortelyou v. Brundt, 2 Johns. 357; McCruden v. Rochester R. R. Co., 5 Miscl.

59, 25 N. Y. Supp. 114; Lewis v. Jones, 1 Pa. St. 336.

¹⁴ Angell on Highways, chap. vii; Baker v. Shepard, 24 N. H. 208; Adams v. Emerson, 6 Pick. 57; Barclay v. Howell, 6 Pet. 498; Jackson v. Hatheway, 15 Johns. 447; Reichert v. St. Louis etc. R. R. Co., 51 Ark. 491, 11 S. W. Rep. 696; Farnsworth v. Rockland 83 Me. 508, 22 Atl. Rep. 394; People v. Foss, 80 Mich. 559, 45 N. W. Rep. 480; Palatine v. Kreuger, 121 Ill. 72, reversing 20 Ill. App. 420. In this case a highway which was originally laid out as a country road had become a village street. The village board of trustees or-

become a city or village street, and, where a single traveled path once sufficed, the entire surface may be required.¹⁵ In such case the rights of the owner must yield to the demands of the public.

The public may use the whole or any part of the right of way, and, where only a part is used, the public authorities may locate the traveled path anywhere within the right of way.¹⁶ Drains may be constructed for the purpose of improving or preserving the traveled road.¹⁷ But under cover of this right drains cannot be laid for the purpose of draining private property.¹⁸ The public acquire no right to the use of springs in the highway, and cannot divert them for the purpose of making a public watering place.¹⁹ The owner of the fee cannot change the location of the road where it crosses his land.²⁰ He may deposit materials on the surface of the way,²¹ plant shade or ornamental trees therein,²² set hitching posts,²³ and make drains across,

dained that it should not be lawful for any person to remove any dirt or earth from any of the streets within the limits of said town for any personal or individual purpose whatever, without first obtaining the consent of said board. Kreuger, acting under the authority of the owner of the fee, removed gravel from a street of the village in violation of the ordinance. He was convicted and fined for such violation by the criminal court. The appellate court reversed the judgment of the criminal court, but the Supreme Court reversed the appellate court, and sustained the conviction. See *Philadelphia v. Ward*, 174 Pa. St. 45, 34 Atl. Rep. 458.

¹⁵ *Palatine v. Kreuger*, 121 Ill. 72; S. C. 20 Ill. App. 420.

¹⁶ But in Iowa the supervisors were enjoined from building a

bridge on one side of the road next to the plaintiff's line, where it would necessitate the destruction of shade trees planted by the plaintiff. *Quinton v. Burton*, 61 Ia. 471.

¹⁷ *Highway Comrs. v. Ely*, 54 Mich. 173.

¹⁸ *Conrad v. Smith*, 32 Mich. 429.

¹⁹ *Suffield v. Hatheway*, 44 Conn. 521; *Old Town v. Dooley*, 81 Ill. 255.

²⁰ *Holcraft v. King*, 25 Ind. 352.

²¹ *Piolett v. Simmons*, 106 Pa. St. 95; *Wood v. Mears*, 12 Ind. 515.

²² *Quinton v. Burton*, 61 Ia. 471; *Commonwealth v. Hanck*, 103 Pa. St. 536; *City of Atlanta v. Holliday*, 96 Ga. 546, 23 S. E. Rep. 509; *Hoyt v. Southern New Eng. Tel. Co.*, 60 Conn. 385, 22 Atl. Rep. 957; *Bills v. Belknap*,

along or underneath the surface of the road.²⁴ So the owner of the fee may excavate underneath the surface and use the space in connection with his adjacent property.²⁵ Wells which have been dug by permission of the public authorities may be filled up if necessary for the health or safety of the public.²⁶ The public cannot place structures on the soil which have no connection with its use as a highway,²⁷ nor bore a well for the purpose of securing water for public

36 Ia. 583; *Everett v. Council Bluffs*, 46 Ia. 66; *Mt. Carmel v. Bell*, 52 Ill. App. 427; *Mt. Carmel v. Shaw*, 52 Ill. App. 429; *Dailey v. State*, 51 Ohio St. 348, 37 N. E. Rep. 710, 10 Am. R. R. & Corp. Rep. 687. According to some cases the abutter may enjoin the removal of shade trees by the public authorities when they do not constitute an obstruction to travel. *Bills v. Belknap*, 36 Ia. 583; *Everett v. Council Bluffs* 46 Ia. 66; *Cross v. Morristown*, 18 N. J. Eq. 305, 313; *Taintor v. Morristown*, 19 N. J. Eq. 46; *State v. Vineland*, 56 N. J. L. 474, 28 Atl. Rep. 1039; *Crismon v. Deck*, 84 Ia. 344, 51 N. W. Rep. 55; *City of Atlanta v. Holliday*, 96 Ga. 546, 23 S. E. Rep. 509; *Mt. Carmel v. Bell*, 52 Ill. App. 427; *Mt. Carmel v. Shaw*, 52 Ill. App. 429. Other cases hold that the courts will not try the question of obstruction as one of fact but will only interfere in case of an abuse of discretion or to prevent a wanton or malicious exercise of it. *Chase v. Oshkosh*, 81 Wis. 313, 51 N. W. Rep. 560, 6 Am. R. R. & Corp. Rep. 1; *Tatè v. Greensborough*, 114 N. C. 392, 19 S. E. Rep. 767.

As to the remedy of the abutter against telegraph and telephone companies for mutilating shade trees in streets, see *Hoyt v. Southern New Eng. Tel. Co.*, 60 Conn. 385, 22 Atl. Rep. 957; *Bradley v. Southern New Eng. Tel. Co.*, 66 Conn. 559, 34 Atl. Rep. 499; *Dailey v. State*, 51 Ohio St. 348, 37 N. E. Rep. 710, 10 Am. R. R. & Corp. Rep. 687; *Memphis Tel. Co. v. Hun*, 16 Lea 456; *O'Connor v. Nova Scotia Tel. Co.*, 22 Duvall 276.

²³ *Commonwealth v. Hanck*, 103 Pa. St. 536.

²⁴ *Perley v. Chandler*, 6 Mass. 454; *Groton v. Haines*, 36 N. H. 388; *Woodring v. Forks Township*, 28 Pa. St. 355. But the owner of the fee may not drain water into the highway to the detriment of the road. *Davis v. Comrs.*, 143 Ill. 9, 33 N. E. Rep. 58. He may build wing fences, connecting with a bridge. *Sadorus v. Black*, 65 Ill. App. 72.

²⁵ *McCarthy v. Syracuse*, 46 N. Y. 194; *Papworth v. Milwaukee*, 64 Wis. 389.

²⁶ *Ferrenbach v. Turner*, 86 Mo. 416.

²⁷ *Winchester v. Capron*, 63 N. H. 605; *Packet Co. v. Sorrels*, 50

use,²⁸ nor take away the support or otherwise encroach upon the adjoining land.²⁹ It has been held that the owner may build so that the eaves, cornice or upper stories will project over the street.³⁰

§ 590. **Right to trees, herbage and materials, etc.**—The herbage growing upon the highway belongs to the owner of the fee, and the public cannot use it or authorize it to be depastured.³¹ The authorities may cut it for the purpose of improving the highway, but after severance it belongs to the owner of the soil.³² In regard to timber and materials, the public have a right to use so much as may be necessary for the construction and repair of the road.³³ The materials taken from one part of a highway may be used upon any

Ark. 466; *Barrows v. Sycamore*, 150 Ill. 588, 37 N. E. Rep. 1096, 10 Am. R. R. & Corp. Rep. 62; *State v. Mobile*, 5 Porter 279.

²⁸ *O'Neal v. Sherman*, 77 Tex. 182, 14 S. W. Rep. 31.

²⁹ *Nichols v. Duluth*, 40 Minn. 389, 42 N. W. Rep. 84; *Stearn's Ex'rs v. Richmond*, 88 Va. 992, 14 S. E. Rep. 847 6 Am. R. R. & Corp. Rep. 247; ante, §§ 101, 102.

³⁰ *Farnsworth v. Rockland*, 83 Me. 508, 22 Atl. Rep. 394; *Gray v. Baynard*, 5 Del. Ch. 499.

See also on the subject of the section: *County of Floyd v. Rome St. R. R. Co.*, 77 Ga. 614; *Parsons v. Clark*, 76 Me. 476; *Rice v. City of Flint*, 67 Mich. 401, 34 N. W. Rep. 719; *Balliet v. Commonwealth*, 17 Pa. St. 509; *Western Union Tel. Co. v. Bulard*, 67 Vt. 272, 31 Atl. Rep. 286.

³¹ *Woodruff v. Neal*, 28 Conn. 165; *Stackpole v. Healy*, 16 Mass. 33; *Adams v. Emerson*, 6 Pick. 57; *Cole v. Drew*, 44 Vt. 49; *Avery v. Maxwell*, 4 N. H. 38; *People v. Foss* 80 Mich. 559, 45 N. W. Rep. 480. Contra: *Griffin*

v. Martin, 7 Barb. 297; *Hardenburgh v. Lockwood*, 25 Barb. 9.

³² *Cole v. Drew*, 44 Vt. 49.

³³ *New Haven v. Sargent*, 38 Conn. 50; *Hovey v. Mayo*, 43 Me. 322; *Bissell v. Collins*, 28 Mich. 277; *Niagara Falls Suspension Bridge Co. v. Buchanan*, 4 Lans. 523; *Robert v. Sadler*, 37 Hun 377 (reversed in 104 N. Y. 229); *Stockley v. Robbstown Bridge Co.*, 5 Watts. 546; *Huston v. Fort Atkinson*, 56 Wis. 350; *St. Anthony etc. Co. v. King Bridge Co.*, 23 Minn. 186; *Rich v. Minneapolis*, 37 Minn. 423, 35 N. W. Rep. 2; *Viliski v. Minneapolis*, 40 Minn. 304, 41 N. W. Rep. 105. In the following cases it was held that the public might cut trees growing on the highway, but could not use them to build or repair the road: *Baker v. Shepard*, 24 N. H. 208; *Tucker v. Eldred*, 6 R. I. 404; see also *Kelly v. Donahoe*, 2 Met. (Ky.) 482; *Jenkins v. Stetler*, 118 Ind. 275, 20 N. E. Rep. 788; *Fairchild v. St. Paul*, 46 Minn. 540, 49 N. W. Rep. 325.

other part thereof, or upon a different highway.³⁴ In some cases it is held that the public can use only such materials as it is necessary to remove in order to bring the road or street to grade or to improve or repair it at the point whence the materials are taken.³⁵ The rights of the public to such materials are paramount and may be protected by injunction.³⁶ The City of Minneapolis made a contract for the building of a sewer in a street through a ledge of rock, by which the contractor was to excavate the street for its entire width to the level of the bottom of the sewer, construct the sewer and refill the street with other material, and take the stone quarried as compensation for his work. The owner of the fee sued for the value of the stone taken out. The court held that as to the part which it was necessary to remove in order to build the sewer the city could dispose of it as it saw fit, but as to the remainder it was liable, the measure of damages being the value of the stone as it lay in the ledge.³⁷ Subject to these rights of the public, the owner of the fee is the owner of the trees and materials in the roadway, and may take and use them in any way which

³⁴ Ibid; *Bundy v. Catto*, 61 Ill. App. 209; *Denniston v. Clark*, 125 Mass. 216; *Baxter v. Turnpike Co.*, 22 Vt. 119; *Adams v. Emerson*, 6 Pick. 57; *Haas v. Evansville*, 20 Ind. App. 482; contra: *Smith v. Rome*, 19 Ga. 89; *Overman v. May*, 35 Ia. 89; *Althen v. Kelly*, 32 Minn. 280; *Cuming v. Prang*, 24 Mich. 514; and see *DeBen v. Gerard*, 4 La. An. 30.

³⁵ *Robert v. Sadler* 104 N. Y. 229. In this case an injunction was granted to prevent the taking of gravel from below the grade for use on the road. Also *Anderson v. Bement*, 13 Ind. App. 248, 41 N. E. Rep. 547; *Ladd v. French*, 6 N. Y. Supp. 56; *Cotauch v. Grover*, 57 Hun 272, 10 N. Y. Supp. 754; *District of*

Columbia v. Robinson, 14 App. Cas. D. C. 512.

³⁶ *New Haven v. Sargent*, 38 Conn. 50.

³⁷ *Viliski v. Minneapolis*, 40 Minn. 304, 41 N. W. Rep. 1050. The court says: "After a careful consideration of the subject we have been led to the conclusion that this proposition is in accordance with reason, and presents the only practicable rule for the determination of the rights of parties viz.: Whenever it becomes reasonably necessary, for purposes connected with the use or improvement of a public street, or for the enjoyment of the public easement therein to have earth or rock excavated or removed therefrom, and where it is impracticable,

does not interfere with the rights of the public.³⁸ In regard to superfluous materials, the proper course would seem to be to notify the owner of the fee to remove them if he desires to do so. If, after a reasonable time has elapsed, he has not done so, then the public authorities may make any disposition of them they see fit.³⁹ The later authorities seem rather to favor the position that materials which it is necessary to remove for the improvement of the way, belong absolutely to the public and may be disposed of as the public see fit.⁴⁰

§ 591. **Property taken for turnpikes.**—A turnpike is a public highway which is built and maintained by private persons or corporations in consideration of the privilege of collecting certain tolls for its use. The same principles apply in respect to the rights of the owner of the fee and of the franchise as apply in the case of highways, and they

in view of the public purposes to be accomplished, to commit to the owners of the soil the work of excavation and removal, the public authorities may do this unembarrassed by claims of private ownership and right of disposal. The public may dispose of the material which it is required to remove in such manner as may be most for its interest, without accountability to the owner of the soil therefor. Whether there may be exceptions to this under peculiar circumstances, or where valuable minerals may be found in the street, we do not decide." See also *Rich v. Minneapolis*, 37 Minn. 423, 35 N. W. Rep. 2, which is a similar case; *Derwell v. Bauer*, 41 N. Y. App. Div. 53.

³⁸ *Deaton v. County of Polk*, 9 Ia. 594; *Dubuque v. Benson*, 23 Ia. 248; *Trustees of Hawesville v. Howes' Heirs*, 6 Bush (Ky.), 232; *Makepeace v. Worden*, 1 N.

H. 16; *Winter v. Petersen*, 24 N. J. L. 524; *Jackson v. Hatheway*, 15 Johns. 447; *Higgins v. Reynolds*, 31 N. Y. 151; *Fisher v. Rochester*, 6 Lans. 225; *Phifer v. Cox*, 21 Ohio St. 248; *Sander-son v. Haverstick*, 8 Pa. St. 294; *Chambers v. Furry*, 1 Yates, 167; *Lancaster v. Richardson*, 4 Lans. 136; *Elder v. Bemis*, 2 Met. 599.

³⁹ *Clark v. Dasso*, 34 Mich. 86. But see *Upham v. Marsh*, 128 Mass. 546, which holds that such a removal may be made by the public without notice to the owner of the fee. See also *Prather v. Ellison*, 10 Ohio, 396.

⁴⁰ *Viliski v. Minneapolis*, 40 Minn. 304, 41 N. W. Rep. 1050; *Rich v. Minneapolis*, 37 Minn. 423, 35 N. W. Rep. 2; *Upham v. Marsh*, 128 Mass. 546; *Robert v. Sadler*, 104 N. Y. 229. See *Titus v. Boston*, 149 Mass. 164, 21 N. E. Rep. 310.

need not be repeated.⁴¹ One additional feature may be noticed, and that is the right of the owner of the franchise to erect and maintain necessary toll-houses and toll-gates, and to remove any trees or soil that may be necessary for that purpose.⁴² But, after a toll-house ceases to be used for any purpose connected with the road, its continuance becomes unlawful and the owner of the fee may maintain ejectment for the ground occupied by it.⁴³ And no structure can be erected which is not for use in connection with the operation of the turnpike.⁴⁴ Where in building the road a spring was uncovered, the water was held to belong absolutely to the owner of the fee.⁴⁵

§ 591a. **Lands taken or dedicated for public parks, squares and the like.**—Lands taken or dedicated for public use as a park or square cannot lawfully be diverted to inconsistent uses of either a public or private nature.⁴⁶ Where a fee was taken for park purposes, it was held that the legislature could relieve the city of the restriction and authorize it to sell and convey the property.⁴⁷ It has been held that land dedicated for a park or public square cannot be used for a town hall,⁴⁸ police station,⁴⁹ or calaboose.⁵⁰

⁴¹ *Robbins v. Barman* 1 Pick. 122; ante, § 589. But see *Clark v. Providence*, 16 R. I. 337, 15 Atl. Rep. 763; *Mowry v. Providence*, 16 R. I. 422, 16 Atl. Rep. 511.

⁴² *Tucker v. Tower*, 9 Pick. 109; *Ward v. Marietta etc. Co.*, 6 Ohio St. 15; *Ridge Turnpike Co. v. Stoever*, 6 W. & S. 378.

⁴³ *Feiber v. Coyle*, 3 Watts 407.

⁴⁴ *Ridge Turnpike Co. v. Stoever*, 6 W. & S. 378.

⁴⁵ *Upper Ten-Mile Plank Road Co. v. Braden*, 172 Pa. St. 460, 33 Atl. Rep. 562.

⁴⁶ *City & County of San Francisco v. Itsett*, 80 Cal. 57, 22 Pac. Rep. 74; *Cummings v. St. Louis*, 90 Mo. 259; *Lamar County v.*

Clements, 49 Tex. 348; *Board of Supervisors v. Winchester*, 84 Va. 467, 4 S. E. Rep. 844; *Trustees of M. E. Church v. Council of Hoboken*, 33 N. J. L. 13; *Clercq v. Trustees of Gallipolis*, 7 Ohio Pt. 1, 217; *Bell v. Ohio etc. R. R. Co.*, 1 Grant 105; *Gilman v. City of Milwaukee*, 55 Wis. 328; *United States v. Illinois Central R. R. Co.*, 2 Biss. 174; *Douglass v. Montgomery*, 118 Ala. 599, 24 So. Rep. 745.

⁴⁷ *Brooklyn v. Copeland*, 106 N. Y. 496. See also *McNeil v. Hicks*, 34 La. An. 1090.

⁴⁸ *Princeville v. Auten*, 77 Ill. 325. See *Foster v. Worcester*, 164 Mass. 419, 41 N. E. Rep. 654. As to use of public square for a court house see *Commonwealth*

Passenger railways may be constructed and operated in parks for the purpose of facilitating the use and enjoyment thereof.⁵¹ Where land was dedicated simply as "public ground," it was held that it could be used for a commercial railroad.⁵² Where a square of ground was dedicated for a park and for no other use or purpose, it was held that the municipality could not appropriate part of it to a street.⁵³

§ 592. **Property taken for other uses.**—Where a right of flowage has been condemned, the owner of the land flowed cannot fill it up so as to exclude the water.⁵⁴ But he may make any use of it which does not materially interfere with its use for the storage of water, and consequently may use it for boom purposes or for cutting ice, to the exclusion of the mill-owner.⁵⁵ The right to build a mill dam must be so exercised as not to unnecessarily interfere with the use of the stream by the public for floating logs, rafts, etc.⁵⁶ Where a stream was taken for supplying water to a town, it was held that a riparian owner might use it in any way which did not impair the public use.⁵⁷ But where land and a stream flowing through it were taken for a water supply and reservoir site, it was held that the condemnor was entitled to the exclusive possession and could dispose of the ice formed on the stream.⁵⁸ Where a strip of land is taken for a line of telegraph, the owner of the fee may make any use of it not

v. Bowman, 3 Pa. St. 202; Attorney General v. Godench, 5 Grant 402. Nor for a school house. Rowsee v. Pierce, 75 Miss. 846.

⁴⁹ Foster v. Buffalo, 64 How. Pr. 127.

⁵⁰ Flaten v. Moorhead, 51 Minn. 518, 53 N. W. Rep. 807; Corporation of Sequin v. Ireland, 57 Tex. 183.

⁵¹ People v. Park etc. R. R. Co., 76 Cal. 156; Philadelphia v. Commissioners of Fairmount Park, 16 Pa. Co. Ct. 625.

⁵² Chicago etc. R. R. Co. v. Joliet, 79 Ill. 25. And see Ander-

son v. Rochester etc. R. R. Co., 9 How. Pr. 553.

⁵³ Price v. Thompson, 48 Mo. 361.

⁵⁴ Boston & Roxbury Mill Corporation v. Newman, 12 Pick. 467.

⁵⁵ Jordan v. Woodward, 40 Me. 317; Edgeton v. Huff, 26 Ind. 35.

⁵⁶ Veazie v. Dwinel, 50 Me. 479.

⁵⁷ Parson's Water Co. v. Knapp, 33 Kan. 752; Kane v. Baltimore, 15 Md. 240.

⁵⁸ Wright v. Woodcock, 86 Me. 113, 29 Atl. Rep. 953.

inconsistent with the rights of the company.⁵⁹ Where land is taken for a reservoir,⁶⁰ or for a pumping station,⁶¹ or a school house or other public building, the public use is exclusive.⁶² Where land was conveyed to a town for a public school it was held that it could not be turned over for the use of a State normal school, to which none were admitted unless they would sign a declaration of intention to teach in the public schools of the State.⁶³ Where an easement is taken for laying water or gas pipes, the right of support is included.⁶⁴ Cases relating to the uses which may be made and rights acquired in lands taken or dedicated for sewers,⁶⁵ public landings,⁶⁶ and some miscellaneous cases are referred to in the margin.⁶⁷

§ 593. **When a fee is taken for public use.**—When a fee is taken for a railroad, highway, turnpike, canal or other

⁵⁹ *Lockie v. Mutual Union Tel. Co.*, 103 Ill. 401.

⁶⁰ *Finn v. Providence Gas & Water Co.*, 99 Pa. St. 631.

⁶¹ *Reading v. Davis*, 153 Pa. St. 360, 26 Atl. Rep. 62. To same effect, *Newton v. Perry*, 163 Mass. 319, 39 N. E. Rep. 1032.

⁶² *Eighth School District v. Copeland*, 2 Gray 414.

⁶³ *Board of Regents v. Painter*, 102 Mo. 464, 14 S. W. Rep. 938.

⁶⁴ *Rochland Water Co. v. Tillson*, 75 Me. 170; *Penn. Gas Coal Co. v. Versailles Fuel Gas Co.*, 131 Pa. St. 522, 19 Atl. Rep. 933.

⁶⁵ *Titus v. Boston*, 149 Mass. 164, 21 N. E. Rep. 310; *Atlanta v. Hunnicutt*, 95 Ga. 138, 22 S. E. Rep. 130; *Noon v. Scranton City*, 7 Pa. Co. Ct. 123; *Melrose v. Cutter*, 157 Mass. 461, 34 N. E. Rep. 695.

⁶⁶ *Platt v. Chicago etc. R. R. Co.*, 74 Ia. 127, 37 N. W. Rep. 107; *Bateman v. Covington*, 90 Ky. 390, 14 S. W. Rep. 361, 3 Am. R. R. & Corp. Rep. 508;

Mayor v. Hopkins, 13 La. An. 326; *Reny v. Municipality No. 2*, 15 La. An. 657; *McNeil v. Hicks*, 34 La. An. 1090; *Sweeney v. Shakespeare*, 42 La. An. 614, 7 So. Rep. 729; *Attorney General v. Tarr*, 148 Mass. 309, 19 N. E. Rep. 358; *Goode v. St. Louis*, 113 Mo. 257, 20 S. W. Rep. 1048; *People v. B. & O. R. R. Co.* 117 N. Y. 150, 22 N. E. Rep. 1026; *Portland etc. R. R. Co. v. Portland*, 14 Or. 188; *Memphis v. Wright*, 6 Yerg 497; *Illinois etc. Co. v. St. Louis*, 2 Dillon 70.

⁶⁷ *Shirk v. Board of Comrs.*, 106 Ind. 573; *Morris v. Turnpike Road*, 6 Bush 671; *Lambert v. Hoke*, 14 Johns. 383; *State v. Travis County*, 85 Tex. 435, 21 S. W. Rep. 1029; *Fox v. Cincinnati*, 104 U. S. 783; *New York etc. Bridge Co. v. Smith*, 90 Hun 312, 35 N. Y. Supp. 920; *Midland R. R. Co. v. Cheekley*, 4 L. R. Eq. Cas. 19.

public use, the public or its representatives acquire the full and absolute dominion over the property and the materials composing it, for the uses specified, and the owner from whom it was taken has no more right therein, while it continues to be used for the purpose for which it was acquired, than he has in the land of a stranger.⁶⁸ The statute may reserve certain rights to the adjoining owner, but unless so reserved he has none whatever. Where the fee of land is acquired for street uses it cannot be devoted to any but legitimate street uses.⁶⁹ But where a fee is taken for railroad purposes, the company may dispose of the land as it sees fit, as against any private person.⁷⁰

§ 594. **Transfers of the right or estate acquired by condemnation.** —Where property has been taken for public use and become vested in the State or in a corporation or individual for such use, the right so acquired may be transferred in such manner as may be authorized by law. So long as the use is not changed, it is immaterial to the owner by whom the right is exercised. As all such rights emanate from the State, and corporations and individuals are but its agents to effect a public object, such transfers amount to nothing more than a change of the agency selected to carry out the public purpose. Such transfers in the case of railroads, turnpikes, canals, water-works and the like are of almost daily occurrence.⁷¹ In *Crolley v. Minneapolis & St. Louis*

⁶⁸ *Chicago & Mississippi R. R. Co. v. Patchin*, 16 Ill. 198; *Zinc Co. v. La Salle*, 117 Ill. 411; *Burnett v. N. & C. R. R. Co.*, 4 Sneed 528; *Baker v. Johnson*, 2 Hill 342; *Water Works Co. v. Burkhart*, 41 Ind. 364; *Union Canal Co. v. La Salle*, 136 Ill. 119, 26 N. E. Rep. 506.

⁶⁹ *Ante*, § 91k; *Barrows v. Sycamore*, 150 Ill. 588, 37 N. E. Rep. 1096, 10 Am. R. R. & Corp. Rep. 62; *Smith v. Leavenworth*, 15 Kan. 81; *Strader v. Cincinnati*, 1 Handy 446.

⁷⁰ *Chamberlain v. Northeast-*

ern R. R. Co., 41 S. C. 399, 19 S. E. Rep. 743, 996; *Calcasien Lumber Co. v. Harris*, 77 Tex. 18, 13 S. W. Rep. 453. So where a fee is taken for a canal. *Eldridge v. Binghampton*, 120 N. Y. 309, 24 N. E. Rep. 462. See post, § 596.

⁷¹ *Chase v. Sutton Manf. Co.*, 4 Cush. 152; *People v. Michigan Southern R. R. Co.*, 3 Mich. 496; *Smith v. McAdams*, 3 Mich. 506; *Noll v. Dubuque etc. R. R. Co.*, 32 Ia. 66; *Harrison v. Lexington etc. Co.*, 9 B. Mon. 470; *Crolley v. Minneapolis & St. Louis Ry. Co.*, 30 Minn. 541; *Barlow v. Chi-*

Ry. Co.⁷² the court say: "In theory the land was taken, and the right to apply it to the public use proposed acquired, for the State. It is true, the title to the right thus acquired vested in the corporation, but it so vested in it only for the purpose of employing it in the public use. So far as taking and holding lands under the sovereign right of eminent domain is concerned, railroad corporations must be deemed agencies through which the State exercises that right, to subserve the public needs. When taken for railroads, the land is taken under authority of the State, to be applied under the same authority to a public use, to wit, to a highway, public in a certain sense. Upon no other theory can the taking and holding of real estate of private persons, without their consent, be justified. It is the purpose for which the land is taken, and not the particular corporation which the State authorizes to take it, that determines whether the use is public or not.

"In this case the State authorized the taking, for the purpose of a railroad from the city of Minneapolis to the south shore of Lake Minnetonka. The use would have been the same had it authorized any other company than the Northwestern to take it for that purpose. Who holds and uses the land for the purpose for which it is taken, does not affect the character of the use. So long as the land continues to be applied to the purpose for which it was taken,—to wit, as a right of way for a railroad between the two points indicated,—the use remains the same, whether it be so applied by the corporation which originally took the land, or by some other. Who owns the railroad, whose duty it is to maintain and operate it for the benefit of the State and the public, and who does in fact so maintain and operate it, is immaterial so far as the character of the use is concerned. When the St. Louis Company took the transfer of the right of way, and constructed, maintained and operated a rail-

icago, Rock Island & Pacific R. Co., 29 Ia. 276; Harshbarger v. Midland R. R. Co., 131 Ind. 177, 27 N. E. Rep. 352; Bardstown etc. R. R. Co. v. Metcalfe,

4 Met. (Ky.) 199; Black v. Delaware etc. Co., 22 N. J. Eq. 130; Bass v. Roanoke etc. Co., 111 N. C. 439, 16 S. E. Rep. 402.

⁷² 30 Minn. 541, 544.

road over it, having authority from the State to acquire and hold rights of way, and to construct, maintain and operate a railroad between the two points, it applied the right of way to the very use for which it was taken. The right of way seems to have been transferred for the purpose of having it so applied; not for the purpose of giving up the enterprise, but for the purpose of having it carried out by the grantee company. We fail to see how that can be deemed an abandonment of the use or of the right of way. A sale of a right of way is not equivalent to an abandonment."

Where the legislature repealed the charter of a railroad company, it was held the roadway did not revert, but remained the property of the State, which might continue to use it for railroad purposes.⁷³

§ 595. **Effect of forced sales.**—As a general rule, where property is taken for a railroad, turnpike, canal or any like use by a corporation or individual vested with the franchise of operating such a work, it cannot, except by special statutory authority, be levied upon and sold under an execution against the corporation or individual in whom the right is vested.⁷⁴ The property is indissolubly linked to the franchise, and cannot be separated from it.⁷⁵

§ 596. **Reversion of lands taken for public use.**—Where only an easement is taken for public use, and the use is abandoned, the land reverts to the original proprietor, his heirs or assigns, or perhaps more properly the land is relieved of the burden cast upon it, and the owner of the fee

⁷³ *Erie & North East R. R. Co. v. Casey*, 26 Pa. St. 287. To same effect, *Tift v. Buffalo*, 82 N. Y. 204. And see *Shreveport etc. R. R. Co. v. Hinds*, 50 La. An. 781, 24 So. Rep. 287.

⁷⁴ *Wood v. Truckee Turnpike Co.* 24 Cal. 474; *Spear v. Allison*, 20 Pa. St. 200; *Hill v. Western Vermont R. R. Co.*, 32 Vt. 68; *Gue v. Tide Water Canal Co.*, 24 How. 257; *East Alabama Ry.*

Co. v. Visscher, 114 U. S. 340. But see *State v. Rivers*, 5 Ired. L. 297.

Such a sale was authorized by statute in the following case: *Indianapolis & Cumberland Gravel Road Co. v. State*, 105 Ind. 37.

⁷⁵ *East Alabama Ry. Co. v. Visscher* 114 U. S. 340. But, if a railroad takes a fee and abandons the use for railroad purposes, the property becomes

is restored to his complete dominion over it.⁷⁶ And an easement taken for one purpose cannot be used for a different purpose.⁷⁷ Thus an easement taken for a canal cannot be transferred to a railroad to be used for railroad purposes, even by authority of the legislature.⁷⁸

But, where a fee simple is taken, the weight of authority is that there is no reversion, but, when the particular use ceases, the property may, by authority of the State, be disposed of for either public or private uses.⁷⁹ But some courts hold that where a fee is taken for a particular public purpose, the land will revert when the use for that purpose is abandoned.⁸⁰

subject to levy and sale upon execution. *Benedict v. Heineberg*, 43 Vt. 231.

⁷⁶ *Benham v. Potter*, 52 Conn. 248; *Dunham v. Williams*, 36 Barb. 136; *McCombs v. Stewart*, 40 Ohio St. 647; *Day v. Railroad Co.*, 44 Ohio St. 406; *Jessup v. Loucks*, 55 Pa. St. 350; *Pittsburgh & Lake Erie R. R. Co. v. Bruce*, 102 Pa. St. 23; *Healey v. Babbitt*, 14 R. I. 533; *Hatch v. Arnault* 3 La. An. 482; *Mendez v. Dugart*, 17 La. An. 171; *Campbell v. City of Kansas*, 102 Mo. 326, 13 S. W. Rep. 897; *Omaha Southern R. R. Co. v. Beeson*, 36 Neb. 361, 54 N. W. Rep. 552; *Hooker v. Utica etc. Road Co.*, 12 Wend. 371; *School District v. Hart*, 3 Wy. 563, 29 Pac. Rep. 741.

⁷⁷ See next section.

⁷⁸ *Strong v. Brooklyn*, 68 N. Y. 1; *Pittsburgh & Lake Erie R. R. Co. v. Bruce*, 102 Pa. St. 23.

⁷⁹ *Nelson v. Fleming*, 56 Ind. 310; *Frank v. Evansville & Indianapolis R. R. Co.*, 111 Ind. 132; *Hayward v. New York*, 8 Barb. 486; S. C. 7 N. Y. 314; *Rexford v. Knight*, 11 N. Y. 308;

Tift v. Buffalo, 82 N. Y. 204; *Sweet v. Buffalo etc. Ry. Co.*, 13 Hun 643; S. C. 79 N. Y. 293; *Eldridge v. Binghampton*, 42 Hun 202; *Birdsall v. Cary*, 66 How. Pr. 358; *Malone v. Toledo*, 28 Ohio St. 643; S. C. 34 Ohio St. 541; *Haldeman v. Pennsylvania R. R. Co.*, 50 Pa. St. 425; *Craig v. Allegheny*, 53 Pa. St. 477; *Robinson v. West Pennsylvania Ry. Co.*, 72 Pa. St. 316; *Wyoming Coal & Trans. Co. v. Price*, 81 Pa. St. 156; *Page v. Heineberg*, 40 Vt. 81; *Benedict v. Heineberg*, 43 Vt. 231; *De Varaigne v. Fox*, 2 Blatch. 95; *Mason v. Lake Erie etc. R. R. Co.*, 9 Biss. 239; *Lyman v. Gedney*, 114 Ill. 388; *Brooklyn v. Copeland*, 106 N. Y. 496; *Eldridge v. City of Binghampton*, 120 N. Y. 309, 24 N. E. Rep. 462; *Chamberlain v. Northeastern R. R. Co.*, 41 S. C. 399 19 S. E. Rep. 743, 996; contra: *Gebhardt v. Reeves*, 75 Ill. 301; *Kellogg v. Malin*, 50 Mo. 496; *People v. White*, 11 Barb. 26.

⁸⁰ *Board of Comrs. v. Young*, 59 Fed. Rep. 96, 8 C. C. A. 27; *Hooker v. Utica etc. Road Co.*,

The city of New York acquired the fee of lands for an almshouse. After using it for that purpose for more than a quarter of a century, it sold the property for private uses and established the almshouse elsewhere. It was held that it had a right to do so and that the land did not revert.⁸¹ A fee taken by the State for a canal may be used as a street after the canal is abandoned.⁸² But, where a street was taken for a canal under an act which vested a fee in the State, it was held that, when the canal was abandoned, the rights of the public and of the abutting owners in the street revived.⁸³ Where land was taken for a railroad whose corporate existence was limited to fifty years, but the right was reserved in its charter to repeal, alter or amend the same, and by a series of consolidations the property and franchises of the first company had become vested in another company whose corporate existence was extended to five hundred years, it was held that the land did not revert at the end of the fifty years, but was taken subject to the right of the legislature to extend the use in the manner it had done.⁸⁴ It is held that "the acquisition of an estate in land for a public use by the exercise of the right of eminent domain is in the nature of a transfer by the State, to which the statute annexes the limitation or condition that the estate acquired shall continue during the existence of the corporation, and so long as the land may be used for the purpose for which it is taken."⁸⁵ In the absence of anything in the statute showing a contrary intention, the right or estate taken for public use is acquired in perpetuity,

12 Wend. 371; *Gebhardt v. Reeves*, 75 Ill. 301; *Kellogg v. Malin*, 50 Mo. 496; *People v. White*, 11 Barb. 26. And see *Lyman v. Gedney*, 114 Ill. 388.

⁸¹ *Heyward v. New York*, 8 Barb. 486; S. C. 7 N. Y. 314; *De Varaigne v. Fox*, 2 Blatch. 95.

⁸² *Malone v. Toledo*, 28 Ohio St. 643; S. C. 34 Ohio St. 541; *Eldridge v. Binghampton*, 42 Hun 202.

⁸³ *Logansport v. Shirk* 88 Ind. 563.

⁸⁴ *Terry v. New York Central & Hudson River R. R. Co.*, 67 How. Pr. 439; *Beal v. Same*, 41 Hun 172; *Miner v. Same*, 46 Hun 612; *Miner v. New York Central etc. R. R. Co.*, 123 N. Y. 242, 25 N. E. Rep. 339; *Davis v. Memphis etc. R. R. Co.*, 87 Ala. 633, 6 So. Rep. 140.

⁸⁵ *Davis v. Memphis etc. R. R.*

though taken by a corporation whose existence is limited in duration. The legislature may provide for a transfer of the right and continuation of the use as it may see fit.⁸⁶ But if the life of the corporation comes to an end without any provision being made for a continuation of the use, the land reverts and the public right ceases.⁸⁷ Where a railroad is foreclosed, its right of way does not revert, but

Co., 87 Ala. 633, 6 So. Rep. 140; *Miner v. New York Central etc. R. R. Co.*, 123 N. Y. 242, 25 N. E. Rep. 339. In the latter case, where the taking was by a corporation whose existence was limited to fifty years, the court says: "The land was taken for a permanent public use. It could not have been understood or expected that the railroad should be operated for the accommodation of the public for fifty years, and that then, after the necessity for it had been greatly increased, it should disappear. While the life of the corporation was limited to 50 years, it could not have been expected that it should really cease to exist at the end of that period. While the legislature reserved the right to cut its life short it also had the power to extend it. It is the experience of mankind that such quasi public corporations never come to an end by mere effluxion of time. A railroad corporation which had, during 50 years, rendered a public service, and properly discharged its corporate functions would, with the passage of years become more and more useful and more and more a necessity. Could it have been the legislative intention that, at the end of 50 years, the lands taken under the act, with the

railroad embankment, ties, culverts, bridges, buildings and other structures, so far as they had become fixtures, should revert to the original owners or their successors in title? Could it have been the intention that, at the end of 50 years, any new or re-organized company could use and operate the railroad only by a new appraisal of damages, which might include, and would probably have to include, the value of the land, with a complete railroad thereon? It is improbable that the parties who sought the charter, and the legislature which granted it, intended the results claimed by the plaintiff."

⁸⁶ In addition to the cases already cited see *Bass v. Roanoke etc. Co.*, 111 N. C. 439, 16 S. E. Rep. 402; *Morrill v. Wabash etc. R. R. Co.*, 96 Mo. 174, 9 S. W. Rep. 657; *Erie etc. R. R. Co. v. Casey*, 26 Pa. St. 287; *C. I. R. Co. v. M. & A. R. R. Co.*, 57 Ia. 249; *Noll v. Dubuque etc. R. R. Co.*, 32 Ia. 66. Also the following, which relate to street railroad franchises: *People v. O'Brien*, 111 N. Y. 1, 18 N. E. Rep. 692; *Detroit Citizen's St. R. R. Co. v. Detroit*, 64 Fed. Rep. 628 12 C. C. A. 365.

⁸⁷ *State v. Boston*, 11 N. H. 407.

passes to the purchaser at the foreclosure sale, and to his assigns.⁸⁸ As a general rule where a street is vacated or abandoned the land reverts to the abutting owners, or becomes vested in them, discharged of the easement.⁸⁹

§ 597. What amounts to an abandonment of the public use.—This is in most instances a question of fact to be determined from the circumstances of each particular case.¹ The mere transfer of rights and franchises from one corporation to another is not an abandonment.² So the condemnation of the property and franchises of a turnpike company for a railroad does not work an abandonment of the turnpike.³ And where, by change of arrangements, what was once a part of the main line of a railroad has become a mere switch-track, it is not abandoned.⁴ But where land was conveyed for a right of way with a proviso that if the railroad over it "should cease to be used and operated as a railroad," the right granted should terminate, and the grantee afterwards consolidated with another company whose tracks were used for traffic and the track over the land conveyed was used for storage of cars only, it was held that the right conveyed was forfeited and that the land could be recovered in ejectment.⁵ Where a statute provided that a school-house lot should revert after a school-house had ceased to be thereon for two years, it does not apply where a school-

⁸⁸ Columbus, Hope & Greensburg Ry. Co. v. Braden, 110 Ind. 558; Harshbarger v. Midland R. Co., 131 Ind. 177, 27 N. E. Rep. 352, 30 N. E. Rep. 1083.

⁸⁹ Showalter v. Southern Kan. R. R. Co., 49 Kan. 421, 32 Pac. Rep. 42; Omaha Southern R. R. Co. v. Beeson, 36 Neb. 361, 54 N. W. Rep. 557; Elliott Roads & Streets, pp. 670, 671. See Helm v. Webster, 85 Ill. 116; United States v. Harris, 1 Sumner 21; Mitchell v. Bass, 33 Tex. 259.

¹ Tennessee etc. R. R. Co. v. Taylor, 102 Ala. 224, 14 So. Rep. 379; C. I. R. R. Co. v. M. & A.

R. R. Co., 57 Ia. 249; Wescott v. New York etc. R. R. Co., 152 Mass. 465, 25 N. E. Rep. 840; Muhle v. New York etc. R. R. Co., 86 Tex. 459, 25 S. W. Rep. 607.

² Crolley v. Minneapolis etc. R. R. Co., 30 Minn. 541; Vought v. Columbus etc. R. R. Co. 58 Ohio St. 123; ante, §§ 594, 596.

³ Brainard v. Missisquoi R. R. Co., 48 Vt. 107.

⁴ Columbus v. Columbus & Shelby R. R. Co., 37 Ind. 294.

⁵ Hickok v. Chicago etc. R. R. Co., 78 Mich. 615, 44 N. W. Rep. 143.

house is not placed on the lot for two years after the condemnation.⁶ The mere fact that a railroad was not built for thirteen years upon land taken for right of way was held not to be an abandonment.⁷ Permitting a temporary use of property for other purposes than that of which it was taken is not an abandonment, even though such uses may be of a purely private nature.⁸

Mere non-user will not constitute an abandonment unless accompanied by such acts and circumstances as to show an intention to abandon.⁹ The same is true of misuser.¹⁰ But where the land is put to a different use, whether of a public or private nature, under such circumstances as to show an intention to abandon the former use, the land will revert.¹¹

⁶ *Jordan v. Haskell*, 63 Me. 189.

⁷ *Barlow v. Chicago, Rock Island & Pacific R. R. Co.*, 29 Ia. 276.

⁸ *Curran v. Louisville*, 83 Ky. 628; *Carolina Central R. R. Co. v. McCaskill*, 94 N. C. 746; *Roby v. New York Central R. R. Co.*, 142 N. Y. 176, 36 N. E. Rep. 1053.

⁹ *Roby v. New York Central etc. R. R. Co.*, 142 N. Y. 176, 36 N. E. Rep. 1053; *Welsh v. Taylor*, 134 N. Y. 450, 31 N. E. Rep. 896; *Mangam v. Sing Sing*, 26 N. Y. App. Div. 464; *Durfee v. Peoria etc. R. R. Co.*, 140 Ill. 435, 30 N. E. Rep. 686; *Hathorn v. Kelley*, 86 Me. 487, 29 Atl. Rep. 1108; *Scarritt v. Kansas City etc. R. R. Co.*, 148 Mo. 676; *Parker v. St. Paul*, 47 Minn. 317, 50 N. W. Rep. 247; *Roanoke Inv. Co. v. Kansas City etc. R. R. Co.*, 108 Mo. 50, 17 S. W. Rep. 1000; *Thompson v. Major*, 58 N. H. 242; *Pennsylvania R. R. Co. v. Freeport*, 138 Pa. St. 91, 20 Atl. Rep. 940; *Great Bend Road*, 2 Pa. Co. Ct. 335; *King v. Norfolk etc. R. R. Co.*, 90 Va. 210, 17 S.

E. Rep. 868. In the case first cited it is said: "An easement may be abandoned by unequivocal acts showing a clear intention to abandon, or by mere non-user if continued for a long time. The mere use of the easement for a purpose not authorized, the excessive use or misuse, or the temporary abandonment thereof, are not of themselves sufficient to constitute an abandonment." The non-user of a highway was held to be prima facie evidence of abandonment. *Beardslee v. French* 7 Conn. 125. The non-user of a public landing for thirty years, during which time commerce on the river had ceased, was held to show an abandonment. *Freedom v. Norris*, 128 Ind. 377, 27 N. E. Rep. 869.

¹⁰ *Roby v. New York Central etc. R. R. Co.*, 142 N. Y. 176, 36 N. E. Rep. 1053; *Parker v. St. Paul*, 47 Minn. 317, 50 N. W. Rep. 247; *Goode v. St. Louis*, 113 Mo. 257, 20 S. W. Rep. 1048.

¹¹ *Campbell v. City of Kansas*,

As to what facts and circumstances will be sufficient to show an abandonment no general rules can be laid down.¹² In a number of States it is provided by statute that if a highway is not opened and worked within a specified length of time after its establishment, it shall be deemed to be discontinued or abandoned.¹³ Such a statute does not begin to run until final action in the matter of the lay-out.¹⁴ Where part of the highway is opened, the statute only applies to the part not opened.¹⁵ A highway was opened within the time, except that an occupant was allowed to keep up gates until his crops were gathered. It was held that the statute did not apply.¹⁶ It is sometimes provided by statute that if a highway ceases to be used for a certain length of time it shall cease to be a highway. It has been held that, in order that the statute may operate, there must

102 Mo. 326, 13 S. W. Rep. 897; Board of Comrs. v. Young, 59 Fed. Rep. 96, 8 C. C. A. 27.

¹² Facts held sufficient to show an abandonment of a railroad right of way. See McClain v. Chicago etc. R. R. Co., 90 Ia. 646, 57 N. W. Rep. 594; Roanoke Inv. Co. v. Kansas City etc. R. R. Co., 108 Mo. 50, 17 S. W. Rep. 1000; Jones v. Van Bochove, 103 Mich. 98, 61 N. W. Rep. 342. Facts held insufficient to show such abandonment. See Durfee v. Peoria etc. R. R. Co., 140 Ill. 435, 30 N. E. Rep. 686; Roby v. New York Central etc. R. R. Co., 142 N. Y. 176, 36 N. E. Rep. 2. And see generally on what is sufficient or insufficient to show an abandonment of a public use. Schwerdtle v. Placer County, 108 Cal. 589, 41 Pac. Rep. 448; Lake Erie & W. R. R. Co. v. Lauter, 47 Ill. App. 339; Heard v. Talbot, 7 Gray 113; Wescott v. New York etc. R. R. Co., 152 Mass. 465, 25 N. E. Rep. 840; Smith v.

New York etc. R. R. Co., 165 Mass. 569, 41 N. E. Rep. 110; Kuschke v. St. Paul, 45 Minn. 225, 47 N. W. Rep. 786; Goode v. St. Louis, 113 Mo. 257, 20 S. W. Rep. 1048; McConnell v. Am. Bronze Powder Mfg. Co., 41 N. J. Eq. 447; Ross v. Pennsylvania R. R. Co., 17 Phil. 339; McCue v. Bellingham Bay Water Co., 5 Wash. 156, 31 Pac. Rep. 461.

¹³ As to the effect of delay in the absence of such a statute, see Smith v. Gorrell, 81 Ia. 218, 46 N. W. Rep. 992; Paine Lumber Co. v. Oshkosh, 89 Wis. 449, 61 N. W. Rep. 1108; Gay St., 6 Pa. Co. Ct. 187.

¹⁴ Coombs v. County Comrs., 71 Me. 239.

¹⁵ State v. Madison, 59 Me. 538; Hovey v. Village of Haverstraw, 124 N. Y. 273, 26 N. E. Rep. 532. But see Buffalo v. Hoffeld, 6 Misc. 197, 27 N. Y. Supp. 869.

¹⁶ Wiley v. Brimfield, 59 Ill.

be an entire disuse of the entire road, and that the disuse of a part, on account of some obstruction or difficulty, will not operate to discontinue that part.¹⁷ Such a statute has been applied to prevent the opening of a road after lapse of the statutory period from the time when it might have been opened.¹⁸ An Iowa statute provided that where work on a railroad had been commenced and should cease and should not be resumed in good faith for eight years, the land and title should revert. The statute was held to apply when the abandonment commenced before the statute was passed.¹⁹ A failure to operate a street railroad for a distance of two blocks for five years, during a great financial depression and while the company was greatly embarrassed, was held not to be an abandonment of its rights in the street.²⁰

§ 598. Right to improvements when land reverts.—Where only an easement is taken and the public use is abandoned, the land reverts to the original owner, but he acquires no right to any accessions which have been placed upon it by the State or its agents. Where a canal was abandoned by the State, it was held that its assignee might remove the materials in the locks and other works.²¹ So in another case it was held that a railroad company might remove stone piers from land it proposed to abandon.²²

§ 599. No rights are acquired beyond the limits of the land condemned.—In opening or improving a highway²³ or turnpike,²⁴ or in constructing a railroad²⁵ or ditch,²⁶ or mill

306. Compare *Neff v. Smith*, 91 Ia. 87, 58 N. W. Rep. 1072.

¹⁷ *O'Dea v. State*, 16 Neb. 241; *Maise v. Kruse*, 85 Wis. 302, 55 N. W. Rep. 389.

¹⁸ *Myers v. Daubenbiss*, 84 Cal. 1, 23 Pac. Rep. 1027.

¹⁹ *Skillman v. Chicago etc. R. R. Co.*, 78 Ia. 404, 43 N. W. Rep. 275.

²⁰ *Wright v. Milwaukee El. R. & L. Co.*, 95 Wis. 29; *Milwaukee El. R. & L. Co. v. Milwaukee*, 95 Wis. 39.

²¹ *Corwin v. Cowan*, 12 Ohio St. 629.

²² *Wagner v. Cleveland & Toledo R. R. Co.*, 22 Ohio St. 563.

²³ *Beyer v. Tanner*, 29 Ill. 135; *Ward v. State*, 12 Lea 469; *Cartersville v. Lyon*, 69 Ga. 577; *Quinn v. Paterson*, 27 N. J. L. 35.

²⁴ *Sidener v. Norristown, Hope & St. Louis Turnpike Co.*, 23 Ind. 623.

²⁵ *Eaton v. European & North American R. R. Co.*, 59 Me. 520; *Brigham v. Agricultural Branch*

dam,²⁷ no deviation can be made from the location as established by the proceedings or defined by contract. In one case a variation of an inch in a country road was deemed immaterial.²⁸ One person, however, cannot complain of a deviation which is not on his own land.²⁹ A railroad has no right to make ditches outside of its right of way, though necessary for the preservation of its roadbed.³⁰ In Massachusetts, where it is held that the compensation need not be made until after the taking, the company can make necessary ditches beyond its right of way, and the owner must pursue his statutory remedy for damages therefor.³¹ Nor can a temporary use be made of adjacent lands during the construction of works, unless such use is provided for by statute and acquired in the usual way.³² In the absence of a statute permitting the right to be acquired or exercised, a railroad company will be liable in trespass for cutting trees on adjoining land, though the same are in danger of falling on the track.³³ Nor may it take materials from the adjoining land,³⁴ and buildings put upon adjoining land, without the consent of the owner, become a part of the realty and may not be removed.³⁵ Where a highway is obstructed or impassable a traveler may go upon adjacent land to pass the obstruction,³⁶ but where a road on the bank

R. R. Co., 1 Allen 316; New Orleans etc. R. R. Co. v. Brown, 64 Miss 479; Kier v. Boyd, 60 Pa. St. 33.

²⁶ Rutledge v. Drainage Commissioners, 16 Ill. App. 655.

²⁷ Dimmett v. Eskridge, 6 Munf. 308.

²⁸ Brown v. Bridges, 31 Ia. 138.

²⁹ Newton v. Agricultural Branch R. R. Co., 15 Gray 27.

³⁰ State v. Armwel, 8 Kan. 288.

³¹ Babcock v. Western R. R. Co., 9 Met. 553.

³² Hoy v. Cohoes Co., 2 N. Y. 159; St. Peter v. Denison, 58 N. Y. 416.

³³ Toledo etc. R. R. Co. v. Loop,

139 Ind. 542, 39 N. E. Rep. 306, 11 Am. R. R. & Corp. Rep. 680. See also Day v. Louisville etc. R. R. Co., 69 Miss. 589, 11 So. Rep. 25; Hickey v. Mich. Central R. R. Co., 96 Mich. 498, 55 N. W. Rep. 989.

³⁴ Doud v. Mason City etc. R. R. Co., 76 Ia. 438, 41 N. W. Rep. 65; Chicago etc. R. R. Co. v. Willets, 45 Kan. 110, 25 Pac. Rep. 576.

³⁵ Houston etc. R. R. Co. v. Adams, 63 Tex. 200. And see Hunt v. Missouri Pac. R. R. Co., 76 Mo. 115.

³⁶ Irwin v. Yerger, 74 Ia. 174, 37 N. W. Rep. 136.

of a stream is washed away the public authorities cannot take additional land without a new condemnation.³⁷ Encroachments upon private property cannot be justified on the ground that they are for public use.³⁸

³⁷ Beeson's Case, 3 Leigh 820.

³⁸ Miles v. Worcester, 154 Mass. 511, 28 N. E. Rep. 676.

CHAPTER XXVI.

OF THE RECORD AND PROCEEDINGS WHEN CALLED IN QUESTION COLLATERALLY.

§ 600. **In general.**—It would be impossible to reconcile the decisions which have been made in cases which collaterally attack the validity of condemnation proceedings. One difficulty consists in the fact that these proceedings are conducted in a great variety of ways and before a great variety of tribunals. But, after all allowances have been made for the different circumstances presented for consideration, it will be found that much remains which cannot be harmonized. The power to force a man to give up his property against his will and for a consideration fixed by others is one which is in its nature harsh and against common right. According to all analogies of the law, such a power, to be effectual in its exercise, must be strictly pursued. This has been repeatedly held with respect to the power of eminent domain.¹ On the other hand, the interests of the public are to be considered, and condemnation proceedings should not be lightly overturned when the public or its agents will thereby suffer loss or inconvenience, or both.² Both these considerations should be borne in mind in determining the validity of condemnation proceedings in collateral suits.

§ 601. **When jurisdiction exists, the proceedings are good collaterally, though erroneous.**—It has been repeatedly adjudicated in respect to condemnation proceedings that,

¹ Ante, § 253.

² "The actions and decisions of tribunals having jurisdiction to accomplish a purpose contemplated and allowed by law, are not to be treated lightly, ignored and disregarded by whoever may see fit to do so. Where it appears that the jurisdiction attaches, the presumption is in fa-

vor of the proper exercise of it, unless the contrary clearly appears, and the action or determination of such tribunal will be upheld, however erroneous or irregular in matters of detail, until corrected, modified or reversed by the proper authority." State v. Smith, 100 N. C. 550, 554, 6 S. E. Rep. 251,

where the tribunal has acquired jurisdiction in the particular case, its proceedings will be good collaterally, notwithstanding the intervention of mere errors or irregularities.³

³ Crise v. Auditor, 17 Ark. 572; Baker v. Windham, 25 Conn. 597; Townsend v. Chicago & Alton R. Co., 91 Ill. 545; Bailey v. McCain, 92 Ill. 277; Miller v. Porter, 71 Ind. 521; Argo v. Barthand, 80 Ind. 63; Foster v. Paxton, 90 Ind. 122; Cauldwell v. Curry, 93 Ind. 363; Rutherford v. Davis, 95 Ind. 245; McMullen v. State, 105 Ind. 334; Sunier v. Miller, 105 Ind. 393; Young v. Sellers, 106 Ind. 101; State v. Berry, 12 Ia. 58; Savings Fund and Loan Association v. Schmidt, 15 Ia. 213; State v. Kinney, 39 Ia. 226; Commissioners v. Espen, 12 Kan. 531; Baker v. Runnels, 12 Me. 235; Longfellow v. Quimby, 29 Me. 196; Small v. Pennell, 31 Me. 267; Plummer v. Waterville, 32 Me. 566; Gay v. Bradstreet, 49 Me. 580; True v. Freeman, 64 Me. 573; Brimmer v. Boston, 102 Mass. 19; Taber v. New Bedford, 135 Mass. 162; Gilkey v. Watertown, 141 Mass. 317; Clark v. Drain Commissioner, 50 Mich. 618; Wyatt v. Thomas, 29 Mo. 23; State v. Richmond, 26 N. H. 232; State v. Canterbury, 28 N. H. 195; White v. Landaff, 35 N. H. 128; State v. Rye, 35 N. H. 368; Brown v. Brown, 50 N. H. 538; State v. Lewis, 22 N. J. L. 564; State v. Trenton, 36 N. J. L. 198; Allen v. Utica etc. R. R. Co., 15 Hun 80; People v. Thayer, 63 N. Y. 348; State v. Witherspoon, 75 N. C. 222; Beebe v. Scheidt, 13 Ohio St. 406; Nolmsville Turnpike Co. v. Quimby, 8 Humph. 476; Nankin

v. State, 2 Swan 206; Gilson v. State, 5 Lea 161; Yeager v. Carpenter, 8 Leigh 454; Draper v. Mackey, 35 Ark. 497; Keigwin v. Drainage Comrs., 115 Ill. 347; White Water Valley Canal Co. v. Henderson, 3 Ind. 3; St. Joseph Hydraulic Co. v. Cincinnati etc. R. R. Co., 109 Ind. 172; Adams v. Harrington, 114 Ind. 66; Bass v. Ft. Wayne, 121 Ind. 389, 23 N. E. Rep. 259, 1 Am. R. R. & Corp. Rep. 173; Goodwine v. Leak, 127 Ind. 569, 27 N. E. Rep. 161; McCullom v. Uhl, 128 Ind. 304, 27 N. E. Rep. 152, 725; Ryder v. Horsting, 130 Ind. 104, 29 N. E. Rep. 567; Rassier v. Grimmer, 130 Ind. 219, 28 N. E. Rep. 866, 29 N. E. Rep. 917; McBride v. State, 130 Ind. 525, 30 N. E. Rep. 699; Cason v. Harrison, 135 Ind. 330, 35 N. E. Rep. 268; Evans v. West, 138 Ind. 621, 38 N. E. Rep. 65; Dunlop v. Pulley, 28 Ia. 469; Chicago etc. R. R. Co. v. Bean, 69 Ia. 257; Rockwell v. Bowers, 88 Ia. 88, 55 N. W. Rep. 1; Chicago etc. R. R. Co. v. Griesser, 48 Kan. 663, 29 Pac. Rep. 1082; Higgins v. Hamor, 88 Me. 25, 33 Atl. Rep. 655; Hazelhursts v. Baltimore, 37 Md. 199; Commonwealth v. Boston, 12 Cush. 254; Old Colony R. R. Co. v. Fall River, 147 Mass. 455; Fuller v. Detroit, 97 Mich. 597, 56 N. W. Rep. 1032; Thompson v. Chicago etc. R. R. Co., 110 Mo. 147, 19 S. W. Rep. 77; Musick v. Kansas City etc. R. R. Co., 114 Mo. 309, 21 S. W. Rep. 491; Roosa v. St. Joseph etc. R. R. Co., 114 Mo. 309,

This general proposition is subject to some exceptions to be hereafter noted,⁴ for there are irregularities which will render the proceedings void, notwithstanding the fact that jurisdiction was obtained originally. The scope of the general proposition is limited to errors and irregularities in the exercise of jurisdiction. The decision of the tribunal in a matter which it has jurisdiction to determine cannot be attacked in a collateral proceeding. Thus the proceedings cannot be avoided, because the damages are excessive or inadequate,⁵ or because no damages were awarded,⁶ or be-

21 S. W. Rep. 1124; *Crenshaw v. Snyder*, 117 Mo. 167, 22 S. W. Rep. 1104; *Union Depot Co. v. Frederick*, 117 Mo. 138, 21 S. W. Rep. 1118, 1130, 26 S. W. Rep. 350; *Burke v. City of Kansas*, 118 Mo. 309, 24 S. W. Rep. 48; *Rousey v. Wood*, 63 Mo. App. 460; S. C., 47 Mo. App. 471, 57 Mo. App. 650; *Crowley v. Board of Comrs.* 14 Mon. 292, 36 Pac. Rep. 313; *Hopkins v. Keller*, 16 Neb. 569; *State v. Weare*, 38 N. H. 314; *Darst v. Griffin*, 31 Neb. 668, 48 N. W. Rep. 819; *Foot v. Stiles*, 57 N. Y. 399; *Morris v. New York*, 55 Hun 476, 29 N. Y. St. Rep. 376, 8 N. Y. Supp. 763; *Farrington v. New York*, 83 Hun 124, 31 N. Y. Supp. 371; *State v. Smith*, 100 N. C. 550, 6 S. E. Rep. 251; *Bewley v. Graves*, 17 Or. 274, 20 Pac. Rep. 322; *Lancaster County v. City of Lancaster*, 170 Pa. St. 108, 32 Atl. Rep. 567; *Town of Wayne v. Caldwell*, 1 S. D. 483, 47 N. W. Rep. 547; *Hopkins v. Cravey*, 85 Tex. 189, 19 S. W. Rep. 1067; *Gulf etc. R. R. Co. v. Ft. Worth etc. R. R. Co.*, 86 Tex. 537, 26 S. W. Rep. 54; *Robinson v. Winch*, 66 Vt. 110, 28 Atl. Rep. 884; *State v.*

Hogue, 71 Wis. 384, 36 N. W. Rep. 860; *Foltz v. St. Louis etc. R. R. Co.*, 60 Fed. Rep. 316, 8 C. A. 635; *Gold v. Pittsburg etc. R. R. Co.*, 153 Ind. 232; *Banbie v. Ossman*, 142 Mo. 499; *State v. Joyce*, 121 N. C. 610; *Sweek v. Jorgensen*, 33 Or. 270, 54 Pac. Rep. 156; *Yankton County v. Klemisch*, 11 S. D. 170; *Bowen v. Hester*, 143 Ind. 511, 41 Atl. Rep. 330; *Carlile v. Des Moines etc. R. R. Co.*, 99 Ia. 345, 68 N. W. Rep. 784; *Mitchell v. Kansas City etc. R. R. Co.*, 138 Mo. 326, 39 S. W. Rep. 790.

⁴ Post, § 603.

⁵ *Hazelhurst v. Baltimore*, 37 Md. 199; *Hopkins v. Keller*, 16 Neb. 569; *Lancaster County v. City of Lancaster*, 170 Pa. St. 108, 32 Atl. Rep. 567; *Hopkins v. Cravey*, 85 Tex. 189, 19 S. W. Rep. 1067.

⁶ *Draper v. Mackey*, 35 Ark. 497; *Raissier v. Grimmer*, 130 Ind. 219, 28 N. E. Rep. 866; *Dunlop v. Pulley*, 28 Ia. 469; *Burke v. City of Kansas*, 118 Mo. 309, 24 S. W. Rep. 48; *Robinson v. Winch*, 66 Vt. 110, 28 Atl. Rep. 884. But see *Weber v. Stagray*, 75 Mich. 32, 42 N. W. Rep. 665.

cause they were assessed upon erroneous principles.⁷ And so of the decision of other questions.⁸ Those who were parties to the proceedings cannot, in a collateral suit, raise objections which were available in the proceedings themselves.⁹

§ 602. What is essential to jurisdiction.—This is a question which is controlled by the particular statute under which the proceedings are had. In general, jurisdiction is obtained by presenting a petition in conformity with the statute and giving the notice required by law.¹⁰ The petition should set forth by appropriate averments all the facts necessary to authorize the tribunal to act. What is sufficient in this respect has already been considered in a former chapter.¹¹ If the petition is required to be signed by a certain class of persons, as by a certain number of freeholders, this fact should affirmatively appear on the record. Some cases have held the proceedings void because it did not so appear.¹² Others have held that the facts might be shown by evidence aliunde.¹³ A recital of the facts in the record has been held sufficient *prima facie* evidence.¹⁴ The

⁷ *Fleming v. Wilmington etc. R. R. Co.*, 115 N. C. 676, 20 S. E. Rep. 714; *Union Depot Co. v. Frederick*, 117 Mo. 138, 21 S. W. Rep. 1118, 1130, 26 S. W. Rep. 350.

⁸ *Foltz v. St. Louis etc. R. R. Co.*, 60 Fed. Rep. 316, 8 C. C. A. 635; *Michael v. St. Louis*, 112 Mo. 610, 20 S. W. Rep. 666; *White Water Valley Canal Co.*, 3 Ind. 3.

⁹ *St. Joseph Hydraulic Co. v. Cincinnati etc. R. R. Co.*, 109 Ind. 172; *Bass v. Ft. Wayne*, 121 Ind. 389, 23 N. E. Rep. 259, 1 Am. R. R. & Corp. Rep. 173; *Cason v. Harrison*, 135 Ind. 330, 35 N. E. Rep. 268; *Rockwell v. Bowers*, 88 Ia. 88, 55 N. W. Rep. 1; *Hazelhurst v. Baltimore*, 37 Md. 199; *Farrington v. New York*, 83 Hun 124, 31 N. Y. Supp. 371; *Gulf etc. R.*

R. Co. v. Ft. Worth etc. R. R. Co., 86 Tex. 537, 26 S. W. Rep. 54.

¹⁰ *Bailey v. McCain*, 92 Ill. 277; *Rutherford v. Davis*, 95 Ind. 245; *State v. Berry*, 12 Ia. 58; *Commissioners v. Espen*, 12 Kan. 531; *Plummer v. Waterville*, 32 Me. 566; *Schroeder v. Onekama*, 95 Mich. 25, 54 N. W. Rep. 642; *Darst v. Griffin*, 31 Neb. 668, 48 N. W. Rep. 819.

¹¹ Ante, Ch. 14.

¹² *Warne v. Baker*, 35 Ill. 382; *Frost v. Leatherman*, 55 Mich. 33; *Doody v. Vaughan*, 7 Neb. 28; *Sharp v. Johnson*, 4 Hill 92; *Roberts v. Highway Commissioners*, 25 Mich. 23.

¹³ *Williams v. Holmes*, 2 Wis. 129.

¹⁴ *Neis v. Franzen*, 18 Wis. 537.

notice given must be such as to satisfy both the statute and the constitution, but, as this subject is fully treated elsewhere, we shall not discuss further the requisites of such notice.¹⁵ If the required notice is not given and there is no waiver of legal notice the proceedings will be void.¹⁶

§ 603. **What irregularities, subsequent to jurisdiction, will vitiate the proceedings.**—The jurisdiction exercised in condemnation cases is always of a special character. The proceedings are to be conducted according to a certain prescribed mode. It is plain, therefore, that, even after the court or tribunal has acquired jurisdiction in the case, errors may be committed which will render the proceedings void. The jurisdiction acquired is simply a jurisdiction to proceed to a final determination of the case *in the mode provided by law*. Any material departure from that mode will be fatal to the proceedings. An erroneous decision in a matter which the tribunal has power to decide and irregularities in respect to matters of form or time and the like

¹⁵ Upon the question of jurisdiction consult chapters 13, 15, 16 & 17.

¹⁶ *People v. Miller*, 82 Cal. 153, 22 Pac. Rep. 935; *Jacksonville etc. R. R. Co. v. Adams*, 27 Fla. 443, 9 So. Rep. 2; *Kidder v. Peoria*, 29 Ill. 77; *Scammon v. Chicago*, 40 Ill. 146; *Dickey v. Chicago*, 152 Ill. 468, 38 N. E. Rep. 932; *Ryder v. Horsting*, 130 Ind. 104; *Chicago etc. R. R. Co. v. Ellithorpe*, 78 Ia. 415, 43 N. W. Rep. 277; *Missouri Pac. R. R. Co. v. Houseman*, 41 Kan. 300, 21 Pac. Rep. 284; *Union Pac. R. R. Co. v. Kindred*, 43 Kan. 134, 23 Pac. Rep. 112; *Kansas City etc. R. R. Co. v. Fisher*, 53 Kan. 512, 36 Pac. Rep. 1004; *Truax v. Sterling*, 74 Mich. 160, 41 N. W. Rep. 885; *Overman v. St. Paul*, 39 Minn. 120, 39 N. W. Rep. 66; *Lyle v. Chicago etc. R. R. Co.*,

55 Minn. 223, 56 N. W. Rep. 820; *Taylor v. Todd*, 48 Mo. App. 550; *Darst v. Griffin*, 31 Neb. 668, 48 N. W. Rep. 819; *Trepennig v. Smith*, 46 Barb. 208; *Henderson v. Davis*, 106 N. C. 88, 11 S. E. Rep. 573; *Vogt v. Bexar County*, 5 Tex. Civ. App. 272, 23 S. W. Rep. 1044; *McIntyre v. Luker*, 77 Tex. 259, 13 S. W. Rep. 1027; *Parker v. Ft. Worth etc. R. R. Co.*, 84 Tex. 333, 19 S. W. Rep. 518; *La Farrier v. Hardy*, 66 Vt. 200, 28 Atl. Rep. 1030; *Lynch v. Rutland*, 66 Vt. 570, 29 Atl. Rep. 1015; *Yates v. West Grafton*, 33 W. Va. 507, 11 S. E. Rep. 8. But see *Pickering v. State*, 106 Ind. 228; *Laverty v. State*, 109 Ind. 217; *Kennedy v. State*, 109 Ind. 236; *Whitaker v. State*, 109 Ind. 600; *Harris v. Ross*, 112 Ind. 314; *Hackett v. State*, 113 Ind. 532.

will be overlooked in a collateral proceeding.¹⁷ Beyond this the authority must be strictly, or at least substantially, followed.¹⁸ Jurisdiction to lay out one road or to condemn one tract of land will not justify the laying out of a different road or the condemnation of a different tract of land.¹⁹ If the statute requires a certain plat or description to be made and recorded, its omission will be fatal.²⁰ So if the statute requires a finding as to the necessity of the proposed taking.²¹ The commissioners must possess the qualifications required,²² and those who act must appear to have been duly appointed.²³ Where the record shows a full compliance with the statute, it cannot be shown in a collateral action, that one of the commissioners did not possess the qualifications required.²⁴

§ 604. **What the record should show.**—It is the rule of the common law that, in case of inferior courts or in case of

¹⁷ *Suits v. Murdock*, 63 Ind. 73; *State v. Kinney*, 39 Ia. 226; *Quayle v. Missouri etc. Ry. Co.*, 63 Mo. 465; *Brown v. Brown*, 50 N. H. 538; *Allen v. Utica etc. R. R. Co.*, 15 Hun 80; ante, § 601.

¹⁸ *McKernan v. Indianapolis*, 38 Ind. 223; *Northampton v. Abell*, 127 Mass. 507; *Tower v. Pittstick*, 55 Ill. 115; *Graves v. Middletown*, 137 Ind. 400, 37 N. E. Rep. 157; *Rousey v. Wood*, 57 Mo. App. 650; *Ayer v. Chicago*, 149 Ill. 262, 37 N. E. Rep. 57; *Warren v. Brown*, 31 Neb. 8, 47 N. W. Rep. 633; *Golahar v. Gates*, 20 Mo. 236.

¹⁹ *Halverson v. Bell*, 39 Minn. 240, 39 N. W. Rep. 324; *Keyes v. Minneapolis*, 42 Minn. 467, 44 N. W. Rep. 529; *State v. Molly*, 18 Ia. 525; *Bennett v. Cutler*, 44 N. H. 69.

²⁰ *Wilson v. Lynn*, 119 Mass. 174; *Wamesit Power Co. v. Allen*, 120 Mass. 352; *Lund v. New*

Bedford, 121 Mass. 286; *Prescott v. Beyer*, 34 Minn. 493; *Pratt v. People*, 13 Hun 664; *Abbott v. County Comrs.*, 5 Kan. App. 162.

²¹ *Hall v. Baird*, 73 Ia. 528, 35 N. W. Rep. 613; *Truax v. Sterling*, 74 Mich. 160, 41 N. W. Rep. 885; *People v. Commissioners*, 27 Barb. 94; *Rice v. Wellman*, 5 Ohio C. C. 334. To same effect: *People v. Canal Board*, 7 Lans. 220. And so of any other statutory requirement. *People v. Gardner*, 24 N. Y. 583; *State v. Colfax County*, 51 Neb. 28.

²² *Judson v. Bridgeport*, 25 Conn. 426; *United States v. Supervisors*, 1 Pinney 566. Contra: *Leonard v. Sparks*, 117 Mo. 103, 22 S. W. Rep. 900.

²³ *State v. Horn*, 34 Kan. 556; *Leavenworth etc. R. R. Co. v. Meyer*, 58 Kan. 305. See as to Commissioners, chap. 17.

²⁴ *Huling v. Kaw Valley R. R. Co.*, 130 U. S. 559, 9 S. C. Rep. 603.

any court exercising a special statutory jurisdiction, the record must show affirmatively all the facts necessary to give jurisdiction and that the proceedings have been according to law.²⁵ This rule has been applied to condemnation proceedings in numerous decisions.²⁶ As a matter of proper practice there is no doubt but that the record should be made up in such a way as to show affirmatively a compliance with the statute. Some courts, however, hold that, if the record contains all that the statute requires to be recorded or preserved in written form, it will be *prima facie* sufficient to establish the validity of the proceedings, provided what is recorded does not disclose any fatal irregularity.²⁷ And it is said that, where the proceedings are before a court of general jurisdiction, or after jurisdiction appears, every reasonable intendment will be made in favor of the regularity of the proceeding.²⁸ A statute of Oregon

²⁵ See cases cited in U. S. Digest, Vol. 4, Title Courts, § 352.

²⁶ *Martin v. Rushton*, 42 Ala. 289; *Nichols v. Bridgeport*, 23 Conn. 189; *Harlow v. Pike*, 3 Me. 438; *Prentice v. Parks*, 65 Me. 559; *Owings v. Worthington*, 10 G. & J. 283; *People v. Highway Commissioner*, 16 Mich. 63; *Ells v. Pacific R. R. Co.*, 51 Mo. 200; *Zimmerman v. Snowden*, 88 Mo. 218; *White v. Memphis etc. R. R. Co.*, 64 Miss. 566; *Gilbert v. Columbia Turnpike Co.*, 3 Johns. Cases 107; *Harbeck v. Toledo*, 11 Ohio St. 219; *State v. Officer*, 4 Or. 180; *Warner v. Baker*, 35 Ill. 382; *Chaplin v. Highway Comrs.*, 129 Ill. 651, 22 N. E. Rep. 484; *Roberts v. Highway Comr.*, 25 Mich. 23; *Frost v. Leatherman*, 55 Mich. 33; *Kruger v. Le Blanc*, 70 Mich. 76, 37 N. W. Rep. 880; *Weber v. Stargray*, 75 Mich. 32, 42 N. W. Rep. 665; *Furman v. Furman*, 86 Mich. 391, 49 N. W. Rep. 147;

Schroeder v. Onekama, 95 Mich. 25, 54 N. W. Rep. 642; *Overman v. St. Paul*, 39 Minn. 120, 39 N. W. Rep. 66; *Rousey v. Wood*, 57 Mo. App. 650; *Taylor v. Todd*, 48 Mo. App. 550; *Doddy v. Vaughan*, 7 Neb. 28; *Sharp v. Johnson*, 4 Hill 92; *State v. Curtis*, 86 Wis. 140, 56 N. W. Rep. 475; *Link v. Brooks, Phillips*, Law 499; *Sime v. Spencer*, 30 Or. 340. Compare *Henline v. People*, 81 Ill. 269; *Prezinger v. Harness*, 114 Ind. 491; *Humphreys v. Woodstown*, 48 N. J. L. 588.

²⁷ *Willis v. Sproule*, 13 Kan. 257; *State v. Prine*, 25 Ia. 231; *Anderson v. Commissioners*, 12 Ohio St. 635; *McClelland v. Miller*, 28 Ohio St. 488; *Lowe v. Aroma*, 21 Ill. App. 598.

²⁸ *Commissioners' Court v. Thompson*, 18 Ala. 694; *Baker v. Windham*, 25 Conn. 597; *Louk v. Woods*, 15 Ill. 256; *Dumass v. Francis*, 15 Ill. 543; *Galbraith v. Littlech*, 73 Ill. 209; *Chicago*,

provided that "in all actions, suits and proceedings concerning the opening, laying out and establishing or widening of any street or alley under the provisions of the act, all the proceedings had for that purpose shall be presumed to have been regularly and legally taken until the contrary is shown." It was held the statute only referred to the proceedings after jurisdiction had attached, and that the record must affirmatively show jurisdiction notwithstanding the statute.²⁹ A similar statute in Wisconsin has been applied in the same way.³⁰ The record should be complete and the whole must be proved to establish the condemnation.³¹ The authorities differ as to the effect of recitals in the record.³²

§ 605. **Parol evidence to aid or contradict the record.**—Some cases hold that, in a collateral proceeding, parol evidence cannot be received to contradict the record;³³ others

Burlington & Quincy R. R. Co. v. Chamberlain, 84 Ill. 333; Ney v. Swinney, 36 Ind. 454; Albertson v. State, 95 Ind. 370; Keys v. Tate, 19 Ia. 123; Cage v. Trager, 60 Miss. 563; Robbins v. Bridge-water, 6 N. H. 524; State v. Lewis, 22 N. J. L. 564; Van Steenberg v. Bigelow, 3 Wend. 42; Leonard v. Sparks, 117 Mo. 103, 22 S. W. Rep. 900; Rousey v. Wood, 63 Mo. App. 460; Se-combe v. Railroad Co., 23 Wall. 108. And see Henline v. People, 81 Ill. 269; Prezinger v. Harness, 114 Ind. 491; Humphreys v. Woodstown, 48 N. J. L. 588.

²⁹ Northern Pac. Terminal Co. v. Portland, 14 Or. 24.

³⁰ Williams v. Giblin, 86 Wis. 147, 56 N. W. Rep. 645; State v. Curtis, 86 Wis. 140, 56 N. W. Rep. 475. See Tomlinson v. Wallace, 16 Wis. 224; State v. Logue, 73 Wis. 598, 41 N. W. Rep. 1061; State v. Harland, 74 Wis. 11, 41 N. W. Rep. 1060; Music v. Kan-

sas City etc. R. R. Co., 124 Mo. 544, 28 S. W. Rep. 72.

³¹ Dempsey v. Donnelly, 58 Ill. 40; Gaptail v. Teft, 16 Ill. 365; Nealy v. Brown, 6 Ill. 10.

³² Wiley v. Brimfield, 59 Ill. 306; State v. Minneapolis etc. R. R. Co., 88 Ia. 689, 56 N. W. Rep. 400; Clement v. Wichita etc. R. R. Co., 53 Kan. 682, 37 Pac. Rep. 133; Schroeder v. Onkama, 95 Mich. 25, 54 N. W. Rep. 642; Taylor v. Todd, 48 Mo. App. 550; Ackerman v. Huff, 71 Tex. 317, 9 S. W. Rep. 236; Lewis v. St. Paul etc. R. R. Co., 5 S. D. 148, 58 N. W. Rep. 580; ante, § 602, note 14.

³³ Galena etc. R. R. Co. v. Pound, 22 Ill. 399; Galbraith v. Letteich, 73 Ill. 209; Looby v. Austin, 19 Ill. App. 325; Wild v. Dieg, 43 Ind. 455; People v. Kniskern, 50 Barb. 87; Pittsburgh v. Cluley, 74 Pa. St. 262; Blaisdell v. Briggs, 23 Me. 123; Lewis v. St. Paul etc. R. R. Co., 5 S. D.

hold that such evidence is competent.³⁴ So some cases hold that the record cannot be aided by parol testimony,³⁵ while others hold the contrary.³⁶ Some courts hold that, if the jurisdiction of a tribunal depends upon facts which the tribunal is required to ascertain, its decision in the matter will be conclusive in any collateral proceeding.³⁷

Without attempting to reconcile these conflicting decisions, we think that justice requires that the owner of property sought to be taken for public use should have the opportunity to object to the proceedings to take his property, either on the ground that the contingency has not arisen which authorizes the proceedings to be taken, or on the ground that the proceedings themselves are not in conformity with the law. If this opportunity has been afforded him in the proceedings themselves, and the record shows jurisdiction, he ought to be concluded by them so far as any collateral attack is concerned. If, on account of the peculiar character of the tribunal or otherwise, this opportunity is not afforded, such owner ought in justice to be allowed to resist the effect of such proceedings when they are invoked against him, and should be allowed to con-

148, 58 N. W. Rep. 580; *Huling v. Kaw Valley R. R. Co.*, 130 U. S. 559, 9 S. C. Rep. 603.

³⁴ *Levitt v. Eastman*, 77 Me. 117; *Cassidy v. Smith*, 13 Minn. 129; *People v. Commissioners*, 27 Barb. 94; *Adams v. Saratoga & W. R. R. Co.*, 10 N. Y. 328; *Anderson v. Commissioners*, 12 Ohio St. 635; *Roehrborn v. Schmidt*, 16 Wis. 519.

³⁵ *Nichols v. Bridgeport*, 23 Conn. 189; *Stockett v. Nicholson*, *Walker (Miss)* 75; *Stewart v. Wallis*, 30 Barb. 344; *Chapman v. Swan*, 65 Barb. 210; *Byer v. New Castle*, 124 Ind. 86, 24 N. E. Rep. 578; *Parker v. Ft. Worth etc. R. R. Co.*, 84 Tex. 333, 19 S. W. Rep. 518; *St. Louis etc. R. R. Co. v. Dudgeon*, 64 Ark. 108.

³⁶ *Willis v. Sproule*, 13 Kan. 257; *Oliphant v. Commissioners*, 18 Kan. 386; *Kohlhepp v. West Roxbury*, 120 Mass. 596; *Robinson v. Mathwick*, 5 Neb. 252; *Harrington v. People*, 6 Barb. 607; *Williams v. Holmes*, 2 Wis. 129; *Austin v. Allen*, 6 Wis. 134; *State v. Weare*, 38 N. H. 314; *Sneed v. Falls County*, 91 Tex. 168.

³⁷ *In re Grove Street*, 61 Cal. 438; *Evansville etc. R. R. Co. v. Evansville*, 15 Ind. 395; *Porter v. Stout*, 73 Ind. 3; *Muncey v. Joest*, 74 Ind. 409; *Heagy v. Black*, 90 Ind. 534; *Jackson v. State*, 104 Ind. 516; *Prezinger v. Harness*, 114 Ind. 491; *Prezinger v. Fording*, 114 Ind. 599; *Chicago etc. R. R. Co. v. Sutton*, 130 Ind. 405,

trovert the record by parol evidence for that purpose.³⁸ As respects a stranger to the record or one whose property is not affected by the proceedings, he should not be allowed to controvert the record by parol evidence.³⁹

§ 606. **Estoppel to question proceedings collaterally.**—If the owner of property taken or affected by a condemnation proceeding accepts the damages which have been awarded him in the proceeding, this will operate as a waiver of all defects and irregularities in the proceedings and both he and those claiming under him will be forever estopped from alleging anything against the validity of the proceedings.⁴⁰

30 N. E. Rep. 291; *Graves v. Middletown*, 137 Ind. 400, 37 N. E. Rep. 157; *Lingo v. Burford*, 112 Mo. 149, 20 S. W. Rep. 459, 18 S. W. Rep. 1081; *Leonard v. Sparks*, 117 Mo. 103, 22 S. W. Rep. 900; *Cincinnati etc. R. R. Co. v. Belle Center*, 48 Ohio St. 273, 27 N. E. Rep. 464.

³⁸ *Gurnsey v. Edwards*, 26 N. H. 224; *Owners of Lands v. People*, 113 Ill. 296.

³⁹ *Home v. Rochester*, 62 N. H. 346; *Seymour v. Salamanca*, 137 N. Y. 364, 33 N. E. Rep. 304. And see *Toops v. State*, 92 Ind. 13; *Hines v. Darling*, 99 Mich. 47, 57 N. W. Rep. 1081.

⁴⁰ *Whittlesey v. Hartford, Providence & Fishkill R. R. Co.*, 23 Conn. 421; *Hitchcock v. Danbury & Newark R. R. Co.*, 25 Conn. 516; *Town v. Blackberry*, 29 Ill. 137; *Rees v. Chicago*, 38 Ill. 322; *Kile v. Tellowhead*, 80 Ill. 208; *Sheaff v. People*, 87 Ill. 189; *Hartshorn v. Pottroff*, 89 Ill. 509; *St. Louis etc. R. R. Co. v. Karnes*, 101 Ill. 402; *Kepley v. Taylor*, 1 Blackf. 492; *Logan v. Vernon etc. R. R. Co.*, 90 Ind. 552; *Marling v. Burlington etc. R. R. Co.*, 67 Ia. 331; *Challis v.*

Atchison etc. R. R. Co., 16 Kan. 117; *Hatch v. Hawkes*, 126 Mass. 177; *Chatterton v. Parrott*, 46 Mich. 432; *Hunter v. Jones*, 13 Minn. 307; *Brooklyn Park Co. v. Armstrong*, 45 N. Y. 234; *Felch v. Gilman*, 22 Vt. 38; *Dodge v. Burns*, 6 Wis. 514; *Burns v. Milwaukee & Mississippi R. R. Co.*, 9 Wis. 450; *Burns v. Dodge*, 9 Wis. 458; *Karber v. Nellis*, 22 Wis. 215; *Schatz v. Pfeil*, 56 Wis. 429; *Moore v. Roberts*, 64 Wis. 538; *Denver City Irr. & W. Co. v. Middaugh*, 12 Col. 434, 21 Pac. Rep. 565; *Allen v. Colorado Cent. R. R. Co.*, 22 Col. 238; *Corwin v. St. Louis etc. R. R. Co.*, 51 Kan. 451, 33 Pac. Rep. 99; *Albany v. Watervliet etc. R. R. Co.*, 108 N. Y. 14, 15 N. E. Rep. 370; *San Antonio v. Grandjean*, 91 Tex. 430. Even a violation of the constitution may be waived in this manner, as where property is taken for a purpose which is not a public use. *Embury v. Conner*, 3 N. Y. 511, reversing S. C. 2 Sandf. 98. Receipt of award by guardian held not to estop minor. *Nashville etc. R. R. Co. v. Hobbs*, 120 Ala. 600.

The acceptance of the damages will not waive a trespass committed prior to the institution of proceedings.⁴¹ A release or settlement of damages will have the same effect as the acceptance of the award.⁴² And where the owner appears in the proceedings and contests the question of damages, he will be estopped in a collateral proceeding from objecting to the validity of the proceedings.⁴³ So in case of highways, the acquiescence of the owner in the establishment of the way, by moving his fences to correspond therewith,⁴⁴ or by recognizing the way in deeds of property,⁴⁵ or even by allowing the public to improve the way without objection⁴⁶ have been held sufficient to estop the owner in a collateral proceeding. So one who has applied to have a highway laid out cannot question the proceedings by which it was established.⁴⁷

⁴¹ Powers v. Hurment, 51 Mo. 136.

⁴² Trickey v. Schlader, 52 Ill. 78; Gurnsey v. Edwards, 26 N. H. 224; Maysville etc. R. R. Co. v. Pelham (Ky.), 20 S. W. Rep. 384; Cook v. Covert, 71 Mich. 249, 39 N. W. Rep. 47. To same effect. Freeman v. Weeks, 45 Mich. 335. But making an unsuccessful claim for the damages, which had been deposited, was held not to estop the owner from maintaining ejectment for the property. Madden v. Louisville etc. R. R. Co., 66 Miss. 258, 6 So. Rep. 181.

⁴³ Ney v. Swinney, 36 Ind. 454; St. Joseph Hydraulic Co. v. Cincinnati, Wabash & Michigan Ry. Co., 109 Ind. 172; Ogden v. Stokes, 25 Kan. 517; Dyckman v.

New York, 5 N. Y. 434; Crouse v. Whitlock, 46 Ill. App. 260; Hedeon v. State, 47 Kan. 402, 28 Pac. Rep. 203. But the mere presence of the owner who takes no part and makes no objection will not have this effect. Roehrborn v. Schmidt, 16 Wis. 519.

⁴⁴ Rees v. Chicago, 38 Ill. 322; Hartshorn v. Potroff, 89 Ill. 509; Hunter v. Jones, 13 Minn. 307; Schatz v. Pfeil, 56 Wis. 429; State v. Wertzel, 62 Wis. 184.

⁴⁵ Moses v. St. Louis Sectional Dock Co., 84 Mo. 242.

⁴⁶ Rettinger v. Passaic, 45 N. J. L. 146; Pittsburgh v. Scott, 1 Pa. St. 309; McClelland v. Miller, 28 Ohio St. 488; Ferris v. Ward, 9 Ill. 499.

⁴⁷ Hopkins v. Crombie, 4 N. H. 520.

CHAPTER XXVII.

OF THE REMEDIES AND PROCEEDINGS TO RECOVER THE DAMAGES AWARDED, OR WHICH SHOULD BE PAID, FOR PROPERTY TAKEN OR AFFECTED.

§ 607. **When the statutory remedy is exclusive.**—In those States in which the law, as held by the courts, permits the occupation of property before compensation is made, it is competent for the legislature to authorize such an occupation of private property upon providing the owner with an adequate remedy whereby he can obtain the just compensation to which he is entitled.¹ In such cases the statutory remedy is exclusive of all other remedies, and supersedes the common law actions for interfering with the owner's possession.² But, if no remedy is provided by the statute,³

¹ See ante, §§ 456-459.

² *Dyer v. Tuskaloosa Bridge Co.*, 2 Porter, Ala. 296; *Johnson v. St. Louis etc. Ry. Co.*, 32 Ark. 758; *Kimble v. White Water Valley Canal Co.*, 1 Ind. 285; *Conwell v. Hagerstown Canal Co.*, 2 Ind. 588; *Null v. White Water Valley Canal Co.*, 4 Ind. 431, 435; *Lafayette & Indianapolis R. R. Co. v. Smith*, 6 Ind. 249; *Levis-ton v. Junction R. R. Co.*, 7 Ind. 597; *McLaughlin v. State*, 8 Ind. 281; *McCormick v. Terre Haute & Richmond R. R. Co.*, 9 Ind. 283; *Snowden v. Wilas*, 19 Ind. 10. (In the following cases in the same State, the remedy was held to be cumulative: *Lane v. Miller*, 22 Ind. 104; *Toney v. Johnson*, 26 Ind. 382.) *Keene v. Chapman*, 25 Me. 126; *Mason v. Kennebec & Portland R. R. Co.*, 31 Me. 215; *Underwood v. North Wayne Scythe Co.*, 41 Me.

291; *Dingley v. Gardiner*, 73 Me. 63; *Homer v. Bar Harbor Water Co.*, 78 Me. 127; *Graham v. Virgin*, 78 Me. 338; *Williams v. Camden & Rockland Water Co.*, 79 Me. 543. (In the following Maine cases under the railroad law, the statutory remedy was held to be cumulative: *Hall v. Pickering*, 40 Me. 548; *Nichols v. Somerset & Kennebec R. R. Co.*, 43 Me. 356.) *Davis v. Russell*, 47 Me. 443; *Gedney v. Tewksbury*, 3 Mass. 307; *Stowell v. Flagg*, 11 Mass. 364; *Stevens v. Proprietors of the Middlesex Canal*, 12 Mass. 466; *Woolcott Woolen Manf. Co. v. Upham*, 5 Pick. 292; *Leland v. Woodbury*, 4 Cush. 245; *Shaw v. Wells*, 5 Cush. 537; *Tower v. Boston*, 10 Cush. 235; *Hazen v. Essex Company*, 12 Cush. 475; *Burnham v. Story*, 3 Allen 378; *McNally v. Smith*, 12 Allen 455; *Dean v. Colt*, 99 Mass.

486; *Hull v. Westfield*, 133 Mass. 433; *Brickett v. Haverhill Aqueduct Co.*, 142 Mass. 394; *Tieck v. Board of Comrs.*, 11 Minn. 292; *Brown v. Beatty*, 34 Miss. 227; *Lindell's Admr. v. Hannibal & St. Joseph R. R. Co.*, 36 Mo. 543; *Leary v. Same*, 38 Mo. 485; *Lebanon v. Olcott*, 1 N. H. 339; *Woods v. Nashua Manf. Co.*, 4 N. H. 527; *Aldrich v. Cheshire R. R. Co.*, 21 N. H. 359; *Hurniker v. Contoocook Valley R. R. Co.*, 29 N. H. 146; *Calking v. Baldwin*, 4 Wend. 667; *Lynch v. Stone*, 4 Denio 356. (But see *Crittenden v. Wilson*, 5 Cow. 165.) *Mumford v. Terry*, 2 N. C. Law Repos. 425; *McIntire v. Western N. C. R. R. Co.*, 67 N. C. 278; *Holloway v. University R. R. Co.*, 85 N. C. 452; *Carolina Central R. R. Co. v. McCaskill*, 94 N. C. 746; *Little Miami R. R. Co. v. Whitacre*, 8 Ohio St. 590; *Knorr v. Germantown R. R. Co.*, 5 Whart. 256; *McKenny v. Monongahela Navigation Co.*, 14 Pa. St. 65; *Cumberland Valley R. R. Co. v. McLanahan*, 59 Pa. St. 23; *Farnham v. Delaware & Hudson Canal Co.*, 61 Pa. St. 265; *Koch v. Williamsport Water Co.*, 65 Pa. St. 288; *Fehr v. Schuylkill Navigation Co.*, 69 Pa. St. 161; *Fuller v. Eddings*, 11 Rich. 239; *Mitchell v. Franklin & Columbia Turnpike Co.*, 3 Humph. 456; *Colcough v. Nashville etc. R. R. Co.*, 2 Head 171; *Fisher v. Horicon Iron Manf. Co.*, 10 Wis. 351; *Babb v. Mackey*, 10 Wis. 371; *Wood v. Hustis*, 17 Wis. 416; *Smith v. Gould*, 59 Wis. 631; *Davis v. LaCrosse & Mississippi R. R. Co.*, 12 Wis. 16; *Boyfield v. Porter*, 13

East 200; *Thicknesse v. Lancaster Canal Co.*, 4 M. & W. 471; *Dunn v. Birmingham Canal Co.*, 8 L. R. Q. B. 42; *Duke of Bedford v. Dawson*, 20 L. R. Eq. Cas. 353; *Hightower v. Jones*, 85 Ga. 697, 11 S. E. Rep. 872; *Krimble v. White Water Valley Canal Co.*, 1 Ind. 285; *Martin v. Louisville*, 97 Ky. 30, 29 S. W. Rep. 864; *Ingraham v. Camden & R. Water Co.*, 82 Me. 335, 19 Atl. Rep. 861; *Day v. Hulburt*, 11 Met. 321; *Boston Belting Co. v. Boston*, 149 Mass. 44, 20 N. E. Rep. 320; *Peterson v. Waltham*, 150 Mass. 564, 23 N. E. Rep. 236; *Feick v. Board of Comrs.*, 11 Minn. 292; *Fremont etc. R. R. Co. v. Mattheis*, 35 Neb. 48, 52 N. W. Rep. 698; *City of Lincoln v. Grant*, 38 Neb. 369, 56 N. W. Rep. 995; *Shaver v. Eldred*, 114 N. Y. 236, 21 N. E. Rep. 411; *Gilliam v. Canaday*, 11 Ired. L. 106; *Knowles v. Norfolk S. R. R. Co.*, 102 N. C. 381, 9 S. E. Rep. 4; *Branson v. Gee*, 25 Or. 462, 36 Pac. Rep. 527; *Cherry v. Lane County*, 25 Or. 487, 36 Pac. Rep. 531; *Power v. Ridgeway*, 149 Pa. St. 317, 24 Atl. Rep. 307; *Philips v. St. Clair Incline Plane Co.*, 153 Pa. St. 230, 25 Atl. Rep. 735; *Mine Hill etc. R. R. Co. v. Zerbe*, 2 Walker's Pa. Supm. Ct. 409; *Ross v. Georgia etc. R. R. Co.*, 33 S. C. 477, 12 S. E. Rep. 101; *Détlor v. Grand Trunk R. R. Co.*, 15 U. C. Q. B. 595; *Norvall v. Canada Southern R. R. Co.*, 28 U. C. C. P. 309; *Hooe v. Chicago etc. R. R. Co.*, 98 Wis. 302. Contra: *Atlantic & Gulf R. R. Co. v. Fuller*, 48 Ga. 423; *Doe v. Georgia R. R. & Banking*

or if the statutory remedy is taken away by repeal,⁴ or if the initiation is given only to the party condemning, who fails to pursue it,⁵ the owner may have his common law action. So in respect to damages which are not within the statute giving the remedy,⁶ or which are caused by acts not done by authority of the statute⁷ or under proceedings which are invalid.⁸ Thus an act giving a remedy for damages caused to those whose lands are flowed by a mill dam does not apply to flowage below the dam by water discharged from above,⁹ nor to a dam erected below a steam mill for the purpose of floating logs to the mill.¹⁰ An act in regard to dams on non-navigable streams does not apply to a dam on a naviga-

Co., 1 Ga. 524. And see *Atlanta v. Hunnicutt*, 95 Ga. 138, 22 S. E. Rep. 130; *Taylor v. St. Paul*, 25 Minn. 129; *Shroder v. Lancaster*, 170 Pa. St. 136, 32 Atl. Rep. 587; *Summy v. Mulford*, 5 Blackf. 202.

³ *Cogswell v. Essex Mill Corporation*, 6 Pick. 94; *Foot v. Cincinnati*, 11 Ohio 408.

⁴ *French v. Owen*, 5 Wis. 112.

⁵ *Bentonville R. R. Co. v. Barker*, 45 Ark. 252.

⁶ *Wooster v. Great Falls Manf. Co.*, 39 Me. 246; *Stevens v. King*, 76 Me. 197; *Williams v. Camden & Rockland Water Co.*, 79 Me. 543; *Brigham v. Wheeler*, 12 Allen 89; *Dean v. Colt*, 99 Mass. 486; *Eward v. Lawrenceburgh etc. R. R. Co.*, 7 Ind. 711; *Hasslett v. New Albany Belt & T. Co.*, 7 Ind. App. 603, 34 N. E. Rep. 845; *Crockett v. Millett*, 65 Me. 191; *Badger v. Boston*, 130 Mass. 170; *In re Squire*, 125 N. Y. 131, 26 N. E. Rep. 142; *McDevitt v. People's Natl. Gas Co.*, 160 Pa. St. 367, 28 Atl. Rep. 948; *Ryan v. Pennsylvania Schuylkill Val. R. R. Co.*, 2 Mont. Co. L. R.

31; *Quigley v. Pennsylvania Val. R. R. Co.*, 2 Mont. Co. L. R. 109.

⁷ *Clapp v. Manter*, 78 Me. 358; *Halsey v. Lehigh Valley R. R. Co.*, 45 N. J. L. 26; *Cator v. Board of Works etc.*, 34 L. J. Q. B. 74; *Queen v. Darlington Local Board of Health*, 35 L. J. Q. B. 45; *Imperial Gas Co. v. Broadbent*, 7 H. L. 600; *S. C.*, 7 DeG. McN. & G. 436; *Clark v. Rockland Water Co.*, 52 Me. 68; *Fitch v. Stevens*, 4 Met. 426; *Hodges v. Hodges*, 5 Met. 205; *Winkley v. Salisbury Mfg. Co.*, 14 Gray 443; *Leonard v. Wading Riv. Res. Co.*, 113 Mass. 235; *Bacon v. Boston*, 154 Mass. 100, 28 N. E. Rep. 9; *Bridges v. Dill*, 97 N. C. 222; *Finney v. Sommerville*, 80 Pa. St. 59; *Caledonia R. R. Co. v. Colt*, 3 Macqueen 833.

⁸ *Badgely v. Hamilton County*, 1 Disney, Ohio, 316; *Burnet v. Knowles*, 3 Dow 280.

⁹ *Wilson v. Campbell*, 76 Me. 94; *Hackstack v. Keschener Improvement Co.*, 66 Wis. 439.

¹⁰ *Bryon v. Burnett*, 2 Jones L. 305.

ble stream.¹¹ If entry has been made without complying with the statute as to preliminaries, it is wrongful, and the owner has his common law remedies for redress.¹² So the language of the statute may be such as to preserve the owner's common law remedies.¹³ Damages caused by negligence in the construction, operation or management of public works are not within the statutory remedy for just compensation, but must be recovered in a common law action.¹⁴ Where a new liability is created by statute, as for damages by a change of grade, and a remedy given therefor, the remedy so given is exclusive.¹⁵

§ 608. **When not exclusive.**—In those States in which, by the express terms of the constitution or by the interpretation placed upon it by the courts, compensation must precede an entry upon the property, it is plain that the owner cannot be turned over to a statutory remedy against the party condemning.¹⁶ "The law does not require the citizen to institute proceedings to protect his rights, but merely permits him to do so. Constitutional guarantees of the rights of property would be of very little value if a corporation could seize the property of an individual and say to the owner, if you want compensation for this property, institute

¹¹ *Strout v. Millbridge Co.*, 45 Me. 76.

¹² *Birge v. Chicago etc. Ry. Co.*, 65 Ia. 440; *Hamor v. Bar Harbor Water Co.*, 78 Me. 127; *Badgely v. Hamilton County*, 1 Disney 316; *Holley v. Torrington*, 63 Conn. 426, 28 Atl. Rep. 613; *Topeka v. Sells*, 48 Kan. 520, 29 Pac. Rep. 604.

¹³ *Ash v. Cummings*, 50 N. H. 591.

¹⁴ *Ante*, § 482; *Badger v. Boston*, 130 Mass. 170; *Boston Belting Co. v. Boston*, 149 Mass. 44, 20 N. E. Rep. 320.

¹⁵ *Bartlett v. Bristol*, 66 N. H. 420, 24 Atl. Rep. 906; *Roeck v. Newark*, 33 N. J. L. 129; *Golding v. Attleborough*, 172 Mass.

223, 51 N. E. Rep. 1076; *Abel v. Minneapolis*, 68 Minn. 89; *Garraux v. Greenville*, 53 S. C. 575, 31 S. E. Rep. 597; *post*, § 624, note 46.

¹⁶ *Atchison, Topeka & Santa Fe R. R. Co. v. Weaver*, 10 Kan. 344; *Republican Valley R. R. Co. v. Fink*, 18 Neb. 82; *Parker v. East Tennessee etc. R. R. Co.*, 13 Lea 669; *Gulf etc. R. R. Co. v. Poindexter*, 70 Tex. 98, 7 S. W. Rep. 316; *Bellingham Bay R. & N. Co. v. Loose*, 2 Wash. 500, 27 Pac. Rep. 174; *Downs v. Seattle & M. R. R. Co.*, 5 Wash. 778, 32 Pac. Rep. 745; *Ante*, §§ 456-459, 559; *Hickman v. City of Kansas*, 120 Mo. 110, 25 S. W. Rep. 225.

proceedings to condemn it, and after we think the proper amount is awarded we will pay you.”¹⁷ Where the statute gives a remedy for what was before actionable, the statutory remedy is cumulative, unless the contrary is declared or indicated in the statute.¹⁸

§ 609. **Action on the award or judgment.**—In some States it is expressly provided by statute that if the award is not paid it may be enforced by action thereon, and the form of action is prescribed.¹⁹ But, in the absence of any such statute, an action of contract upon the award has been held to be a proper remedy for enforcing payment.²⁰ Where the common law practice prevails, the form of action may be either debt²¹ or assumpsit.²² Where the statute provided

¹⁷ *Republican Valley R. R. Co. v. Fink*, 18 Neb. 82, 86. This was trespass against a railroad company which had entered upon the plaintiff's property without having his damages assessed. The statute gave the initiative to either party. It was held the suit could be maintained. But see *City of Lincoln v. Grant*, 38 Neb. 369, 56 N. W. Rep. 995.

¹⁸ *Zanesville v. Fannan*, 53 Ohio St. 605, 42 N. E. Rep. 703.

¹⁹ *Fowler v. Holbrook*, 17 Pick. 188; *Abbot v. Upham*, 13 Met. 172; *Fisher v. New York*, 57 N. Y. 344; *Philadelphia v. Dickson*, 38 Pa. St. 247.

²⁰ *Fuller v. French*, 10 Met. 359; *Russell Mills v. County Commissioners*, 16 Gray 347; *Ganson v. Buffalo*, 1 Keyes 454; *Sage v. Brooklyn*, 89 N. Y. 189; *Fisher v. Warwick R. R. Co.*, 12 R. I. 287; *Aken v. Parfrey*, 35 Wis. 249; *Jersey City v. Gardner*, 33 N. J. Eq. 622; *McCormack v. Brooklyn*, 108 N. Y. 49, 14 N. E. Rep. 808; *Lent v. New York etc. R. R. Co.*, 130 N. Y. 504, 29 N. E. Rep. 988, reversing

S. C., 55 Hun 180, 28 N. Y. St. Rep. 82, 7 N. Y. Supp. 729; *Eno v. Met. El. R. R. Co.*, 56 N. Y. Supr. Ct. 95, 1 N. Y. Supp. 521; *Supervisors v. Buffalo*, 63 Hun 565, 45 N. Y. St. Rep. 365, 18 N. Y. Supp. 635; *McKevin v. Northern Pac. R. R. Co.*, 45 Fed. Rep. 464; *Toledo v. Sanwald*, 13 Ohio C. C. 496; *Wilder v. Buffalo etc. R. R. Co.*, 24 U. C. Q. B. 222; *Cottle v. New York etc. R. R. Co.*, 27 App. Div. N. Y. 604.

²¹ *Corwith v. Hyde Park*, 14 Ill. App. 635; *Blanchard v. Maysville etc. Turnpike Co.*, 1 Dana 86; *Bigelow v. Cambridge etc. Turnpike Co.*, 7 Mass. 202; *Jeffrey v. Blue Hill Turnpike Co.*, 10 Mass. 368; *Gay v. Welles*, 7 Pick. 217; *Kimball Admx. v. Rockland*, 71 Me. 137; *Lebanon v. Olcott*, 1 N. H. 339; *Robbins v. Bridge-water*, 6 N. H. 524; *Smart v. Portsmouth & Concord R. R. Co.*, 20 N. H. 233; *Akers v. Philadelphia*, 4 Phila. 56; *White Water Val. Canal Co. v. Henderson*, 3 Ind. 3.

²² *Chicago v. Wheeler*, 25 Ill. 478; *Hallock v. Woolsey*, 23

for the collection of the damages awarded by means of a distress warrant issued in the same proceedings, it was held that debt would not lie on the award.²³ An action on the award is proper, though a bond has been given to secure its payment. The bond is simply an additional security and does not suspend any remedy.²⁴ The true owner may sue and recover on the award, though it is to the unknown owners of the property.²⁵ An action brought before the award is complete and final, will be premature.²⁶ Where an award was confirmed against the county of A. for land taken for a highway, and that part of the county embracing the proposed highway was erected into a new county, it was held the original county remained liable on the award.²⁷

§ 610 **Defences thereto.**—As to the conclusiveness of the award or judgment generally in a collateral suit, we refer to the last preceding chapter. Where the proceedings have been instituted by the party condemning, and possession has been taken under them and the right to possession is through the proceedings, the party condemning should be held to be estopped, when sued on the award, from setting up any defect or irregularity in the proceedings as a defence.²⁸ Nor should the defendant in such a suit be permitted to insist upon irregularities which are the result of its own fault or neglect, or which it has waived by seeking the approval of the award.²⁹ Nor can irregularities be in-

Wend. 328; *Battles v. Braintree*, 14 Vt. 348; *LaCrosse & Milwaukee R. R. Co. v. Seeger* 4 Wis. 268; *Chicago v. Hayward*, 60 Ill. App. 582; *Baker v. Braman*, 6 Hill 47. But see *McCullough v. Brooklyn*, 23 Wend. 458.

²³ *Gredney v. Tewksbury*, 3 Mass. 307. Contra: *Chicago v. Hayward*, 60 Ill. App. 582.

²⁴ *Fisher v. Warwick R. R. Co.*, 12 R. I. 287.

²⁵ *Fisher v. New York*, 57 N. Y. 344, reversing S. C., 4 Lans. 451. To same effect: *Lancaster v.*

Richmond, 83 Me. 534, 22 Atl. Rep. 393; *Busenbark v. Crawfordsville*, 9 Ind. App. 578, 37 N. E. Rep. 278.

²⁶ *Bradbury v. Cumberland Co.*, 52 Me. 27. See also *Lacroix v. Medway*, 12 Met. 123.

²⁷ *Jones v. Oxford*, 45 Me. 419.

²⁸ *Corwith v. Hyde Park*, 14 Ill. App. 635. And see *Robbins v. Bridgewater*, 6 N. H. 524; *Fernald v. Palmer*, 83 Me. 244, 22 Atl. Rep. 467.

²⁹ *Chicago v. Wheeler*, 25 Ill. 478; *Morgan v. New York & M.*

sisted upon which affect the owner only, such as a failure to observe some statutory provision for his benefit.³⁰ But, where the proceedings for damages have been initiated by the owner, the defendant, in a suit upon the award, may insist upon a more strict compliance with the law. The jurisdictional facts must appear³¹ and the suit must not be brought until the award has been confirmed as required by law.³² Where the amount of the award has been collected and paid over to highway commissioners, whose duty it is to pay it to the owner, they cannot defend a suit for the money on the ground of irregularities or even want of jurisdiction in the proceedings.³³ It is not permissible to show that by mistake the award is too much, or that land was included in the estimate which was not taken,³⁴ or that the award for a part interest was the entire value of the land.³⁵ Where, after suit brought upon an award, the court of county commissioners amended the record so as to make the award in favor of the plaintiff and two others jointly, it was held the amendment was a nullity.³⁶ Where, after proceedings had been completed for the establishment of a street and damages awarded, the plaintiff made a map of his property and sold lots recognizing the existence of the street, it was held not to be a dedication which would prevent the plaintiff from recovering the damages which had been awarded him.³⁷ In a suit upon an award for land taken for a street, it is held that an assessment of benefits against the plaintiff's property for the same improvement

R. R. Co., 130 N. Y. 692, 29 N. E. Rep. 990.

³⁰ Buel v. Trustees of Lockport, 3 N. Y. 197. Nor can the unconstitutionality of the statute be set up as against the owner's suit on the award. Baker v. Braman, 6 Hill 47.

³¹ Mifflin v. Commissioners, 5 S. & R. 69; Akers v. Philadelphia, 4 Phila. 56.

³² Bradbury v. Cumberland County, 52 Me. 27.

³³ Hallock v. Woolsey, 23 Wend. 328.

³⁴ Gay v. Welles, 7 Pick. 217. To same effect: White Water Val. Canal Co. v. Henderson, 3 Ind. 3; Wilder v. Buffalo etc. R. R. Co., 24 U. C. Q. B. 520.

³⁵ Sparhawk v. Walpole, 20 N. H. 317.

³⁶ Littlefield v. Boston & Maine R. R. Co., 65 Me. 248.

³⁷ Jersey City v. Sackett, 44 N. J. L. 428.

may be set off.³⁸ Under the English Land Clauses Act it has been held that, in a suit for damages awarded for property injuriously affected, the award was not conclusive, but it might be shown that the award was for damages not the subject of compensation under the act.³⁹ So where the suit was upon a common law award, which was for separate amounts for different items of damage, it was held that a recovery might be had for those properly allowable and denied as to the others.⁴⁰ The fact that other owners have appealed is no defense, where possession has been taken of the plaintiff's property.⁴¹ If the damages have been assessed by an unconstitutional tribunal,⁴² or if the proceedings are not within the statute,⁴³ or if they have not been completed according to law,⁴⁴ an action on the award will not lie.

§ 611. When the damages are payable from an assess-

³⁸ *Fisher v. New York*, 3 Hun 648; *Loweree v. Newark*, 38 N. J. L. 151; *Baldwin v. Same*, 38 N. J. L. 158.

³⁹ *Rhodes v. Aredele Drainage Comrs.*, 1 L. R. C. P. Div. 380; *Chapman v. Monmouthshire Ry. & Canal Co.*, 27 L. J. N. S. Ex. 97; S. C., 2 H. & N. 267. But it is only the right to damages which can be contested, not the amount. *Mortimer v. Southwestern Ry. Co.*, 1 Ellis & Ellis 375; S. C., 102 E. C. L. R. 374; S. C., 38 L. J. Q. B. 129. A similar ruling has been made in Minnesota. One H. brought ejectment against the city for a 30-foot strip occupied by the city as a street, and obtained judgment. Thereupon the city condemned the strip and damages were awarded to H. An assessment of benefits was made to pay the award. A statute provided that if the award was not paid in six

months the owner should be entitled to a general judgment against the municipality. An assignee of H. brought suit on the award. The abutters intervened. It was shown that the strip had been dedicated as a street and that H. should not have had judgment. The court held that the abutters were not estopped by either the judgment in ejectment or condemnation, and that they could set up the dedication to defeat both the assessment and the suit on the award. *Smith v. St. Paul*, 69 Minn. 276.

⁴⁰ *Dalrymple v. Whittingham*, 26 Vt. 345.

⁴¹ *Roper v. New Britain*, 70 Conn. 459.

⁴² *Mills v. East Syracuse*, 20 Misc. N. Y. 651.

⁴³ *McDermott v. Warren etc. R. R. Co.*, 172 Mass. 197, 51 N. E. Rep. 972.

⁴⁴ *State v. White*, 151 Ind. 364.

ment of benefits.—It has already been shown that a law which makes the payment of damages contingent upon the collection of an assessment of benefits is invalid.⁴⁵ But the owner may waive the invalidity, and if he does so he must take the law as he finds it. If the damages are not made a debt against the municipality, his only remedy is by mandamus to compel the municipality to proceed and collect the assessment or by action on the case for neglect.⁴⁶ But, such a law being invalid, the courts will, if possible, so construe it as to make the damages a debt against the corporation and sustain an action therefor.⁴⁷

§ 612. When there has been no entry, or when the taking has been abandoned. —As to when the right to damages becomes vested, is a question which depends upon local statutes, and is discussed in a subsequent chapter.⁴⁸ The right to the damages may be complete, though the property has not been entered upon.⁴⁹ An abandonment after the right to the damages has vested, will not affect the right. Where part of a highway over plaintiff's land was abandoned, it was held he was nevertheless entitled to recover the entire award.⁵⁰ After a railroad had been partly constructed over plaintiff's land, and after the award of damages had been made, an act was passed that, in case of the abandonment of the route, before the payment of damages, the owner should be entitled only to the actual damages sustained. It was held that plaintiff's right to the damages was complete before the act was passed, and was not affected by it.⁵¹ In a suit for annual damages for flowage, it is no defence that the dam has been carried away and the mill burned, if the right to maintain the dam has not been abandoned.⁵² In a pro-

⁴⁵ Ante, § 460.

⁴⁶ *McCullough v. Brooklyn*, 23 Wend. 458; see *Chicago v. Wheeler*, 25 Ill. 478; *McCormack v. Brooklyn*, 108 N. Y. 49, 14 N. E. Rep. 808; *People v. Common Council*, 20 How. Pr. 491.

⁴⁷ *Sage v. Brooklyn*, 89 N. Y. 189.

⁴⁸ Post, § 656.

⁴⁹ *Kimball Admx. v. Rockland*, 71 Me. 137; *Philadelphia v. Dickson*, 38 Pa. St. 247; *Kent v. Wallingford*, 42 Vt. 651; *Philadelphia v. Dyer*, 41 Pa. St. 463.

⁵⁰ *Reid v. Wall Township*, 34 N. J. L. 275.

⁵¹ *Smart v. Portsmouth & Concord R. R. Co.*, 20 N. H. 233.

⁵² *Fuller v. French*, 10 Met. 359.

ceeding to condemn certain land for a railroad, damages were assessed and deposited and the company entered into possession. Afterwards the company was enjoined from constructing its road on the route selected because it was not authorized so to do. On a bill of interpleader to determine the right to the money deposited, it was held that the condemnation proceedings were void and that the owner was not entitled to the money.⁵³

§ 613. **Mandamus to compel payment or the raising of a fund for payment.**—Mandamus to compel the levy and collection of a tax or assessment for the purpose of raising the fund out of which the award is payable,⁵⁴ or to compel payment where the fund is already in existence,⁵⁵ or the deposit of the damages as required by statute,⁵⁶ or the auditing of the same by a common council,⁵⁷ has been held an appropriate remedy. Where the money was to be raised by a sale of bonds, mandamus was granted to compel a sale for that purpose.⁵⁸ The petition for a mandamus should show

⁵³ First Natl. Bank v. West River R. R. Co., 49 Vt. 167; First Natl. Bank v. West River R. R. Co., 46 Vt. 633.

⁵⁴ Higgins v. Chicago, 18 Ill. 276; Miller v. Township Committee, 24 N. J. L. 54; Minhinah v. Haines, 29 N. J. L. 388; People v. Supervisors of St. Lawrence, 5 Cow. 292; McCullough v. Brooklyn, 23 Wend. 458; Shoolbred v. Charleston, 2 Bay 63; Brock v. Hishen, 40 Wis. 674; Commissioners of Highways v. Jackson, 165 Ill. 17, 45 N. E. Rep. 1000; Spencer County Court v. Commonwealth, 84 Ky. 36; Johnston v. Supervisors, 19 Johns. 272; Balch v. Detroit, 109 Mich. 253.

⁵⁵ Crise v. Auditor, 17 Ark. 572; People v. Township Board, 2 Mich. 187; People v. Lowell, 9 Mich. 144; State v. Board of

Park Commissioners, 33 Minn. 524; St. Francois Co. v. Marks, 14 Mo. 539; Same v. Peers, 14 Mo. 537; Ex parte Rogers, 7 Cow. 526; People v. Schuyler, 69 N. Y. 242; Ryan v. Hoffman, 26 Ohio St. 109; Justices of Williamson v. Jefferson, 1 Coldw. 419; Auditor v. Crise, 20 Ark. 540; People v. Fitch, 147 N. Y. 355, 41 N. E. Rep. 695; People v. Myers, 73 Hun 43, 25 N. Y. Supp. 1034; Opening Spring Street, 112 Pa. St. 258; Hibbard v. County of Delaware, 1 Pa. Supr. Ct. 204.

⁵⁶ State v. Grand Island etc. R. R. Co., 31 Neb. 209, 47 N. W. Rep. 857.

⁵⁷ People v. Common Council, 140 N. Y. 300, 35 N. E. Rep. 485, affirming S. C., 2 Misc. 7, 21 N. Y. Supp. 601.

⁵⁸ People v. Fitch, 78 Hun 321,

all the facts necessary to entitle the relator to the relief sought. Where the petition was for a mandamus upon highway commissioners to compel them to issue an order on the treasurer for payment, it was held insufficient, because it did not show that the treasurer had the funds.⁵⁹ In another case, where the highway commissioners had authority by statute to annul the proceedings in case they deemed the damages awarded too heavy a burden, the petition was held fatally defective in not averring that the proceedings had not been annulled.⁶⁰ If the tribunal which made the award had jurisdiction, mere errors or irregularities will not be a defence to a petition for mandamus to pay the award.⁶¹ If the tribunal did not have jurisdiction, the award is a nullity and mandamus will not lie to enforce its payment.⁶² Where a statute provided that the proceedings to open a street should be void if the damages were not paid within a year, it was held payment could not be enforced by mandamus after the year was up.⁶³ Where a certiorari was pending to review the proceedings, it was held that a mandamus to compel payment should be stayed until the certiorari was determined.⁶⁴

§ 614. **Mandamus to compel an assessment of damages.**—Where the right to damages has accrued, mandamus will lie against the proper persons to compel them to proceed and have the damages assessed.⁶⁵ Thus, where lands were taken

29 N. Y. Supp. 163; *Duncan v. Mayor of Louisville*, 8 Bush 98.

⁵⁹ *Commissioners of Highways v. Snyder*, 15 Ill. App. 645.

⁶⁰ *People v. Highway Comrs.*, 88 Ill. 141.

⁶¹ *Crise v. Auditor*, 17 Ark. 572; *Higgins v. Chicago*, 18 Ill. 276; *People v. Township Board*, 2 Mich. 187; *People v. Lowell*, 9 Mich. 144; *People v. Supervisors of St. Lawrence*, 5 Cow. 292; *State v. Wilson*, 17 Wis. 687; *People v. Fitch*, 147 N. Y. 355, 41 N. E. Rep. 695.

⁶² *People v. Township Board of Scio*, 3 Mich. 121; *People v. Schuyler*, 69 N. Y. 242; *People v. Whitney's Point*, 102 N. Y. 81; *State v. School District*, 79 Mo. App. 103.

⁶³ *Commonwealth v. Commissioner of Philadelphia*, 2 Whart. 286.

⁶⁴ *People v. Fitch*, 147 N. Y. 355, 41 N. E. Rep. 695.

⁶⁵ *McDowell v. Asheville*, 112 N. C. 747, 17 S. E. Rep. 537; *Whittier v. North Providence*, 10 R. I. 266; *State v. Supervisors*,

for a canal and it was made the duty of the canal appraisers to make an assessment of damages, a mandamus was granted to compel them to do so.⁶⁶ Where damages were given by statute for injuries resulting from a change of grade, and such a change was made, mandamus was awarded to compel the proper persons to proceed and have the damages assessed as provided in the statute.⁶⁷ So under the English Land Clauses Act, after notice to treat by a railroad or other public company, it may be compelled by mandamus to go on with the assessment of damages.⁶⁸ The relator must show title to the land for which damages are claimed.⁶⁹ So mandamus will lie to compel the doing of any act necessary to complete the assessment, such as making a report and the like.⁷⁰ Mandamus will not lie to compel county commissioners to accept a report, it being an act judicial in its nature.⁷¹ Where the tribunal improperly refuses to proceed, it may be compelled to act by mandamus.⁷²

§ 615. **Bill in equity for the same purpose.**—In England it has been held that, where a railroad company has taken possession of land for its uses, and neglects to have the damages assessed, the owner can maintain a bill to compel it to do so, and the proceeding is likened to a bill for specific performance.⁷³ In this country we do not know of any pre-

66 Wis. 199, 68 Wis. 502; *People v. Sass*, 171 Ill. 357.

66 *People v. Hayden*, 6 Hill 359.

67 *People v. Green*, 3 Hun 755; *Gilligan v. Providence*, 11 R. I. 258; *Aldrich v. Aldermen of Providence*, 12 R. I. 241.

68 *King v. Nottingham Waterworks*, 6 A. & E. 355; *Queen v. York etc. Ry. Co.*, 16 A. & E. N. S. 886; *S. C.*, 71 E. C. L. R. 886; *Fotterby v. Metropolitan Ry. Co.*, 2 L. R. C. P. 188; *Morgan v. Same*, 4 L. R. C. P. 97; *Birmingham & Oxford Junction Ry. Co. v. Queen*, 20 L. J. Q. B. 304. But not after its compulsory powers have expired. *Queen v. London*

& Northwestern Ry. Co., 16 A. & E. N. S. 864, 71 E. C. L. R. 863; see *Regina v. Wilts etc. Canal Co.*, 8 Dowling 623.

69 *Canal Comrs. v. People*, 5 Wend. 423.

70 *Matter of Trustees etc.*, 1 Barb. 34; *People v. Jefferds*, 2 Hun 149; *People v. Green*, 3 Hun 755.

71 *Proprietors of Kennebunk Toll Bridge*, 11 Me. 263. See *Commonwealth v. Sessions of Norfolk*, 5 Mass. 435.

72 *Budd v. New Jersey R. R. Co.*, 14 N. J. L. 467.

73 *Adams v. London & Blackwall Ry. Co.*, 18 L. J. Ch. N. S.

cedent for this practice, though damages are sometimes assessed under the supervision of the chancellor in bills for injunction to prevent the use of the land.

§ 616. **Proceedings to obtain damages which have been deposited.** —Where damages have been deposited in court for the benefit of the owner, there appears to be no well-defined practice as to paying it over. A petition to the court would seem to be proper.⁷⁴ If the amount of damages has been finally determined, the condemning party has no further interest in the matter and is not entitled to notice of the application.⁷⁵ He cannot contest the application,⁷⁶ nor appeal from the order to pay over.⁷⁷ Where the deposit was required to be made in a court of chancery, it was held it should not be paid out without a reference to the master, to ascertain and report as to the rights of the applicant.⁷⁸ The money deposited represents the land.⁷⁹ Trustees with a power of sale were held entitled to the money.⁸⁰ If the claimant's title is doubtful the court may require a refunding bond.⁸¹ Where the deposit was loaned by the clerk, the owner was held entitled to the interest.⁸² Where a probate judge refused to pay over a deposit, an action on his bond, and not mandamus, was held the proper remedy.⁸³ Where

357; *Mason v. Stokes Bay Pier & Ry. Co.*, 32 L. J. Ch. 110; *Inge v. Birmingham etc. Ry. Co.*, 3 De G. McN. & G. 658; and see *Adams v. London & Blackwall R. Co.*, 2 McN. & G. 118; *Hedges v. Metropolitan Ry. Co.*, 28 Beav. 109; *Red River Bridge Co. v. Clarksville*, 1 Sneed 176; *Scanlon v. London etc. R. R. Co.*, 23 Grant Ch. 559.

⁷⁴ *Haswell v. Vermont Central R. Co.*, 23 Vt. 228; *Matter of Bogart's Admr.*, 1 Wend. 41; *Matter of Art Street*, 20 Wend. 685.

⁷⁵ *Northern Pac. R. R. Co. v. Jackman (Dak.)*, 50 N. W. Rep. 123; *Ex parte Heirs of Van Vorst*, 2 N. J. Eq. 292.

⁷⁶ *Matter of Department of Parks*, 73 N. Y. 560.

⁷⁷ *Haswell v. Vermont Central R. Co.*, 23 Vt. 228.

⁷⁸ *Ex parte Heirs of Van Vorst*, 2 N. J. Eq. 292.

⁷⁹ *Ross v. Adams*, 28 N. J. L. 160. See *In re City of Rochester*, 136 N. Y. 83, 32 N. E. Rep. 702.

⁸⁰ *In re Hobson's Trusts*, 7 L. R. Ch. D. 708.

⁸¹ *In Matter of De Wint*, 2 Cow. 498.

⁸² *Snyder v. Cowan*, 50 Mo. App. 430.

⁸³ *State v. Meiley*, 22 Ohio St. 534.

after a deposit was made for land taken for a street, the proceedings were dismissed, at the suit of the owner, it was held that the latter was not entitled to the deposit, though the city had built a sewer through the property.⁸⁴ Where the deposit is made pursuant to an order of court the court may determine conflicting claims thereto.⁸⁵

§ 617. **The remedy upon bonds given for security of damages.**—Where a city had taken land for a street and had given a bond to secure the payment of damages, and was in possession, it was held that the owner must first exhaust the assessment of benefits before proceeding on the bond.⁸⁶ Where a railroad company gave a bond to secure the payment of damages, the fact that the road and franchises were sold out on foreclosure was held not to release the company or its sureties.⁸⁷ In such case the owner was held to have no remedy on the fund but only on the bond.⁸⁸ Where the bond was to pay damages caused by a dam, the taking of the dam by the state was held no defence.⁸⁹ A bond was conditioned to pay the amount of compensation which should be awarded. The award was \$1,644 and the further sum of \$400 unless the company should give a license to remove the improvements. It was held that there could be no recovery on the bond for the \$400 but only for the part of the award which was certain and unconditional.⁹⁰ Suits upon such bonds are governed by the usual rules and a breach of the condition must be shown to authorize a recovery.⁹¹

⁸⁴ *Pearce v. Chicago*, 176 Ill. 152, 52 N. E. Rep. 27, affirming 67 Ill. App. 671.

⁸⁵ *Farrand v. Clarke*, 63 Minn. 181, 65 N. W. Rep. 361; *Grady v. N. W. Loan & Inv. Co.*, 93 Wis. 229, 67 N. W. Rep. 34.

⁸⁶ *Pittsburgh v. Irwin's Exrs.*, 85 Pa. St. 420.

⁸⁷ *Keller v. Harrisburg etc. R. R. Co.*, 161 Pa. St. 504, 29 Atl. Rep. 95.

⁸⁸ *Hoffman's Appeal*, 118 Pa. St. 512, 12 Atl. Rep. 57.

⁸⁹ *People v. Murray*, 5 Hill 468.

⁹⁰ *Murray v. Thompson*, 35 U. C. Q. B. 28.

⁹¹ *Harris v. Schuylkill Riv. E. S. R. R. Co.*, 159 Pa. St. 468, 28 Atl. Rep. 296; *Centralia etc. R. R. Co. v. Henry*, 31 Ill. App. 456; *Centralia etc. R. R. Co. v. Brake*, 31 Ill. App. 459.

§ 618. Enjoining use and possession until damages are paid.—Another mode of enforcing payment indirectly is by enjoining the use of land taken until the compensation is paid. This has been held to be a proper remedy,⁹² and is available not only against the party condemning, but also against one claiming under him by lease or otherwise.⁹³ The plea of public inconvenience is no answer to the prayer for this remedy, since the public can derive no permanent rights in private property except upon payment of the just compensation guaranteed by the constitution.⁹⁴

⁹² *Thornton v. Sheffield etc. R. R. Co.*, 84 Ala. 109; *Young v. Harrison*, 6 Ga. 130; *Gammage v. Georgia Southern R. R. Co.*, 65 Ga. 614; *Richards v. Des Moines Valley R.R. Co.*, 18 Ia. 259; *Hibbs v. Chicago & Southwestern Ry. Co.*, 39 Ia. 340; *Irish v. Burlington & S. Ry. Co.*, 44 Ia. 380; *Harness v. Chesapeake & Ohio Canal Co.*, 1 Md. Ch. 248; *Wight v. Packer*, 114 Mass. 473; *Elwell v. Eastern R. R. Co.*, 124 Mass. 160; *Lohman v. St. Paul, Stillwater etc. R. R. Co.*, 18 Minn. 174; *Evans v. Missouri, Ia. & Neb. Ry. Co.*, 64 Mo. 453; *Provolt v. Chicago, Rock Island & Pacific R. R. Co.*, 69 Mo. 633; *Ray v. Atchison & Nebraska R. R. Co.*, 4 Neb. 439; *Omaha & Northwestern R. R. Co. v. Menk*, 4 Neb. 21; *Monmouth County v. Red Bank & Holmdel Turnpike Co.*, 18 N. J. Eq. 91; *Stewart v. Raymond R. R. Co.*, 7 S. & M. 568; *White v. Nashville etc. R. R. Co.*, 7 Heisk. 518; *Kendall v. Railroad Co.*, 55 Vt. 438; *Kittell v. Missisquoi R. R. Co.*, 56 Vt. 96; *Sturtevant v. Milwaukee etc. R. R. Co.*, 11 Wis. 63; *Davis v. La Crosse & Miss. R. R. Co.*, 12 Wis. 16; *Gilman*

v. Sheboygan & Fond du Lac R. R. Co., 40 Wis. 653; *Cosens v. Bogner Ry. Co.*, 36 L. J. Eq. 104; *Strattan v. Great Western & Brentford Ry. Co.*, 40 L. J. Eq. 50. See next chapter.

⁹³ *Hibbs v. Chicago etc. Ry. Co.*, 39 Ia. 340; *Wight v. Packer*, 114 Mass. 473; *Provolt v. Chicago, Rock Island & Pacific R. R. Co.*, 69 Mo. 633; *Ray v. Atchison & Nebraska R. R. Co.*, 4 Neb. 439; *Kendall v. Railroad Co.*, 55 Vt. 438; *Kittell v. Missisquoi R. R. Co.*, 56 Vt. 96; *Gilman v. Sheboygan & Fond du Lac R. R. Co.*, 40 Wis. 653.

⁹⁴ *Evans v. Missouri, Iowa & Neb. Ry. Co.*, 64 Mo. 453. "That mythical personage, 'The Public,' so often summoned as a convenient accessory when some flagrant wrong or constitutional right is in contemplation, can only acquire rights in the land of the humblest citizen by payment therefor." In another case it is said: "With regard to what is said as to public interest, I am not inclined to listen to any suggestion of public interest as against private rights acquired in a lawful way. I do not think that the interest of the public,

A statute provided that, when the damages had been assessed and remained unpaid for thirty days after demand, the use of the land might be enjoined. It was held that this remedy was available only to the owner of the land, and not to an assignee of the damages awarded.⁹⁵ As a means of enforcing payment of damages, this is, of course, a remedy which can be used only where an entry has been made or is threatened.

The right to an injunction may be lost by the owner having acquiesced in the possession of the party condemning, at least until all other remedies have been exhausted.⁹⁶

§ 619. Suit to abate dam unless the damages are paid.—Similar to the remedy mentioned in the last section is that of a bill in equity to abate a mill-dam unless the damages occasioned by the flowage are paid.⁹⁷ Where the party originally liable has transferred its right to the dam, and it appears there are assets of the first party which can be reached on execution, the relief by abatement will be stayed

in using something that is provided for their convenience, is to be upheld at the price of saying that a person's property is to be confiscated for that purpose. A man who comes to this court is entitled to have his rights ascertained and declared, however inconvenient it may be to third persons to whom it may be a convenience to have the use of his property." *Strattan v. Great Western & Brantford Ry. Co.* 40 L. J. Eq. 50, 58.

⁹⁵ *Illsley v. Portland & Rochester R. R. Co.*, 56 Me. 531.

⁹⁶ *Runshart v. Railroad Co.*, 54 Ga. 579; *Griffin v. Augusta & Knoxville R. R. Co.*, 70 Ga. 164; *Reisner v. Strong*, 24 Kan. 410; *Moore v. Kennebec & Portland R. R. Co.*, 58 Me. 279; *Forward v. Hampshire & Hampden Canal Co.*, 22 Pick. 462; *Ross v. Eliza-*

bethtown etc. R. R. Co., 2 N. J. Eq. 422; *Hentz v. Long Island R. R. Co.*, 13 Barb. 646; *Goodin v. Cincinnati & Whitewater Canal Co.*, 18 Ohio St. 169; *Pettibone v. La Crosse & Milwaukee R. R. Co.*, 14 Wis. 443; *Carnochan v. Norwich & Spalding Ry. Co.*, 26 Beav. 169; *Wood v. Charing Cross Ry. Co.*, 33 Beav. 290; *Mold v. Wheatcroft*, 27 Beav. 510. See also *Bentley v. Wabash, St. Louis & Pacific Ry. Co.*, 61 Ia. 229; *Deere v. Guest*, 1 Mylne & Craig 516; *Pell v. Northampton etc. R. R. Co.*, L. R. 2 Ch. App. 100.

⁹⁷ *Smith v. Olmstead*, 5 Blackf. 37; *Ackerman v. Horicon Iron Manf. Co.*, 16 Wis. 150; *Zweig v. Same*, 17 Wis. 362; *Newell v. Smith*, 26 Wis. 582; *Wilmington Water Power Co. v. Evans*, 166 Ill. 548, 46 N. E. Rep. 1083.

until the legal remedy is exhausted.⁹⁸ It is said that the right to have the dam abated may be lost by delay in enforcing the right.⁹⁹

§ 620. **Enforcing the claim for damages as a vendor's lien.**—Where it is held that the title or right to possession may vest before the payment of damages, such title or right is subject to the obligation of making just compensation which is in the nature of a vendor's lien. A proceeding in equity for the purpose of enforcing this lien is therefore a proper remedy.¹

The relief granted upon such a bill should be that, if the claim is not paid, the property be sold according to the practice in such cases. If such a sale is made, the purchaser acquires the property discharged of any claim under the condemnation, and may have the same remedies to obtain or protect his possession as though the original occupation had been without any right whatever. This would seem to be the only consistent mode of enforcing the claim for compensation as a vendor's lien.² But in some cases, instead of decreeing a regular foreclosure of the lien, the

⁹⁸ *Zweig v. Horicon Iron Manf. Co.*, 17 Wis. 362.

⁹⁹ *Cobb v. Smith*, 16 Wis. 661; *Crosby v. Smith*, 19 Wis. 449.

¹ *Mimms v. Macon & Western R. R. Co.*, 3 Ga. 333; *Gillison v. Railroad Co.*, 7 S. C. 173; *Kendall v. Railroad Co.*, 55 Vt. 438; *Walker v. Ware, Hadham & Buntingford Ry. Co.*, 35 L. J. Eq. 94; *Wing v. Tottenham & Hampstead Junction Ry. Co.*, 37 L. J. Ch. 654; *Goodford v. Stonehouse & Nailsworth Ry. Co.*, 38 L. J. Eq. 307; *Lycett v. Stafford & Uttoxeter Ry. Co.*, 41 L. J. Eq. 474; *S. C. 13 Eq. Cas. L. R. 261*; *Earl St. Germans v. Crystal Palace Ry. Co.*, *L. R. 11 Eq. Cas. 568*; *Organ v. Memphis etc. R. R. Co.*, 51 Ark. 235, 11 S. W. Rep.

96; *Hobbs v. State Trust Co.*, 68 Fed. Rep. 618, 15 C. C. A. 604; *Sedgwick v. Watford etc. R. R. Co.*, 36 L. J. Ch. 379; *Galt v. Erie etc. R. R. Co.*, 15 Grant Ch. 637; *Slater v. Canada Cent. R. R. Co.*, 25 Grant Ch. 363; *Howe v. Harding*, 76 Tex. 17, 13 S. W. Rep. 41, 1 Am. R. R. & Corp. Rep. 502. But in Pennsylvania, where a railroad company entered upon giving security and mortgaged its road before judgment for damages was entered, it was held that the owner must look to the personal responsibility of the company and to the bond given as security. *Fries v. Southern Pennsylvania Ry. Co.*, 85 Pa. St. 73. See next section.

² See *Hobbs v. State Trust Co.*,

courts enjoin the use of the land until payment is made.³ In Ohio it is held that, where the property constitutes a section of a railroad right of way, the decree should be for the sale of the entire road, with its franchises, and not of the property with respect to which the lien exists.⁴ If the com-

68 Fed. Rep. 618, 15 C. C. A. 604.

³ *Provolt v. Chicago, Rock Island & Pacific R. R. Co.*, 69 Mo. 633; *Kendall v. Railroad Co.*, 55 Vt. 438; *Kittell v. Missisquoi R. R. Co.*, 56 Vt. 96.

⁴ *Dayton, Xenia & Belpre R. R. Co. v. Lewton*, 20 Ohio St. 401. The court say: "The rights of the public must not be ignored; and it is the right of the public that this highway be maintained. It was by and through the exercise of its power of eminent domain that it was established. And we take it, that the right of the public to maintain the highway is paramount to the right of the defendant in error to destroy it. To sell the section of the right of way over the lands of the defendant in error, and separate its use from the line of the road, would destroy the highway. Hence, to have decreed a sale of this fraction of the road, or right of way, would have been erroneous. The public having delegated to the Dayton, Xenia & Belpre Railroad Company the power to exercise the right of eminent domain in the establishment of this highway, the company had power to obtain the right of way for its road in two modes—by condemnation and prepayment of compensation under the right of eminent do-

main, or by contract with the owners of the land, upon such terms as might be agreed upon. In Lewton's case the latter mode was resorted to, and, by the terms of the contract, a right to enter upon the land and construct the road before the payment of compensation was secured; and yet that compensation was secured to Lewton by an equitable lien upon the easement thus obtained by the company. And justice requires that this security shall be applied to the satisfaction of Lewton's claim. Can it be done? The difficulty is apparent, rather than real. The public has and can have no right which springs from an act of injustice to the defendant in error. Its only right is to preserve the continuity of the road, of the line of public travel and transportation. And this right is as well subserved, if the ownership and management of the highway be in the hands of one party as another. Hence the public has no interest impaired by a sale of the whole line. We have seen that the Little Miami, and Columbus & Xenia Railroad Companies and Rockwell stand in the shoes of the Dayton, Xenia & Belpre Railroad Company. And what shall be said of the rights of the latter? Has it a right to retain the property of the de-

pensation has been previously assessed, the decree should be for the payment of the award with interest and costs, or that the property be sold. If it has not been previously assessed, the amount may be ascertained under the direction of the chancellor.⁵

§ 621. The right to damages, as against those claiming under the party condemning. —No rights can be acquired in private property under the power of eminent domain except subject to the duty of making just compensation therefor. Consequently, the party originally taking or occupying the property cannot transfer to another, by mortgage, lease or

defendant in error without paying for it? Having obtained the possession of this property from the defendant in error, under a promise to pay for it, the Dayton, Xenia & Belpre Railroad Company may not so blend and mix it with other property of its own, as to constitute a great and indivisible highway, and then be permitted to say in equity, to the defendant in error, 'This property, upon which you had and have a specific lien, had become, by my act, a part of a highway which the public has an interest in maintaining, and because the withdrawal of your part from the common use would defeat the public right, therefore you may not enforce your lien.' On the other hand, because a part may not be sold on account of the paramount right of the public to keep the highway intact, a necessity arises, in order that justice may be done to the defendant in error, to decree the sale of the whole line of the road to satisfy his lien. And this is the only mode in which the rights and interests of other parties, either as owners or lien-

holders upon the road, can be protected, and their property or security saved from absolute destruction." And see *Varner v. St. Louis etc. R. R. Co.*, 55 Ia. 677.

⁵ *Kendall v. Railroad Co.*, 55 Vt. 438. "It is further claimed that the damages adjudged in the suit against the former company should not be adopted in this proceeding. The adjudication as to amount was pursuant to the statute and regular. The lien for a money equivalent existed under the constitution of the State. The statute provided two methods for fixing the amounts: one available to the railroad company, the other to the land-owner upon failure of the company to proceed. If regularly determined by either method, we think it was the design of the statute that such determination should be permanent and controlling as against any party subject to the operation of the lien. Such is the holding in other jurisdictions." See also *Sennott v. St. Johnsbury & Lake Champlain R. R. Co.*, 59 Vt. 226.

otherwise, any right in the property except subject to the same duty. In other words, the owner's claim for just compensation is paramount to any right which can be derived by or through the party making or seeking the condemnation.⁶ Different courts work out this result in different ways, but we believe all concur in reaching it in one way or another. Some courts hold that the claim for compensation is in the nature of a vendor's lien, and as such is prior to any right

⁶ *Mims v. Macon & Western R. R. Co.*, 3 Ga. 333; *Lake Erie & Western Ry. Co. v. Griffin*, 92 Ind. 487; *S. C. 107 Ind.* 464; *Drury v. Midland Ry. Co.*, 127 Mass. 571; *Williams v. New Orleans, Mobile & Texas R. R. Co.*, 60 Miss. 689; *Provolt v. Chicago, Rock Island & Pacific R. R. Co.*, 69 Mo. 633; *Dayton etc. R. R. Co. v. Lewton*, 20 Ohio St. 401; *Hatry v. Painsville & Youngstown Ry. Co.*, 1 Ohio Circ. Ct. Rep. 426; *Appeal of Borough of Easton*, 47 Pa. St. 255; *Western Pennsylvania R. R. Co. v. Johnston*, 59 Pa. St. 290; *Buffalo, New York & Phila. R. R. Co. v. Harvey*, 107 Pa. St. 319; *Gillison v. Savannah & Charleston R. R. Co.*, 7 S. C. 173; *White v. Nashville etc. R. R. Co.*, 7 Heisk. 518; *Kendall v. Railroad Co.*, 55 Vt. 438; *Kittell v. Missisquoi R. R. Co.*, 56 Vt. 96; *Adams v. St. Johnsbury & Lake Champlain R. R. Co.*, 57 Vt. 240; *Bridgman v. Same*, 58 Vt. 198; *Sennot v. St. Johnsbury & Lake Champlain R. R. Co.*, 59 Vt. 226; *Pfeifer v. Sheboygan etc. R. R. Co.*, 18 Wis. 155; *Gilman v. Sheboygan etc. R. R. Co.*, 37 Wis. 317; *Gilman v. Same*, 40 Wis. 653; *Walker v. Ware, Hadham & Buntingford Ry. Co.*, 35 L. J. Eq. 94.

Organ v. Memphis etc. R. R. Co., 51 Ark. 235, 11 S. W. Rep. 96; *Penn. Mutual Life Ins. Co. v. Heiss*, 141 Ill. 35, 31 N. E. Rep. 138, 6 Am. R. R. & Corp. Rep. 407; *New York etc. R. R. Co. v. Hammond*, 132 Ind. 475, 32 N. E. Rep. 83; *Chicago etc. R. R. Co. v. Hall*, 135 Ind. 91, 34 N. E. Rep. 704; *Chicago etc. R. R. Co. v. Galey*, 141 Ind. 360, 39 N. E. Rep. 925; *Kansas City etc. R. R. Co. v. Fisher*, 53 Kan. 512, 36 Pac. Rep. 1004; *Lowell v. Shaw*, 15 Me. 242; *New York etc. R. R. Co. v. Stanley's Heirs*, 35 N. J. Eq. 283; *S. C. 34 N. J. Eq.* 55, 39 N. J. Eq. 361; *Post v. West Shore etc. R. R. Co.*, 123 N. Y. 580, 23 N. E. Rep. 7; *S. C. 50 Hun* 301, 20 N. Y. St. Rep. 180, 3 N. Y. Supp. 172; *Hendrick v. Carolina Cent. R. R. Co.*, 101 N. C. 617, 8 S. E. Rep. 236; *York Borough v. Welsh*, 117 Pa. St. 174, 11 Atl. Rep. 390; *Rio Grande etc. R. R. Co. v. Ortie*, 75 Tex. 602, 12 S. W. Rep. 1129, 1 Am. R. R. & Corp. Rep. 344; *Central Trust Co. v. Bridges*, 57 Fed. Rep. 753, 6 C. C. A. 539; *Hobbs v. State Trust Co.*, 68 Fed. Rep. 618, 15 C. C. A. 604; *Paterson v. Buffalo etc. R. R. Co.*, 17 Grant U. C. 521; *Starling v. Grand Junction R. R. Co.*, 30 U. C. C.

which the party condemning can acquire or transfer.⁷ Others hold that no title passes until payment, and consequently that a mortgage or conveyance by the party condemning conveys nothing to the grantee except such possessory rights as the former may have.⁸ The latter view seems to us the correct one, and is in accordance with the views heretofore expressed in regard to the proper interpretation of the constitution.⁹ But it is immaterial which view is correct, so far as the present inquiry is concerned. If title does not pass until compensation is made, the case is clear. On the other hand, if it be held that the title may vest before compensation is made, yet it only vests subject to the obligation of making compensation. The instrument or proceedings by which title is acquired are notice of the claim for compensation, and third parties dealing with the property are bound to ascertain whether this claim has been satisfied.¹⁰ The foreclosure of a mortgage upon the prop-

P. 247. Compare *Lehigh Valley etc. R. R. Co. v. McFarlan*, 43 N. J. L. 605; *Elson v. Seaburg*, 11 Ohio St. 265; *Coburn v. Sands*, 150 Ind. 141; *Cowan v. Southern R. R. Co.*, 118 Ala. 354, 23 So. Rep. 754.

⁷ *Mims v. Macon & Western R. Co.*, 3 Ga. 333; *Provolt v. Chicago, Rock Island & Pacific R. Co.*, 69 Mo. 633; *Dayton etc. R. R. Co. v. Lewton*, 20 Ohio St. 401; *Gillison v. Savannah & Charleston R. R. Co.*, 7 S. C. 173; *Walker v. Ware, Hadham & Buntingford Ry. Co.*, 35 L. J. Eq. 94; *Central Trust Co. v. Bridges*, 57 Fed. Rep. 753, 6 C. C. A. 539; ante, § 620.

⁸ *Hatry v. Painsville & Youngstown Ry. Co.*, 1 Ohio Circ. Ct. Rep. 426; *Appeal of Borough of Easton*, 47 Pa. St. 255; *Western Pennsylvania R. R. Co. v. Johnston*, 59 Pa. St. 290; *Buffalo, New York & Phila. R. R. Co. v. Har-*

vey, 107 Pa. St. 319; *White v. Nashville etc. R. R. Co.*, 7 Heisk. 518; *Kittell v. Missisquoi R. R. Co.*, 56 Vt. 96; *Bridgeman v. St. Johnsbury & Lake Champlain R. R. Co.*, 58 Vt. 198; *Gilman v. Sheboygan & Fond du Lac R. R. Co.*, 40 Wis. 658; *Organ v. Memphis etc. R. R. Co.*, 51 Ark. 235, 11 S. W. Rep. 96; *Chicago etc. R. R. Co. v. Hall*, 135 Ind. 91, 34 N. E. Rep. 704; *Chicago etc. R. R. Co. v. Galley*, 141 Ind. 360, 39 N. E. Rep. 925; *Kansas City etc. R. R. Co. v. Fisher*, 53 Kan. 512, 36 Pac. Rep. 1004; *Hendrick v. Carolina Central R. R. Co.*, 101 N. C. 617, 8 S. E. Rep. 236; *Central Trust Co. v. Valley R. R. Co.*, 79 Fed. Rep. 195.

⁹ Ante, §§ 454-459.

¹⁰ *Rio Grande etc. R. R. Co. v. Ortiz*, 75 Tex. 602, 12 S. W. Rep. 1129, 1 Am. R. R. & Corp. Rep. 344.

erty and franchises of the condemnor, to which the claimants for damages are not parties, cannot affect the rights of the latter.¹¹ Sometimes such claimants are made parties and their rights adjusted in the foreclosure proceeding, and the property sold clear of such claims.¹² In such case the claims for land damages should be given preference to the mortgage debt in the distribution of the proceeds, and a decree to the contrary is error.¹³ In a proceeding to foreclose a mortgage upon a railroad, the owner of land taken for right of way was made a party. The claim for damages had been liquidated by a judgment against the mortgagee company. The owner presented his claim in the foreclosure suit and it was rejected and the property and the franchises ordered sold free and clear of all liens and incumbrances. The property was bought and the land in question used by another railroad company. In a suit against the latter upon the judgment for damages it was held liable and the decree in foreclosure was held no bar.¹⁴ In a foreclosure suit wherein the claimants for land damages were parties and their rights were adjusted therein, it was held that judgments for such damages against the mortgagor company which had been entered by default should be opened and the damages reassessed by a jury.¹⁵

§ 622. **Of the remedies for compensation as against those claiming under the party condemning.**—Under the authorities referred to in the last section and the principles which they sustain, it follows that the owner of property which has been taken for public use and not paid for, may have the same remedies to enforce his rights against those claiming under the party condemning as against such party him-

¹¹ See cases already cited in this section, in most of which the transfer was by mortgage and foreclosure.

¹² Penn. Mut. Life Ins. Co. v. Heiss, 141 Ill. 35, 31 N. E. Rep. 138, 6 Am. R. R. & Corp. Rep. 407; Central Trust Co. v. Bridges, 57 Fed. Rep. 753, 6 C. C. A. 539.

¹³ Ibid.; Hobbs v. State Trust

Co., 68 Fed. Rep. 618, 15 C. C. A. 604.

¹⁴ Rio Grande etc. R. R. Co. v. Ortiz, 75 Tex. 602, 12 S. W. Rep. 1129, 1 Am. R. R. & Corp. Rep. 344.

¹⁵ Penn. Mut. Life Ins. Co. v. Heiss, 141 Ill. 35, 31 N. E. Rep. 138, 6 Am. R. R. & Corp. Rep. 407.

self. As to the remedies by trespass, ejectment, or to enjoin the possession or use of the property, or to enforce the claim for compensation as a vendor's lien, there does not seem to be any question.¹⁶ The only doubt appears to be as to the right to a personal remedy against those claiming under the original condemnor. In *Pfeifer v. Sheboygan & Fond du Lac R. R. Co.*¹⁷ it appeared that the Sheboygan & Mississippi R. R. Co. occupied Pfeifer's land for its purposes; that his damages were assessed but never paid, that afterwards the property and franchises of the company were sold under a mortgage and ultimately became vested in the defendant company, which used the plaintiff's land for the same purposes for which it was originally taken. This case was a suit upon the judgment for damages against the new company, and it was held it could be maintained. The reasoning of the case is that the first company could not acquire the right to use the land for railroad purposes without paying the damages awarded, that the use of the land by the new company was an assent to take the land upon the same condition, and that it was therefore personally liable for the damages awarded. In a subsequent case against the same company the same doctrine is repudiated without either explaining or, in terms, overruling the prior case.¹⁸ In the latter case it was held that the owner's remedy is either an action of trespass, or ejectment, or to enjoin the use of the land until compensation is made. The doctrine of the case in the 18th Wisconsin Reports has been approved and followed in Indiana.¹⁹ Substantially the same doctrine is maintained in Pennsylvania, where it is held that, under a similar state of facts, the new company may be made a party to the judgment for compensation by

¹⁶ *Organ v. Memphis etc. R. Co.*, 51 Ark. 235 11 S. W. Rep. 96; *Rio Grande etc. R. R. Co. v. Ortiz*, 75 Tex. 602, 12 S. W. Rep. 1129, 1 Am. R. R. & Corp. Rep. 344; *Cowan v. Southern R. R. Co.*, 118 Ala. 354, 23 So. Rep. 754.

¹⁷ 18 Wis. 155.

¹⁸ *Gilman v. Sheboygan & Fond du Lac R. R. Co.*, 37 Wis. 317.

¹⁹ *Lake Erie & Western R. R. Co. v. Griffin*, 92 Ind. 487; S. C. 107 Ind. 464; *New York etc. R. R. Co. v. Hammond*, 132 Ind. 475,

scire facias, and so be made personally liable therefor.²⁰ And so in other states.²¹

The correctness of the doctrine does not seem open to question. The first company has taken possession of private property for a public use and is under an obligation to make just compensation to the owner. When its rights and franchises are transferred to a new company, by foreclosure or otherwise, the new company is under no obligation to use the property, nor is it liable for the debts of the old company.²² The new company may refuse to use the property at all, or it may condemn it anew.²³ In such case it would lose the benefit of the improvements upon the property.²⁴ But, if it elects to use the property for the purposes for which it was originally taken, and as the successor of the first company, knowing that the right to use it can be obtained only by the payment of just compensation, it in legal effect assents to the performance of this obligation and an implied promise to pay the same to the owner arises, upon which an action may be maintained.²⁵ "If a person

32 N. E. Rep. 83; Chicago etc. R. R. Co. v. Hall, 135 Ind. 91, 34 N. E. Rep. 704; Chicago etc. R. R. Co. v. Galey, 141 Ind. 360, 39 N. E. Rep. 925.

²⁰ Western Pennsylvania R. R. Co. v. Johnston, 59 Pa. St. 290; Buffalo, New York & Phila. R. R. Co. v. Harvey, 107 Pa. St. 319.

²¹ Organ v. Memphis etc. R. R. Co., 51 Ark. 235, 11 S. W. Rep. 96; Kansas City etc. R. R. Co. v. Fisher, 53 Kan. 512; New York etc. R. R. Co. v. Stanley's Heirs, 35 N. J. Eq. 283; S. C. 34 N. J. Eq. 55, 39 N. J. Eq. 361; Hendrick v. Carolina Central R. R. Co., 101 N. C. 617, 8 S. E. Rep. 236; Rio Grande etc. R. R. Co. v. Ortiz, 75 Tex. 602, 12 S. W. Rep. 1129, 1 Am. R. R. & Corp. Rep. 344. And see Lowell v.

Shaw, 15 Me. 242; Lehigh Valley R. R. Co. v. McFarlan, 43 N. J. L. 605.

²² Organ v. Memphis etc. R. R. Co., 51 Ark. 235, 11 S. W. Rep. 96; Vilas v. Milwaukee etc. Ry. Co., 17 Wis. 497.

²³ Adams v. St. Johnsbury & Lake Champlain R. R. Co., 57 Vt. 240; New York etc. R. R. Co. v. Stanley's Heirs, 35 N. J. Eq. 283.

²⁴ Ibid.

²⁵ Organ v. Memphis etc. R. R. Co., 51 Ark. 235, 11 S. W. Rep. 96; New York etc. R. R. Co. v. Hammond, 132 Ind. 475, 32 N. E. Rep. 83; Rio Grande etc. R. R. Co. v. Ortiz, 75 Tex. 602, 12 S. W. Rep. 1129, 1 Am. R.R. & Corp. Rep. 344; and other cases cited in this section.

accepts anything which he knows to be subject to a duty or charge, it is rational to conclude that he means to take such duty or charge upon himself, and the law may very well imply a promise to perform what he has so taken upon himself."²⁶ If the obligation has previously been liquidated by an assessment against the old company, this will be binding upon the new company.²⁷

§ 622 a. **Whether same rules apply to compensation for property damaged as for property taken.**—It has been held that a claim for damages to abutting property by a railroad in a street, has priority over a mortgage of the road and its franchises,²⁸ and the owner may enjoin the operation of the road until such damages are paid.²⁹ There would seem to be no reason why the abutter should not have the same remedies against those claiming under the first company, as against the first company itself, even to the matter of a personal action.³⁰

§ 623. **Common law suits for the value of lands appropriated without proceedings.**—Where land is appropriated to a public use, either with the consent of the owner or otherwise, a common law action will lie to recover the just compensation to which the owner is entitled.³¹ These cases

²⁶ Broom's Legal Maxims 709.

²⁷ New York etc. R. R. Co. v. Hammond, 132 Ind. 475, 32 N. E. Rep. 83; Chicago etc. R. R. Co. v. Galey, 141 Ind. 360, 39 N. E. Rep. 925; Rio Grande etc. R. R. Co. v. Ortiz, 75 Tex. 602, 12 S. W. Rep. 1129, 1 Am. R. R. & Corp. Rep. 344; and cases cited in notes 2-6.

²⁸ Penn. Mut. Life Ins. Co. v. Heiss, 141 Ill. 35, 31 N. E. Rep. 138, 6 Am. R. R. & Corp. Rep. 407.

²⁹ Harbach v. Des Moines etc. R. R. Co., 80 Ia. 593, 44 N. W. Rep. 348, 1 Am. R. R. & Corp. Rep. 449; Chicago etc. R. R. Co. v. Darke, 148 Ill. 226, 35 N. E.

Rep. 750, 9 Am. R. R. & Corp. Rep. 73.

³⁰ Ft. Scott etc. R. R. Co. v. Fox, 42 Kan. 490, 22 Pac. Rep. 583; Tate v. Railway Co., 64 Mo. 149; Strickley v. Chesapeake etc. R. R. Co., 93 Ky. 323, 20 S. W. Rep. 261. The second company is not liable for damages accruing before it took possession. Louisville etc. R. R. Co. v. Orr, 91 Ky. 109, 15 S. W. Rep. 8; Hubert v. Missouri etc. R. R. Co., 80 Mo. App. 87.

³¹ Bentonville R. R. Co. v. Baker, 45 Ark. 252; Rome v. Perkins, 30 Ga. 154; Blake v. Dubuque, 13 Ia. 66; Donald v. St. Louis etc. R. R. Co., 52 Ia. 411;

proceed upon the ground of an implied promise to pay the just compensation to which the owner is entitled, or by

- Wichita & Western R. R. Co. v. Fechheimer, 36 Kan. 45; Lawrence v. Second Municipality, 12 Rob. La. 453; Bailey v. New Orleans, 19 La. An. 271; Bailey v. Carrollton, 28 La. An. 171; Jamison v. Springfield, 53 Mo. 224; Ring v. Mississippi Bridge Co., 57 Mo. 496; Allen v. Wabash, St. Louis & Pacific R. R. Co., 84 Mo. 646; Welsh v. Chicago, Burlington & Kansas City Ry. Co., 19 Mo. App. 127; Cincinnati v. Combs, 16 Ohio 181; Watkins v. Walker County, 18 Tex. 585; G. C. & S. F. R. R. Co. v. Donahoo, 59 Tex. 128; I. & G. N. Ry. Co. v. Benitos, 59 Tex. 326; Hamilton County v. Garrett, 62 Tex. 602; Newell v. Smith, 15 Wis. 101; Little Rock etc. R. R. Co. v. McGehee, 41 Ark. 202; Chattanooga etc. R. R. Co. v. East Rome Town Co., 89 Ga. 732, 16 S. E. Rep. 608; Fulton County v. Phillips, 91 Ga. 66, 16 S. E. Rep. 260; East Georgia etc. R. R. Co. v. King, 91 Ga. 519, 17 S. E. Rep. 939; Smith v. Atlanta, 92 Ga. 119, 17 S. E. Rep. 981; Chicago etc. R. R. Co. v. Wedel, 144 Ill. 9, 32 N. E. Rep. 547; Centralia v. Wright, 156 Ill. 561, 41 N. E. Rep. 217; Chicago v. Smyth, 33 Ill. App. 28; Bloomfield R. R. Co. v. Grace, 112 Ind. 128; Indiana etc. R. R. Co. v. Allen, 113 Ind. 308; Louisville etc. R. R. Co. v. Beck, 119 Ind. 124, 21 N. E. Rep. 471; New York etc. R. R. Co. v. Hammond, 132 Ind. 475, 32 N. E. Rep. 83; Ft. Wayne v. Hamilton, 132 Ind. 487, 32 N. E. Rep. 324; Chicago etc. R. R. Co. v. Hall, 135 Ind. 91, 34 N. E. Rep. 704; Chicago etc. R. R. Co. v. Galey, 141 Ind. 360, 39 N. E. Rep. 925; City of Huntington v. Kenower, 12 Ill. App. 456, 40 N. E. Rep. 550; Kansas City etc. R. R. Co. v. Splitlog, 45 Kan. 68, 25 Pac. Rep. 202; Leavenworth etc. R. R. Co. v. Wilkins, 45 Kan. 674, 26 Pac. Rep. 16; Wichita etc. R. R. Co. v. Fechheimer, 49 Kan. 643, 31 Pac. Rep. 127; Chicago etc. R. R. Co. v. Stewart, 50 Kan. 33, 31 Pac. Rep. 668; Kansas City etc. R. R. Co. v. Fisher, 53 Kan. 512, 36 Pac. Rep. 1004; Strickley v. Chesapeake etc. R. R. Co., 93 Ky. 323, 20 S. W. Rep. 261; Dussan v. Municipality No. 1, 6 La. An. 575; Mitchell v. New Orleans etc. R. R. Co., 41 La. An. 363, 6 So. Rep. 522; Street v. New Orleans etc. R. R. Co., 43 La. An. 116, 9 So. Rep. 15; Payne v. Morgan's L. & T. R. & S. S. Co., 43 La. An. 981, 10 So. Rep. 10; Hickerson v. City of Mexico, 58 Mo. 61; McReynolds v. Kansas City etc. R. R. Co., 110 Mo. 484, 19 S. W. Rep. 824; Doyle v. Kansas City etc. R. R. Co., 113 Mo. 280, 20 S. W. Rep. 970; Webster v. Kansas City etc. R. R. Co., 116 Mo. 114, 22 S. W. Rep. 474; Childs v. Kansas City etc. R. R. Co., 117 Mo. 414, 23 S. W. Rep. 373; Hickman v. City of Kansas City, 120 Mo. 110, 25 S. W. Rep. 225; Poillon v. Brooklyn, 101 N. Y. 132; Pennsylvania Co. v. Platt, 47 Ohio St. 366, 25 N. E. Rep. 1028;

analogy to the action of trover in case of personal property. The rule applies to the owner of any estate, or interest, in the property;³² also to the taking of materials or the use of property.³³ The measure of damages would be the same as in a condemnation proceeding.³⁴ The consent or acquiescence of the owner in the occupation of his land is not a waiver of his claim for compensation and, consequently, is

Longworth v. Cincinnati, 48 Ohio St. 637, 29 N. E. Rep. 274; Lawrence R. R. Co. v. O'Hara, 50 Ohio St. 667, 36 N. E. Rep. 14; Ehret v. Schuylkill Riv. E. S. R. R. Co., 151 Pa. St. 158, 24 Atl. Rep. 1068; Noon v. Scranton City, 7 Pa. Co. Ct. 123; Frater v. Hamilton County, 90 Tenn. 661, 19 S. W. Rep. 233; Rio Grande etc. R. R. Co. v. Ortiz, 75 Tex. 602, 12 S. W. Rep. 1129, 1 Am. R. R. & Corp. Rep. 344; East Dallas v. Barksdale, 83 Tex. 117, 18 S. W. Rep. 329; Barber v. East Dallas, 83 Tex. 147, 18 S. W. Rep. 438; Alexandria etc. R. R. Co. v. Faunce, 31 Gratt. 761; Lewis v. Seattle, 5 Wash. 741, 32 Pac. Rep. 794; District of Columbia v. Hutchinson, 1 App. Cas. D. C. 403; Chicago League Ball Club v. Chicago, 77 Ill. App. 124; Pittsburgh etc. R. R. Co. v. Beck, 152 Ind. 421, 53 N. E. Rep. 439; Kennedy v. Cleveland etc. R. R. Co., 20 Ind. App. 315; Ragan v. Kansas City etc. R. R. Co., 144 Mo. 623; Propst v. Cass County, 51 Neb. 736; Hays v. South Easton Borough, 10 Pa. Supr. Ct. 390; Douglas County v. Taylor, 50 Neb. 535. As to sufficiency of complaint in such an action see Cleveland etc. R. R. Co. v. Stackhouse, 10 Ohio St. 567.

Contra: Railroad Co. v. Rob-

bins, 35 Ohio St. 531. But see remarks on this case in Longworth v. Cincinnati, 48 Ohio St. 637, 29 N. E. Rep. 274. If the owner can take the initiative in the statutory proceeding to assess the damages, this remedy will be exclusive. See ante, § 607.

³² Alexandria e.c. R. R. Co. v. Faunce, 31 Gratt. 761; Ehret v. Schuylkill Riv. E. S. R. R. Co., 151 Pa. St. 158, 24 Atl. Rep. 1068.

³³ Board of Comrs. v. Trees, 12 Ind. App. 479, 40 N. E. Rep. 535; Canal & C. Nav. Co. v. Commissioners, 26 La. An. 740; Poillon v. Brooklyn, 101 N. Y. 132; May v. Kornhaus, 9 W. & S. 121; Watkins v. Walker County, 18 Tex. 585; Board of Levee Inspectors v. Crittenden, 94 Fed. Rep. 613, 36 C. C. A. 418.

³⁴ McReynolds v. Kansas City etc. R. R. Co., 110 Mo. 484, 19 S. W. Rep. 824; Centralia v. Wright, 156 Ill. 561, 41 N. E. Rep. 217; Ft. Wayne v. Hamilton, 132 Ind. 487, 32 N. E. Rep. 324; Wichita etc. R. R. Co. v. Fechheimer, 49 Kan. 643, 31 Pac. Rep. 127; Street v. New Orleans etc. R. R. Co., 43 La. An. 116, 9 So. Rep. 15; Greeley etc. R. R. Co. v. Yount, 7 Col. App. 189, 42 Pac. Rep. 1023; but see

no bar to a suit therefor.³⁵ It is of course a good defense to such a suit that the damages have been regularly assessed and tendered or deposited,³⁶ or that they have been fixed by agreement of the parties and tendered to the owner.³⁷ Where lands were taken for a street and were to be paid for by special assessment, it was held that an action would not lie against the city for their value as upon a general liability, because no promise could be implied to pay for the lands except out of the particular fund.³⁸ Where, in case of lands taken for a railroad, the owner was to apply to the company within two years for an assessment of damages or be barred, it was held that, if the owner applied within the time and the company promised to pay or settle without proceedings, an action could be maintained upon this promise after the two years.³⁹

A recovery in such a suit vests the right to the lands in the defendant, and the pleadings and record should properly describe the land and show that the suit is for just compensation.⁴⁰

§ 624. The remedy to recover compensation for property damaged, injured or injuriously affected.—If, by reason of

Fries v. Wheeling etc. R. R. Co., 56 Ohio St. 135.

³⁵ Louisville etc. R. R. Co. v. Beck, 119 Ind. 124, 21 N. E. Rep. 471; Payne v. Morgan's L. & T. R. & S. S. Co., 43 La. An. 981, 10 So. Rep. 10; Webster v. Kansas City etc. R. R. Co., 116 Mo. 114, 22 S. W. Rep. 474; Childs v. Kansas City etc. R. R. Co., 117 Mo. 414, 23 S. W. Rep. 373; Longworth v. Cincinnati, 48 Ohio St. 637, 29 N. E. Rep. 274. But see Norfolk etc. R. R. Co. v. Perdue, 40 W. Va. 442, 21 S. E. Rep. 755.

³⁶ Hueston v. Eaton etc. R. R. Co., 4 Ohio St. 685. See Leroy etc. R. R. Co. v. Small, 46 Kan. 300, 26 Pac. Rep. 695.

³⁷ Terre Haute etc. R. R. Co. v.

Harris, 126 Ind. 7, 25 N. E. Rep. 831. See Ragan v. Kansas City etc. R. R. Co., 111 Mo. 456, 20 S. W. Rep. 234.

³⁸ Paret v. Bayonne, 40 N. J. L. 333.

³⁹ Plott v. Western North Carolina R. R. Co., 65 N. C. 74.

⁴⁰ Wichita & Western R. R. Co. v. Feckheimer, 36 Kan. 45; Lawrence v. Second Municipality, 12 Rob. La. 453; Jamison v. Springfield, 53 Mo. 224; G. C. & S. F. R. R. Co. v. Donahoo, 59 Tex. 128; Huntington v. Kenower, 12 Ind. App. 456, 40 N. E. Rep. 550; Hickerson v. City of Mexico, 58 Mo. 61; Doyle v. Kansas City etc. R. R. Co., 113 Mo. 280, 20 S. W. Rep. 970; Noon v. Scranton City, 7 Pa. Co. Ct. 123.

the proper construction or use of public works, damage is done to private property for which there is a right to recover under the constitution, and which is consequential in its nature, a common law action will lie to recover the "just compensation" guaranteed by the constitution.⁴¹ Suits for damages to abutting property by a change of grade,⁴² or by the construction and operation of railroads in streets,⁴³ afford numerous illustrations of the above rule. The ordinary statutory remedies for the assessment of damages

⁴¹ *Protzman v. Indianapolis & Cincinnati R. R. Co.*, 9 Ind. 467; *Burlington & Missouri River R. Co. v. Reinhackle*, 15 Neb. 279; *Taylor v. Metropolitan Elevated Ry. Co.*, 50 N. Y. Supr. Ct. 311; *Railroad Co. v. Hambleton*, 40 Ohio St. 496; *Johnson v. Parkersburg*, 16 W. Va. 402; *Blanchard v. City of Kansas*, 5 McCrary 217; *Grafton v. Baltimore & Ohio R. R. Co.*, 21 Fed. Rep. 309; *Ohio etc. R. R. Co. v. Wachter*, 123 Ill. 440; *Pickneyville v. Hutchings*, 63 Ill. App. 137; *Pickneyville v. Rhine*, 63 Ill. App. 139; *Stone v. Augusta*, 46 Me. 127; *Fremont etc. R. R. Co. v. Setright*, 34 Neb. 253, 51 N. W. Rep. 833; *White v. Northwestern N. C. R. R. Co.*, 113 N. C. 610, 18 S. E. Rep. 330, 9 Am. R. R. & Corp. Rep. 103; *O'Brien's Ex. v. Pennsylvania S. V. R. R. Co.*, 119 Pa. St. 184, 13 Atl. Rep. 74.

⁴² *Cook v. City of Ansonia*, 66 Conn. 413, 34 Atl. Rep. 183; *Springer v. Chicago*, 135 Ill. 552, 26 N. E. Rep. 514, 4 Am. R. R. & Corp. Rep. 52; *Nebraska City v. Northcutt*, 45 Neb. 456, 63 N. W. Rep. 807; *Folmsbee v. Amsterdam*, 66 Hun 214, 21 N. Y. Supp. 42; *County of Chester v.*

Brower, 117 Pa. St. 647, 12 Atl. Rep. 577; *Walker v. Sedalia*, 74 Mo. App. 70.

⁴³ *Highland Ave. & B. R. R. Co. v. Matthews*, 99 Ala. 24, 10 So. Rep. 267; *Eachus v. Los Angeles Consol. El. R. R. Co.*, 103 Cal. 614, 37 Pac. Rep. 750; *Jacksonville etc. R. R. Co. v. Lockwood*, 33 Fla. 573, 15 So. Rep. 327; *Stough v. Chicago etc. R. R. Co.*, 71 Ia. 641; *Ft. Scott etc. R. R. Co. v. Fox*, 42 Kan. 490, 22 Pac. Rep. 583; *Leavenworth etc. R. R. Co. v. Curtan*, 51 Kan. 432, 33 Pac. Rep. 297; *Atchison etc. R. R. Co. v. Davidson*, 52 Kan. 739, 35 Pac. Rep. 787; *Louisville & N. R. R. Co. v. Orr*, 91 Ky. 109, 15 S. W. Rep. 8; *Maysville etc. R. R. Co. v. Ingram*, (Ky.) 30 S. W. Rep. 8; *Lake Roland El. R. R. Co. v. Webster*, 81 Md. 529, 32 Atl. Rep. 186; *Smith v. Kansas City etc. R. R. Co.*, 98 Mo. 20, 11 S. W. Rep. 259; *Martin v. Chicago etc. R. R. Co.*, 47 Mo. App. 452; *Wallace v. Kansas City etc. R. R. Co.*, 47 Mo. App. 491; *White v. Northwestern N. C. R. R. Co.*, 113 N. C. 610, 18 S. E. Rep. 330, 9 Am. R. R. & Corp. Rep. 103; *Cincinnati etc. R. R. Co. v. Campbell*, 51 Ohio St. 328, 37 N.

for property taken for public use are held not to apply.⁴⁴ The right to recover for damage to property by the construction and use of public works, has been fully considered in former chapters.⁴⁵ If the constitution or statute gives a right to compensation for damages for which no remedy before existed, as for damages for changing the grade of a street, and points out no mode in which it is to be recovered or assessed, it may be recovered in a common law suit.⁴⁶ But, if a remedy is provided to which the party injured may resort, that remedy is exclusive.⁴⁷ If a statute gives compensation for damages by changing the grade of a street and imposes the duty upon the city or municipality of having such damages assessed and paid, and a change is made without complying with the statute as to the assessment and payment of damages, the owner may resort to the appropriate common law remedy.⁴⁸ Where damages by a

E. Rep. 366; *Pennsylvania S. V. R. R. Co. v. Ziemer*, 124 Pa. St. 560, 17 Atl. Rep. 187; *Thompson v. Citizens Traction Co.*, 181 Pa. St. 131; *Harman v. Louisville etc. R. R. Co.*, 87 Tenn. 614, 11 S. W. Rep. 703; *Kaufman v. Tacoma etc. R. R. Co.*, 11 Wash. 632, 40 Pac. Rep. 137; *Fox v. B. & O. R. R. Co.*, 34 W. Va. 466, 12 S. E. Rep. 757; *Stewart v. Ohio Riv. R. R. Co.*, 38 W. Va. 438, 18 S. E. Rep. 604.

⁴⁴ *Indiana Central R. R. Co. v. Boden*, 10 Ind. 96; *New Albany & Salem R. R. Co. v. O'Dailey*, 13 Ind. 353; *Burlington & Mo. Riv. R. R. Co. v. Reinhackle*, 15 Neb. 279; *New Mexican R. R. Co. v. Hendricks*, (N. M.) 30 Pac. Rep. 901.

⁴⁵ See chapters 3-6 and 8.

⁴⁶ *Gregg v. Baltimore*, 56 Md. 256; *McCarty v. St. Paul*, 22 Minn. 527; *Smith v. Floyd County*, 85 Ga. 422, 11 S. E. Rep. 850; *Republican Valley R. R. Co. v.*

Fellers, 16 Neb. 169; *County of Chester v. Brower*, 117 Pa. St. 647, 12 Atl. Rep. 577; *O'Brien v. Pennsylvania S. V. R. R. Co.*, 119 Pa. St. 184, 13 Atl. Rep. 74; *Delaware County's Appeal*, 119 Pa. St. 159, 13 Atl. Rep. 62; *Lloyd v. Philadelphia*, 17 Phil. 202; *Kershaw v. Philadelphia*, 10 Pa. Co. Ct. 153; *Fox v. Baltimore & O. R. R. Co.*, 34 W. Va. 466, 12 S. E. Rep. 757.

⁴⁷ *Tripp v. Overocker*, 7 Col. 72; *Cole v. Muscatine*, 14 Ia. 296; *Burlington v. Gilbert*, 31 Ia. 356; *Reock v. Newark*, 33 N. J. L. 129; *White v. McKeesport*, 101 Pa. St. 394; *Matter of Beale St.*, 39 Cal. 495; *Smith v. White Plains*, 67 Hun 81, 22 N. Y. Supp. 450; *Moore v. Great Southern etc. R. R. Co.*, 10 Irish C. L. 46; *Tuohey v. Great Southern etc. R. R. Co.*, 10 Irish C. L. 98; *Pratt v. Stratford*, 14 Ontario, 260; ante, §§ 607, 608.

⁴⁸ *Healey v. New Haven*, 49

proposed change of grade were agreed upon with the owner, but the improvement was afterward abandoned, it was held that the owner had no claim to the damages agreed upon.⁴⁹

Case is the proper common law action to recover for damages of the kind referred to in this section, and is the form of action adopted in the cases cited.⁵⁰

§ 625. **The measure of damages in such cases.**—This is a question which has already been discussed to some extent in a former chapter.⁵¹ The question is to be considered with reference to damages caused to property not taken by works of a public nature, constructed or operated upon property acquired under the power of eminent domain by persons vested with the power for the purposes of constructing and operating such works. In such cases, the cause of the damage being of a permanent nature, there should be but one recovery, and all damages, past, present and prospective, should be included.⁵² There are many cases, however, which hold that a recovery in such cases is limited to the damages which have accrued up to the time of bringing

Conn. 394; *Hempstead v. Des Moines*, 52 Ia. 303; *Noyes v. Mason City*, 53 Ia. 418; *Mulholland v. Des Moines etc. R. R. Co.*, 60 Ia. 740; *La Fayette v. Waterman*, 107 Ind. 404; *Wright v. Georgetown*, 4 Cranch 534; *Dickson v. Baltimore & Philadelphia R. R. Co.*, 3 McArthur D. C. 362; *Lafayette v. Nagle*, 113 Ind. 425; *McGavock v. Omaha*, 40 Neb. 64, 58 N. W. Rep. 543; *Folmsbee v. Amsterdam*, 66 Hun 214, 21 N. Y. Supp. 42. See also *Drady v. Des Moines etc. R. R. Co.*, 57 Ia. 393; *Wilson v. Des Moines etc. R. R. Co.*, 67 Ia. 509; *Benton v. Milwaukee*, 50 Wis. 368.

⁴⁹ *Griggs v. Foote*, 4 Allen, 195.

⁵⁰ "When a right exists and no adequate remedy is provided it may be enforced by an action

on the case." *County of Chester v. Brower*, 117 Pa. St. 647, 12 Atl. Rep. 577; *Kershaw v. Philadelphia*, 20 Phil. 318; *Fox v. B. & O. R. R. Co.*, 34 W. Va. 466, 12 S. E. Rep. 757.

⁵¹ Ante, §§ 492-495, 503a-503e.

⁵² *Chicago & Alton R. R. Co. v. Maher*, 91 Ill. 312; *Chicago & Eastern Illinois R. R. Co. v. Loeb*, 118 Ill. 203; *S. C. 8 Ill. App. 627*; *North Vernon v. Voegler*, 103 Ind. 314; *Powers v. Council Bluffs*, 45 Ia. 652; *Stodghill v. Chicago, Burlington & Quincy R. R. Co.*, 53 Ia. 341; *Van Orsdol v. B. C. R. & N. R. Co.*, 56 Ia. 470; *Hempstead v. Des Moines*, 63 Ia. 36; *Drake v. Chicago, R. I. & P. R. R. Co.*, 63 Ia. 302; *Miller v. Keokuk & Des Moines Ry. Co.*, 63 Ia. 680; *Kansas R. R. Co. v. Muhlman*, 17

the action, and that successive actions may be brought.⁵³ Where the former rule of damages prevails, a recovery will operate to vest in the defendant a permanent right to maintain, use and operate the works which cause the damage sued for.⁵⁴ Whether in any given case the plaintiff may sue for permanent damages, or whether the recovery must be limited to damages sustained prior to the suit, is discussed elsewhere.⁵⁵ Where the suit is for the "just compensation" guaranteed by the constitution the measure of damages is the depreciation in the value of the property by the causes sued for.⁵⁶

The proper plaintiff in such cases will be the owner of the property when the right of action accrues. In those States which hold that there can be but one recovery, the right to the entire damages vests in the owner at the time of the injury and does not pass by a subsequent grant of the injured premises. Such subsequent grantee, therefore, cannot main-

Kan. 224; Central Branch U. P. R. R. Co. v. Andrews, 26 Kan. 702, 711; Elizabethtown etc. R. R. Co. v. Combs, 10 Bush 382, 393; Jeffriesville etc. R. R. Co. v. Esterle, 13 Bush 667; Ortwine v. Baltimore, 16 Md. 387; Fowle v. New Haven etc. Co., 112 Mass. 334; Baldwin v. Chicago, Mil. & St. Paul Ry. Co., 35 Minn. 354; Troy v. Cheshire R. R. Co., 23 N. H. 83; Town v. Faulkner, 56 N. H. 255; Texas & Pacific R. R. Co. v. Long, 1 Tex. App. Civil Cas., p. 281; Texas Central Ry. Co. v. Clifton, 2 Same, p. 433.

⁵³ Ford v. Santa Cruz R. R. Co., 59 Cal. 290; Dickson v. Chicago, R. I. & P. R. R. Co., 71 Mo. 575; Uline v. New York Central & Hudson River R. R. Co., 101 N. Y. 98; Taylor v. Metropolitan R. R. Co., 50 N. Y. Supr. Ct. 311; Gulf, Col. & S. F. Ry. Co. v. Helsley, 62 Tex. 593; G. H. & S. A. Ry. Co. v. Tait, 63 Tex. 223;

Same v. Seymour, 63 Tex. 345; Carl v. Sheboygan & Fond du Lac R. R. Co., 46 Wis. 625. And see Drady v. Des Moines etc. R. R. Co., 57 Ia. 393; Winchester v. Stevens Point, 58 Wis. 350; Valley Ry. Co. v. Franz, 43 Ohio St. 623.

⁵⁴ White v. Northwestern N. C. R. R. Co., 113 N. C. 610, 18 S. E. Rep. 330, 9 Am. R. R. & Corp. Rep. 103.

⁵⁵ Post, § 653b.

⁵⁶ Highland Ave. & C. R.R. Co. v. Matthews, 99 Ala. 24, 10 So. Rep. 267; Eachus v. Los Angeles Consol. El. R. R. Co., 103 Cal. 614, 37 Pac. Rep. 750; Jacksonville etc. R. R. Co. v. Lockwood, 33 Fla. 573, 15 So. Rep. 327; Smith v. Floyd County 85 Ga. 422, 11 S. E. Rep. 850; Maysville etc. R. R. Co. v. Ingram, (Ky.) 30 S. W. Rep. 8; Lake Roland El. R. R. Co. v. Webster, 81 Md. 529, 32 Atl. Rep. 186; Martin

tain a suit for such damages.⁵⁷ A city which merely permits a railroad company to occupy a street is not liable to abutting owners for damages to their property by reason of the railroad in the street.⁵⁸ Where the city caused a street to be carried over a railroad by a viaduct, it was held that the railroad company was not liable for damages to adjacent property on the ground that it contributed towards paying for the work.⁵⁹

§ 625 a. **Assessment of just compensation in an equitable proceeding to enjoin the construction or use of works. New York Elevated railroad cases.**—It is the law of New York that in a common law suit for damages to property by a railroad in a street, the recovery must be limited to the commencement of the suit.⁶⁰ But it has been repeatedly held that in an equitable proceeding to enjoin the construction or operation of the road, the court may ascertain the just compensation to which the abutting owner is entitled for the right to permanently maintain and operate the road and also the amount due for past damages, if any, and may decree that unless such sums are paid the road shall be enjoined.⁶¹ These suits are in practice, though not in theory

v. Chicago etc. R. R. Co., 47 Mo. App. 452; *Stewart v. Ohio Riv. R. R. Co.*, 38 W. Va. 438, 18 S. E. Rep. 604.

⁵⁷ *Chicago & Alton R. R. Co. v. Maher*, 91 Ill. 312; *Chicago & Eastern Ill. R. R. Co. v. Loeb*, 118 Ill. 203. In *Merchants' Union Barb. Wire Co. v. Chicago, Burlington & Quincy R. R. Co.*, 70 Ia. 105, it was held the grantee might sue if there had been no prior recovery of permanent damages.

⁵⁸ *Olney v. Wharf*, 115 Ill. 519; *Hedrick v. Olathe*, 30 Kan. 348; *Dillenschach v. Xenia*, 41 Ohio St. 207. Contra: *Stack v. East St. Louis*, 85 Ill. 377.

⁵⁹ *Culbertson & Blair Packing and Provision Company v. Chi-*

cago, 111 Ill. 651. See further, as to defendants in such cases, *Bizer v. Ottumwa Hydraulic Power Co.*, 70 Ia. 145; *Day v. New Orleans Pacific Ry. Co.*, 37 La. An. 131; *Railroad Company v. Hambleton*, 40 Ohio St. 496.

⁶⁰ *Pond v. Met. El. R. R. Co.*, 112 N. Y. 186, 19 N. E. Rep. 487; *Hussner v. Brooklyn City R. R. Co.*, 114 N. Y. 433, 21 N. E. Rep. 1002; *Ottenot v. New York etc. R. R. Co.*, 119 N. Y. 603, 23 N. E. Rep. 169; *Tallman v. Met. El. R. R. Co.*, 121 N. Y. 119, 23 N. E. Rep. 1134, 2 Am. R. R. & Corp. Rep. 325; *Williams v. Brooklyn El. R. R. Co.*, 126 N. Y. 96, 26 N. E. Rep. 1048.

⁶¹ *Shepard v. Manhattan R. R. Co.*, 117 N. Y. 442, 23 N. E. Rep.

and principle, actions to compel the payment of just compensation.⁶² In such a proceeding the past damages will be assessed upon the same principles as in an action at

30; *Galway v. Met. El. R. R. Co.*, 128 N. Y. 132, 28 N. E. Rep. 479, 5 Am. R. R. & Corp. Rep. 391; *Pappenheim v. Met. El. R. R. Co.*, 128 N. Y. 436, 28 N. E. Rep. 518, 5 Am. R. R. & Corp. Rep. 378; *Gray v. Manhattan R. R. Co.*, 128 N. Y. 499, 28 N. E. Rep. 498; *Kearney v. Metropolitan El. R. R. Co.*, 129 N. Y. 76, 29 N. E. Rep. 70; *American Bank Note Co. v. New York El. R. R. Co.*, 129 N. Y. 252, 29 N. E. Rep. 302, 5 Am. R. R. & Corp. Rep. 583; *Lynch v. Metropolitan El. R. R. Co.*, 129 N. Y. 274, 29 N. E. Rep. 315; *Bohm v. Met. El. R. R. Co.*, 129 N. Y. 576, 29 N. E. Rep. 802, 5 Am. R. R. & Corp. Rep. 416; *Minton v. New York El. R. R. Co.*, 130 N. Y. 332, 29 N. E. Rep. 319; *Thompson v. Manhattan R. R. Co.*, 130 N. Y. 360, 29 N. E. Rep. 264; *Woolsey v. New York El. R. R. Co.*, 134 N. Y. 323, 30 N. E. Rep. 387, 31 N. E. Rep. 891; *O'Reilly v. New York El. R. R. Co.*, 148 N. Y. 347, 42 N. E. Rep. 1063. And see *Patton v. Olympia etc. Co.*, 15 Wash. 210, 46 Pac. Rep. 237.

⁶² The theory of these cases is explained at length in *Galway v. Met. El. R. R. Co.*, 128 N. Y. 132, 28 N. E. Rep. 479, 5 Am. R. R. & Corp. Rep. 391, wherein the court says: "The expression, made use of in some of the cases, to the effect that 'the only remedy, whereby just compensation for the property taken can be compelled, is an action to restrain the continuous trespass' (*Pond*

v. Met. El. R. R. Co., 112 N. Y. 186, 19 N. E. Rep. 487; *Tallman v. Met. El. R. R. Co.*, 121 N. Y. 119, 23 N. E. Rep. 1134), means simply that an injured party can by that means secure the enjoyment of his property, unless the wrongdoer, by making compensation, in some form, for the injury inflicted, has acquired the lawful right to continue it. In this sense only they may be, not incorrectly, called actions to compel the payment of damages."

In *Pappenheim v. Met. El. R. R. Co.*, 128 N. Y. 436, 28 N. E. Rep. 518, 5 Am. R. R. & Corp. Rep. 378, the theory of the cases is thus stated by Peckham, J.: "In an action at law the owner of the property interfered with or trespassed upon cannot recover damages to his premises, based upon the assumption that such trespass is to be permanent. He can recover only the damages he has sustained up to the commencement of the action. The judgment entered for the damages sustained does not operate as a purchase of the right to continue the trespass. But the owner may resort to equity for the purposes of enjoining the continuance of the trespass, and to thus prevent a multiplicity of actions at law to recover damages; and in such action the court may determine the amount of damage which the owner would sustain were permanently continued, and it may provide that upon payment of

law,⁶³ the permanent or fee damages as in a condemnation proceeding.⁶⁴ The defendant is not entitled to a jury trial upon either question of damages.⁶⁵ If the premises are subject to a mortgage the decree should provide for release of the same as to the rights or easements conveyed.⁶⁶

§ 626. When no damages are awarded, the only remedy is by appeal.—If proceedings are regularly instituted for the condemnation of property, and the owner is duly notified and no damages are awarded him, his only remedy is by appeal.⁶⁷ He can neither enjoin possession in equity nor sue for damages at law.⁶⁸

§ 627. Conflicting claims to the damages awarded. Following the award into the hands of those not entitled thereto.—If damages are assessed and paid to one as owner, who is not the true owner, he will be liable to the true owner in an action for money had and received.⁶⁹ So, where it was conceded that the entire value of premises was awarded to the landlord, it was held the tenant could recover from the land-

that sum the plaintiff shall give a deed or convey the right to the defendant, and it will refuse an injunction when the defendant is willing to pay upon the receipt of a conveyance. The court does not adjudge that the defendant shall pay such sum, and that the plaintiff shall so convey. It provides that if the conveyance is made and the money paid, no injunction shall issue. If defendant refuse to pay, the injunction issues." And see *Eno v. Met. El. R. R. Co.*, 56 N. Y. Supr. 313, 8 N. Y. Supp. 197.

⁶³ *American Bank Note Co. v. New York El. R. R. Co.*, 129 N. Y. 252, 29 N. E. Rep. 302, 5 Am. R. R. & Corp. Rep. 583.

⁶⁴ *Ibid.*

⁶⁵ *Lynch v. Met. El. R. R. Co.*,

129 N. Y. 274, 29 N. E. Rep. 315.

⁶⁶ *Woolsey v. New York El. R. R. Co.*, 134 N. Y. 323, 30 N. E. Rep. 387; *Hughes v. Met. El. R. R. Co.*, 57 N. Y. Supr. 378, 8 N. Y. Supp. 535, affirmed in 130 N. Y. 14; *Kissam v. Brooklyn El. R. R. Co.*, 86 Hun 598, 33 N. Y. Supp. 740; *Jordan v. Met. El. R. R. Co.*, 60 N. Y. Supr. 385.

⁶⁷ *Powell v. Clelland*, 82 Ind. 24; *Connolly v. Griswold*, 7 Ia. 416; *Master v. McHolland*, 12 Kan. 17; *Fravert v. Finfrook*, 31 Ohio St. 621.

⁶⁸ *Ibid.*

⁶⁹ *Tamon v. Kellogg*, 49 Mo. 118; *Meginnis v. Nunamaker*, 64 Pa. St. 374. This is sometimes provided for by statute. *DePeyster v. Mali*, 27 Hun 439; *Matter of New York*, 42 App. Div. N. Y. 198.

lord his equitable share.⁷⁰ But, where separate awards are made to both landlord and tenant, the tenant cannot recover from the landlord the amount of an item which the commissioners erroneously allowed the landlord instead of the tenant.⁷¹ Where premises were leased after the commencement of proceedings, the tenant was held entitled to compensation out of the fund.⁷² Where the whole value of the property is awarded one tenant in common, he will be liable to the others for their pro rata shares.⁷³ But where only one tenant in common was a party to condemnation proceedings, it was held that the condemnor could not recover from him the amount which it had been compelled to pay to the other cotenants.⁷⁴ Where land was condemned for a railroad and damages paid to the owner, but the land was never used and was subsequently condemned by a second company, it was held the first was entitled to the damages, and not the original owner.⁷⁵ But, where land was conveyed to a railroad company in consideration of the construction of a road over the same which was sold out under a mortgage before the road was completed over the land, and afterwards was taken by another company, it was held that the original vendor of the land was entitled to compensation, and not the purchaser at the foreclosure sale.⁷⁶ Where the land was taken which was subject to a life estate, it was held the life tenant was entitled to the use of the damages until her death.⁷⁷ If the holder of the legal title is in fact a trustee, the cestui que trust may by

⁷⁰ *Harris v. Howes*, 75 Me. 436; *McAllister v. Reel*, 53 Mo. App. 81. So where the whole compensation was paid to tenants for life, it was held the remainderman could recover from them his just proportion, and a bill for that purpose was sustained. *Owston v. Grand Trunk R. R. Co.*, 28 Grant Ch. 431.

⁷¹ *Turner v. Williams*, 10 Wend. 139. To same effect: *Umland Club v. Schupback*, 168 Mass. 430.

⁷² *City of Chicago v. Messler*, 38 Fed. Rep. 308.

⁷³ *Brinkeroff v. Wemple*, 1 Wend. 470.

⁷⁴ *New Madrid County v. Phillips*, 125 Mo. 61, 28 S. W. Rep. 321.

⁷⁵ *Dubuque & Dakota Ry. Co. v. Diehl*, 64 Ia. 635.

⁷⁶ *Ingalls v. Byers, Admr.*, 94 Ind. 134.

⁷⁷ *Kansas City, Springfield & Memphis R. R. Co. v. Weaver*, 86 Mo. 473. And see *In re Phillips*

bill in equity establish the trust and obtain the damages awarded.⁷⁸ If the party condemning have notice of adverse claims to the damages awarded, it should deposit the same for the use of the true owner, and if after notice it pays to the wrong party, it will be liable to the true owner.⁷⁹ Where A was in possession of property at the time of proceedings to condemn it, but B had an action pending against A for the land, in which he afterwards succeeded, and the damages had been deposited in court, it was held that A was entitled to the part awarded for injury to the crops and B to the remainder.⁸⁰ In one case it was held that the court had power to cause rival claimants to the damages awarded to interplead.⁸¹ In another case the party out of possession, but claiming to be the true owner was directed to bring ejectment within a month for the purpose of trying his title.⁸² In case of the death of a person in whose favor an award has been made, it has been held that the title to the land descends to the heirs, subject to the contingency of being divested upon payment of the damages awarded, while the right to the damages passes to the personal representatives.⁸³ Property, which was subject to a mortgage, was condemned and the damages deposited with the county treasurer. By mistake the mortgagee was not made a party. The mistake consisted in the failure of an abstract firm to note the mortgage on an abstract of title ordered by the condemnor. It was held that the condemnor could maintain

Trusts, L. R. 6 Eq. 250; *In re Pfleger*, L. R. 6 Eq. 426.

⁷⁸ *Whitney v. Milwaukee*, 57 Wis. 636.

⁷⁹ *Hatch v. New York*, 82 N. Y. 436.

⁸⁰ *Rooney v. Sacramento Valley R. R. Co.*, 6 Cal. 638. But in the following case it was held that the parties in possession claiming title were entitled to the entire damages: *Sacramento Valley R. R. Co. v. Moffatt*, 7 Cal. 577.

⁸¹ *Gerrard v. Omaha etc. R. R.*

Co., 14 Neb. 270. And see *Pollock v. Morris*, 105 N. Y. 676; *Hilton v. St. Louis*, 99 Mo. 199, 12 S. W. Rep. 657; *First Nat. Bank v. West River R. R. Co.*, 49 Vt. 167; *Young v. Stoddard*, 27 App. Div. N. Y. 162.

⁸² *Metropolitan Board of Works v. Sant*, 38 L. J. Eq. 7.

⁸³ *Welles v. Cowles*, 4 Conn. 182; *Wilson v. Harvey*, 3 Harr. 500; *Wilson v. Cochran*, 4 Harr. 88; *Rice Exr. v. Barre Turnpike Co.*, 4 Pick. 130.

a bill to have the damages applied on the mortgage.⁸⁴ An award for the land of infants or lunatics is treated as real estate.⁸⁵ It should not be paid to the guardian ad litem in the condemnation proceedings but to the regular guardian.⁸⁶ If there is a transfer of title before the right to the compensation is vested, the transferee is entitled to the compensation.⁸⁷ The owner of an inchoate dower has been held entitled to compensation out of the fund.⁸⁸ When the award has been deposited any one having a lien or claim may resort to the fund.⁸⁹ In a suit upon an award, it was held that a rival claimant could be made a party and assert his claim in the suit.⁹⁰ Property was taken for a street and the entire award paid to the defendant as owner. He had only a life estate and the proceedings were afterwards declared void because the remainderman was not a party. New proceedings were then had and a new award made and apportioned to the different interests. It was held that a suit would lie by the municipality to recover back the first award but that defendant might set off the second award

⁸⁴ Calumet Riv. R. R. Co. v. Brown, 136 Ill. 322, 26 N. E. Rep. 501, 4 Am. R. R. & Corp. Rep. 152, reversing S. C., 37 Ill. App. 113. And see Yakima Water etc. Co. v. Hathaway, 18 Wash. 377.

⁸⁵ In re Department of Public Works, 35 N. Y. Supp. 332; In re Board of Street Opening, 89 Hun 525, 35 N. Y. Supp. 409; Midland County R. R. Co. v. Oswin, 1 Collyer 74-81.

⁸⁶ Brown v. Rome etc. R. R. Co., 86 Ala. 206.

⁸⁷ Rice v. Chicago, 57 Ill. App. 558; Price v. Engelking, 58 Ill. App. 547; Kiebler v. Holmes, 58 Mo. App. 119; Shute v. Barnes, 2 Allen 598; Delap v. Brooklyn, 3 Misc. 22, 22 N. Y. Supp. 179; Englehardt v. Brooklyn, 3 Misc. 30, 21 N. Y. Supp. 777; Gates v.

De La Mare, 142 N. Y. 307, 37 N. E. Rep. 121. See next section.

⁸⁸ In re New York & B. Bridge, 75 Hun 558, 27 N. Y. Supp. 597; Trustees v. Leary, 89 Hun 219, 34 N. Y. Supp. 1002.

⁸⁹ Chicago etc. R. R. Co. v. Sheldon, 53 Kan. 169, 35 Pac. Rep. 1105. And see Buchanan Co. Bank v. Cedar Rapids etc. R. R. Co., 62 Ia. 494; Harris v. Brewster, 154 Pa. St. 22, 25 Atl. Rep. 829. As to claims of heirs and personal representatives, see Detroit v. Schilling, 93 Mich. 429, 53 N. W. Rep. 565; Hoskin v. Toronto General Trust Co., 12 Ontario 480; Cushman v. Wood, 6 Hun 520.

⁹⁰ Smith v. St. Paul, 65 Minn. 295, 68 N. W. Rep. 32.

to him.⁹¹ Where an award was deposited with the county treasurer and different parties claimed it, it was held that he might file a bill of interpleader to have the right determined.⁹² Where part of a property was taken which was subject to a mortgage and pending proceedings to condemn judgments were rendered against the owner, it was held that the mortgagee was entitled to such part of the award as the value of the part taken bore to the entire mortgaged premises and that the judgment creditors were entitled to the balance.⁹³

§ 627 a. Right to the compensation when there has been a transfer of title pending proceedings to take the property.—Where a party, having power to acquire property for public use, enters upon and occupies property for the purpose of appropriating it to such use, without having complied with the law, a conveyance of the property pending such occupation, will vest the right to compensation in the grantee, whether the entry was with or without consent.¹ The authorities are by no means harmonious upon this proposition, but it is supported by the greater number and by the general rules which govern the acquisition of interests in real estate.² The right to recover for the wrongful entry and for past damages would remain in the grantor.³

⁹¹ *Horney v. Coldbrook*, 65 Ill. App. 477.

⁹² *Keller v. Bading*, 64 Ill. App. 198; and see *Young v. Stoddard*, 27 App. Div. N. Y. 162.

⁹³ *Yakima Water etc. Co. v. Hathaway*, 18 Wash. 377.

¹ *Pittsburgh & W. R. R. Co. v. Perkins*, 49 Ohio St. 326, 31 N. E. Rep. 350; *Lawrence R. R. Co. v. O'Harra*, 50 Ohio St. 667, 36 N. E. Rep. 14; *Hendrick v. Carolina Central R. R. Co.*, 101 N. C. 617, 8 S. E. Rep. 236; *Livermon v. Roanoke etc. R. R. Co.*, 109 N. C. 52, 13 S. E. Rep. 734; *Fordyce v. Wolfe*, 82 Tex. 145, 18 S. W. Rep. 145; *Partridge v.*

Great Western R. R. Co., 8 U. C. C. P. 97; ante, §§ 298, 318; contra: *Evansville etc. R. R. Co. v. Nye*, 113 Ind. 223; *Harshbarger v. Midland R. R. Co.*, 131 Ind. 177, 27 N. E. Rep. 352; *Indianapolis etc. R. R. Co. v. Price*, 153 Ind. 31; *Milwaukee etc. R. R. Co. v. Strange*, 63 Wis. 178; *Roberts v. Northern Pac. R. R. Co.*, 158 U. S. 1, 15 S. C. Rep. 756. See *Essery v. Grand Trunk R. R. Co.*, 21 Ontario 224.

² Compare the authorities cited in the last note with those cited in sections 298 and 318.

³ *Fordyce v. Wolf*, 82 Tex. 145, 18 S. W. Rep. 145; *Chicago etc.*

The passage of an ordinance to widen or extend a street, or the filing of a map of a proposed street, or the doing of other similar acts of a preliminary nature, do not affect the property proposed to be taken, and a transfer of the property after such acts will have the same effect as though made before and will vest in the grantee the title to the property and right to the compensation when the taking is consummated.⁴ Where the title vests in the condemnor by virtue of certain ex parte acts, such as the making and filing of a location, as is permitted in some of the States, the right to compensation vests in the person who is owner at the time the title vests in the condemnor.⁵ A purchaser at judicial sale before the property is taken, who receives a deed afterwards, is to be regarded as owner from the day of sale and is entitled to the compensation.⁶ After the right to compensation has once vested, it becomes a personal claim and does not pass with the land.⁷ But in some cases it has been held, though under somewhat peculiar circumstances, that a conveyance, though after the taking, operates as an assignment of the claim for compensation.⁸ A conveyance pending proceedings to condemn transfers to the vendee the right to the award when made.⁹ Where the confirmation of the award vests the right to the compensation and obligates the condemnor to take and pay for the property, a transfer of the property after the confirmation does not

R. R. Co. v. Sheldon, 53 Kan. 169, 35 Pac. Rep. 1105; ante, note 1.

⁴ Kiebler v. Holmes, 58 Mo. App. 119; Matter of Board of Street Opening, 68 Hun 562, 22 N. Y. Supp. 1021; Justice v. Philadelphia, 169 Pa. St. 503, 32 Atl. Rep. 592; Shute v. Barnes, 2 Allen 598.

⁵ Ante, § 318, note 3; and see Bate v. Philadelphia etc. R. R. Co., 1 Mont. Co. L. R. 47; Hoskin v. Toronto General Trust Co., 12 Ontario 480.

⁶ Pennsylvania S. V. R. R. Co.

v. Clary, 125 Pa. St. 442, 17 Atl. Rep. 468.

⁷ Tenbrooke v. Jahke, 77 Pa. St. 392; Appeal of Warrell, 130 Pa. St. 600, 18 Atl. Rep. 1040.

⁸ Magee v. City of Brooklyn, 144 N. Y. 265, 39 N. E. Rep. 87; Delap v. Brooklyn, Ibid., affirming S. C., 3 Misc. 22, 22 N. Y. Supp. 179; Englehardt v. Brooklyn, 3 Misc. 30, 21 N. Y. Supp. 777; Burkard v. Brooklyn, 6 Misc. 431, 26 N. Y. Supp. 1112; In re Thompson, 89 Hun 32, 35 N. Y. Supp. 6.

⁹ Gates v. De La Mare, 142 N.

transfer the right to the award.¹⁰ But where the award or judgment merely fixes the price at which the condemnor may take the property, and the condemnor has the option to take or not, a conveyance vests the right to the compensation in the vendee.¹¹ The grantor may reserve the right to the award or compensation.¹² Where after suit commenced for damages to abutting property by an elevated railroad, the plaintiff conveys, it is held that the grantee may be brought into the suit and the rights of all parties adjusted.¹³

§ 628. **Rights and remedies of mortgagees of the lands taken.**—Whether a mortgagee is a necessary party to condemnation proceedings, is a question upon which the authorities differ and which has been considered in a former chapter.¹⁴ If the mortgagee is made a party to the proceedings, his interests can be fully protected by such an application of the damages as justice may require.¹⁵ In those jurisdictions in which it is held that the mortgagee's interest can be divested without making him a party, his only remedy is against the fund and he may, by application to the court in which the proceedings are pending or by bill in equity, subject the award to the payment of his debt.¹⁶

Y. 307, 37 N. E. Rep. 2; Chicago v. Messler, 38 Fed. Rep. 308. See Stopf v. Wilt, 177 Ill. 620, 52 N. E. Rep. 1028.

¹⁰ Simms v. Brooklyn, 33 N. Y. Supp. 859.

¹¹ Rice v. Chicago, 57 Ill. App. 558; Price v. Engelking, 58 Ill. App. 547.

¹² Hawes v. Louisville, 5 Bush. 667.

¹³ Koehler v. New York Elevated R. R. Co., 159 N. Y. 218, 53 N. E. Rep. 1114. See Saxton v. New York El. R. R. Co., 12 App. Div. 263, 42 N. Y. Supp. 263; Mooney v. New York El. R. R. Co., 13 App. Div. 380, 43 N. Y. Supp. 35.

¹⁴ Ante, § 324.

¹⁵ Matter of Noble Street, 1 Ashmead 276; Platt v. Bright, 31 N. J. Eq. 81.

¹⁶ Wood v. Westborough, 140 Mass. 403; Bank of Auburn v. Roberts, 44 N. Y. 192; Hooker v. Martin, 10 Hun 302; Platt v. Bright, 29 N. J. Eq. 128; S. C., 31 N. J. Eq. 81, affirmed 32 N. J. Eq. 362; Rand v. Ft. Scott etc. R. R. Co., 50 Kan. 114, 31 Pac. Rep. 683; Armstrong v. Moore, 1 Kan. App. 450, 40 Pac. Rep. 834; Boutelle v. Minneapolis, 59 Minn. 493, 61 N. W. Rep. 554; Packard v. Bergen Neck R. R. Co., 48 N. J. Eq. 281, 22 Atl. Rep. 227; Devlin v. New York,

Where the award was paid to a creditor of the mortgagor by virtue of garnishment proceedings, it was held that the mortgagee could recover the money from such creditor.¹⁷ Where the award was deposited with the county treasurer and paid over to the mortgagor, it was held that the mortgagee had no recourse on the bond of the treasurer.¹⁸ But if the mortgagee is a necessary party, he is not affected by a condemnation to which he is not a party and, if default is made in the payment of the mortgage debt, he may have the same remedy by foreclosure that he would have if the property condemned had been conveyed for private uses.¹⁹ The decree in case of non-payment should be first for the sale of the balance of the tract subject to the rights of the party condemning, and, if that prove insufficient, then for the sale of the party condemned.²⁰ In *Kennedy v. Milwaukee & St. Paul Ry. Co.*²¹ the court stayed the foreclosure to enable the railroad company to have the property regularly condemned. The mortgagee may subject the award to the payment of his debt, notwithstanding his right to foreclose upon the property condemned.²² Where the mortgage has been foreclosed the purchaser at the foreclosure sale is en-

131 N. Y. 123, 30 N. E. Rep. 45; *Utter v. Richmond*, 112 N. Y. 610, 20 N. E. Rep. 554; *Hill v. Wine*, 35 App. Div. N. Y. 520. See *Pile v. Pile*, 3 L. R. Ch. D. 36.

¹⁷ *Dunlop v. York*, 16 Grant U. C. 216; and see *Sawyer v. Landers*, 56 Ia. 422.

¹⁸ *Armstrong v. Moore*, 1 Kan. App. 450, 40 Pac. Rep. 834.

¹⁹ *Severin v. Cole*, 38 Ia. 463; *Dodge v. Omaha & Southwestern R. R. Co.*, 20 Neb. 276; *North Hudson R. R. Co. v. Booream*, 28 N. J. Eq. 450; *Wade v. Hennessey*, 55 Vt. 207; *Adams v. St. Johnsbury & Lake Champlain R. Co.*, 57 Vt. 240; *Kennedy v.*

Milwaukee & St. Paul Ry. Co., 22 Wis. 581; *Watson v. Grand Rapids etc. R. R. Co.*, 91 Mich. 198, 51 N. W. Rep. 990; *Gray v. Case*, 51 N. J. Eq. 426, 26 Atl. Rep. 805; *In re Toronto Belt Line R. R. Co.*, 26 Ontario 413.

²⁰ *Ibid.* But see *First Natl. Bank v. Thompson*, 116 Ala. 166, 22 So. Rep. 668.

²¹ 22 Wis. 581. And see *Finnell's Admr. v. Louisville Southern R. R. Co.*, 99 Ky. 570.

²² *Sawyer v. Landers*, 56 Ia. 422; *Platt v. Bright*, 22 N. J. Eq. 128; *S. C.*, 31 N. J. Eq. 81, 32 N. J. Eq. 362.

titled to the award or damages.²³ The court in a foreclosure suit cannot order the award brought into court.²⁴

§ 629. **Rights and remedies of the owners of other liens and interests in the land taken.**—Substantially the same principles apply to other liens as to mortgages. If the owners are required to be made parties by the law or constitution as interpreted by the courts, their interests will be protected in the condemnation proceedings, or if not made parties the proceedings will be void as to them. If they are not required to be made parties, they will have the same claim upon the damages awarded as upon the land, and may enforce their rights by appropriate proceedings. The interests of judgment creditors²⁵ and legatees²⁶ have been thus protected; also an inchoate dower.²⁷ The lien for ground rent has been held superior to the lien of judgment creditors.²⁸

§ 629 a. **Remedy of condemnor to have award applied to the payment of the claims of mortgagees or lien holders, who were not made parties.**—Where there was an omission to make the mortgagee a party, it was held that the condemnor could pay the money into court and have the rights of the mortgagee protected, so as not to be obliged to pay twice.²⁹ And where the property condemned was subject to mortgages and other liens and the holders of such claims were not parties, the statute not requiring them to be made parties and being silent as to the effect of the condemnation upon their interests, it was held that the condemnor might apply to a court of equity for leave to pay the money

²³ *Moritz v. St. Paul*, 52 Minn. 409, 54 N. W. Rep. 370; *Magee v. Brooklyn*, 144 N. Y. 265, 39 N. E. Rep. 87; *Burkard v. Brooklyn*, 6 Misc. 431, 26 N. Y. Supp. 1112; *Livermon v. Roanoke etc. R. R. Co.*, 109 N. C. 52, 13 S. E. Rep. 734.

²⁴ *Schermerhorn v. Peck*, 43 Kan. 667, 23 Pac. Rep. 1043.

²⁵ *Gimble v. Stolte*, 59 Ind. 446.

²⁶ *Rees v. Addams*, 16 S. & R. 40.

²⁷ *Wheeler v. Kirtland*, 27 N. J. Eq. 534. See, further, as to making the owners of such interests parties, ante, §§ 325, 341.

²⁸ *Powell v. Whitaker*, 88 Pa. St. 445.

²⁹ *Wooster v. Sugar Riv. Val. R. R. Co.*, 57 Wis. 311.

into court for the benefit of the lien holders.³⁰ In another case, where the property condemned was subject to a mortgage and the mortgagee had not been made a party, though required to be by law, it was held that the condemnor could maintain a bill to have the damages, which had been deposited with the county treasurer, applied on the mortgage.³¹ The decree provided for a redetermination of the amount of damages in case the mortgage debt should not be realized from the balance of the security. The jurisdiction of equity was placed on the ground of mistake in omitting to make the mortgagee a party, and that mistake was due to the failure of an abstract firm, employed by the condemnor, to note the mortgage upon the abstract.

§ 630. **Rights of an assignee of the damages awarded.**—The award or judgment for damages may be assigned or transferred the same as any other judgment. Where part of an award was assigned and the award was afterward set aside and a new award made, it was held to operate on the new award to the extent of the same fractional part.³²

§ 630 a. **Miscellaneous Cases—Execution—Specific performance, etc.**—In some cases it is held that payment of the award may be enforced by execution.³³ Where the taking is accomplished by the filing of an instrument of location, this would seem to be a proper course, if there is nothing in the statute to indicate the contrary. Under the English acts, when the proper notices have been served and the damages fixed by agreement or arbitration, the company may be compelled by bill for specific performance to com-

³⁰ Philadelphia etc. R. R. Co. v. Pennsylvania S. V. R. R. Co., 151 Pa. St. 569, 25 Atl. Rep. 177.

³¹ Calumet Riv. R. R. Co. v. Brown, 136 Ill. 322, 26 N. E. Rep. 501, 4 Am. R. R. & Corp. Rep. 152, reversing S. C., 37 Ill. App. 113.

³² Spears v. New York, 87 N. Y. 359; S. C., 10 Hun 160.

³³ Neal v. Pittsburgh etc. R. R.

Co., 31 Pa. St. 19; Harrisburg etc. R. R. Co. v. Peffer, 84 Pa. St. 295; Matter of Rhinebeck etc. R. R. Co., 8 Hun 34; State v. Withrow (Mo.), 24 S. W. Rep. 638. Contra: McColgan v. Baltimore Belt R. R. Co., 85 Md. 519. But if a special mode is provided by statute for enforcing payment an execution will not be issued,

plete the purchase.³⁴ A statute that a county should not be sued unless the claim sued on had been presented to the county commissioners for allowance, was held to apply to a claim for compensation for land taken for a highway.³⁵ Where under certain circumstances a trustee may be appointed to recover the compensation for property taken, the regularity of his appointment cannot be questioned in a suit by him for such compensation.³⁶ In a proceeding by a city to take property for public use it has been held that it could not reserve out of the condemnation money the amount of a tax which became a lien pending the proceedings.³⁷ Where after the award has been deposited the condemnor dismisses the proceedings, it is entitled to withdraw the deposit.³⁸

Municipality No. 1 v. Millanden, 12 La. An. 769.

³⁴ Cork etc. R. R. Co. v. Harnett, 5 Irish Rep. Eq. 308; S. C. 16 Ir. Ch. Rep. 268; Smith v. Dublin etc. R. R. Co., 3 Irish Ch. 225; Blount v. Great Southern etc. R. R. Co. 2 Irish Ch. 40; and see Regents Canal Co. v. Ware, 23 Beav. 575; Munro v. Newry etc. R. R. Co., 2 Irish Ch. 260; Edinburgh etc. R. R. Co. v. Leven, 1 Macqueen 284.

³⁵ Norwood v. Gonzales County, 79 Tex. 218, 14 S. W. Rep.

1057; Douglas County v. Taylor, 50 Neb. 535. See Whalen v. Bates, 19 R. I. 274, 33 Atl. Rep. 224; Bancroft v. San Diego, 120 Cal. 432.

³⁶ Boston v. Robbins, 126 Mass. 384.

³⁷ Carpenter v. New York, 27 Misc. N. Y. 272; see Baker v. New York, 31 App. Div. N. Y. 112.

³⁸ Reynolds v. Louisiana etc. R. R. Co., 59 Ark. 171, 26 S. W. Rep. 1039.

CHAPTER XXVIII.

THE REMEDY FOR A WRONGFUL INTERFERENCE WITH PROPERTY UNDER COLOR OF EMINENT DOMAIN, AND OTHER REMEDIES.

§ 631. Injunction to prevent entry or construction of works before complying with the law or without authority of law.—It is now almost universally held that an entry upon private property under color of the eminent domain power will be enjoined until the right to make such entry has been perfected by a full compliance with the constitution and the laws.¹ If the just compensation has not been

¹ Tait v. Hall, 71 Cal. 149; County Comrs. v. Humphrey, 47 Ga. 565; Morgan v. Miller, 59 Ia. 481; Bolton v. McShane, 67 Ia. 207; Chicago & Atchison Bridge Co. v. Pacific Mutual Tel. Co., 36 Kan. 113; Frederick v. Groshon, 30 Md. 436; Piedmont & Cumberland Ry. Co. v. Speelman, 67 Md. 260; Devaux v. Detroit, Harr. Ch. (Mich.) 98; Woodruff v. Glendale, 23 Minn. 537; Chadbourne v. Zilsdorf, 34 Minn. 43; Prescott v. Beyer, 34 Minn. 493; McPike v. West, 71 Mo. 199; Mettler v. Easton & Amboy R. R. Co., 25 N. J. Eq. 214; Wagner v. Railway Co., 38 Ohio St. 32; Warner v. Railroad Co., 39 Ohio St. 70; Jarden v. Philadelphia etc. R. R. Co., 3 Whart. 502; Pierpoint v. Harrisville, 9 W. Va. 215; Boughner v. Clarksburg, 15 W. Va. 394; Forsyth v. Wheeling, 19 W. Va. 318; Wilson v. Mineral Point, 39 Wis. 160; Wren v. Walsh, 57 Wis. 98; Bonaparte v. Camden & Amboy R. R. Co., Bald. C. C. 205; Field

v. Carnarvon etc. Ry. Co., L. R. 5 Eq. Cas. 190; S. C., 37 L. J. Ch. 176; Poynder v. Great Northern Ry. Co., 2 Phillips 330; Willey v. South Eastern Ry. Co., 1 McN. & G. 58; Strohecker v. Ala. R. R. Co., 42 Ga. 509; Brunswick etc. R. R. Co. v. Waycross, 94 Ga. 102, 21 S. E. Rep. 145; Willett v. Woodhaws, 1 Brad. 411; Breese v. Poole, 16 Brad. 551; Midland R. R. Co. v. Smith, 113 Ind. 233; Lake Erie & W. R. R. Co. v. Michener, 117 Ind. 465, 20 N. E. Rep. 254; Kern v. Isgrig, 132 Ind. 4, 31 N. E. Rep. 455; Chicago etc. Bridge Co. v. Pac. Mut. Tel. Co., 36 Kan. 113; Hughes v. Milligan, 42 Kan. 396, 22 Pac. Rep. 313; Kent v. Board of Co. Comrs., 42 Kan. 534, 22 Pac. Rep. 610; Calder v. Police Jury, 44 La. An. 173, 10 So. Rep. 726; American Tel. & Tel. Co. v. Smith, 71 Md. 535, 18 Atl. Rep. 910, 1 Am. R. R. & Corp. Rep. 73; Baltimore B. R. R. Co. v. Lee, 75 Md. 596, 23 Atl. Rep. 901; Vanderlip v. Grand Rapids, 79 Mich.

paid, or deposited as required by law,² or if the proceedings under which the right to enter is claimed are invalid for any

322, 41 N. W. Rep. 677; Beatty v. Beethe, 23 Neb. 210, 36 N. W. Rep. 494; Schock v. Falls City, 31 Neb. 599, 48 N. W. Rep. 408; Johnson v. Baltimore etc. R. R. Co., 45 N. J. Eq. 454, 17 Atl. Rep. 574; Pratt v. Roseland R. R. Co., 50 N. J. Eq. 150, 24 Atl. Rep. 1027; Grosser v. City of Rochester, 148 N. Y. 235, 42 N. E. Rep. 672; Gorrell v. Toledo etc. R. R. Co., 4 Ohio C. C. 398; Appeal of Curwensville, 129 Pa. St. 74, 18 Atl. Rep. 561; Penn Gas Coal Co. v. Versailles Gas Co., 131 Pa. St. 522, 19 Atl. Rep. 933; S. C., 2 Monaghan Pa. Sup. Ct. 730; Ostrom v. San Antonio, 77 Tex. 345, 14 S. W. Rep. 66; Yates v. West Grafton, 33 W. Va. 507, 11 S. E. Rep. 8; Church v. Joint School District, 55 Wis. 399; Northern Pac. R. R. Co. v. B. & M. R. R. Co., 4 Fed. Rep. 298; Jones v. Florida etc. R. R. Co., 41 Fed. Rep. 70; Cincinnati Southern R. R. Co. v. Chattanooga etc. R. R. Co., 44 Fed. Rep. 470; Southern Pac. R. R. Co. v. Oakland, 58 Fed. Rep. 50; Everse v. North-West R. R. Co., 2 Montreal Supr. Ct. 290; Wilson v. Port Hope, 2 Grant U. C. 370; Ranken v. East & West India Docks etc. Co., 12 Beav. 298; Harrisburg v. Cravens, 148 Ind. 1; Henry v. Ward, 49 Neb. 392, 68 N. W. Rep. 518; Hodges v. Board of Suprs., 49 Neb. 666, 68 N. W. Rep. 1027; Brink v. Dunmore, 174 Pa. St. 395, 34 Atl. Rep. 598; Bass v. Met. West Side El. R. R. Co., 82 Fed. Rep. 857; also the following sections and notes. Compare

Deering v. York & Cumberland R. R. Co., 31 Me. 172; Brooklyn v. Meserole, 26 Wend. 132.

² McCann v. Sierra Co., 7 Cal. 121; Curran v. Shattuck, 24 Cal. 427; Grigsby v. Burtnett, 31 Cal. 406; Shute v. Chicago & Milwaukee R. R. Co., 26 Ill. 436; Cobb v. Illinois etc. R. R. Co., 68 Ill. 233; La Fayette v. Bush, 19 Ind. 326; Elkhart v. Simonton, 69 Ind. 196; New Albany v. White, 100 Ind. 206; Dinwiddie v. Roberts, 1 G. Greene 363; Trustees of Iowa College v. Davenport, 7 Ia. 213; Horton v. Hoyt, 11 Ia. 496; Young v. Harrison, 6 Ga. 130; Gammage v. Georgia Southern R. R. Co., 65 Ga. 614; Chambers v. Cincinnati & Georgia R. R. Co., 69 Ga. 320; Kirkendall v. Hunt, 4 Kan. 514; Western R. R. Co. v. Owings, 15 Md. 199; New Central Coal Co. v. George's Creek Coal & Iron Co., 37 Md. 537; Stewart v. Raymond R. R. Co., 7 S. & M. 568; Cameron v. Board of Supervisors of Washington Co., 47 Miss. 264; Ray v. Atchison & Nebraska R. R. Co., 4 Neb. 439; Champion v. Sessions County Comrs., 1 Nev. 478; S. C., 2 Nev. 271; Ross v. Elizabethtown etc. R. R. Co., 2 N. J. Eq. 422; Morris & Essex R. R. Co. v. Hudson Tunnel R. R. Co., 25 N. J. Eq. 384; Folley v. Passaic, 26 N. J. Eq. 216; Redman v. Philadelphia etc. R. R. Co., 33 N. J. Eq. 165; Keene v. Borough of Bristol, 26 Pa. St. 46; Saver v. Philadelphia, 35 Pa. St. 231; Appeal of Borough of Verona, 108 Pa. St. 83; Large v. Philadel-

reason,³ an entry will be enjoined. So if the right to enter is claimed under a statute which is unconstitutional and

phia, 3 Phila. 382; *Parker v. East Tenn., Va. & Ga. R. R. Co.*, 13 Lea 669; *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 396; *Mason City Salt & Mining Co. v. Mason*, 23 W. Va. 211; *Shepardson v. Milwaukee & Beloit R. R. Co.*, 6 Wis. 605; *Powers v. Bears*, 12 Wis. 213; *Bohlman v. Green Bay & Lake Pepin Ry. Co.*, 30 Wis. 105; *Diedricks v. Northwestern Union Co.*, 33 Wis. 219; *Bohlman v. Green Bay & Minn. Ry. Co.*, 40 Wis. 157; *Bonaparte v. Camden & Amby R. R. Co.*, 1 Bald. C. C. 205; *Eidemiller v. Wyandotte City*, 2 Dill. 376; *Northern Pacific R. R. Co. v. St. Paul etc. R. R. Co.*, 1 McCrary 302; *Murphy v. Groot*, 44 Cal. 51; *Georgia etc. R. R. Co. v. Archer*, 87 Ga. 237, 13 S. E. Rep. 636; *Olive v. Union Point etc. R. R. Co.*, 83 Ga. 257, 9 S. E. Rep. 1086; *Travis County v. Trogden*, 88 Tex. 302, 31 S. W. Rep. 358. Of course the text will not apply to those States where it is held that compensation need not be first made. *New Albany & Salem R. R. Co. v. Connelly*, 7 Ind. 32; *Jefferson etc. R. R. Co. v. New Orleans*, 31 La. An. 478; *Heston v. Canal Comrs.*, *Brightley's N. P.* 183; *Johnston v. Rankin*, 70 N. C. 550; *Phifer v. Carolina Central R. R. Co.*, 72 N. C. 433.

³ *Miller v. Mobile*, 47 Ala. 163; *Curry v. Jones*, 4 Del. Ch. 559; *Frizell v. Rogers*, 82 Ill. 109; *McPherson v. Holdredge*, 24 Ill. 38; *Erwin v. Fulk*, 94 Ind. 235; *Alcott v. Acheson*, 49 Ia. 569;

Barnes v. Fox, 61 Ia. 18; *Oliphant v. Commissioners of Atchison Co.*, 18 Kan. 386; *McMillen v. Baker*, 20 Kan. 50; *Jeffries v. Swampscott*, 105 Mass. 535; *Lohman v. St. Paul etc. R. R. Co.*, 18 Minn. 174; *Penrice v. Wallis*, 37 Miss. 172; *Carpenter v. Grisham*, 59 Mo. 247; *Chaplin v. New York*, 3 Paige 573; *Meserole v. Brooklyn*, 8 Paige 198; *Anderson v. Commissioners of Hamilton Co.*, 12 Ohio St. 635; *Floyd v. Turner*, 23 Tex. 292; *Paris v. Mason*, 37 Tex. 447; *Lumsden v. Milwaukee*, 8 Wis. 485; *People v. Miller*, 82 Cal. 153, 22 Pac. Rep. 935; *Chaplin v. Highway Comrs.*, 129 Ill. 651; *S. C.*, 27 Ill. App. 643; *Hudson v. Voreis*, 134 Ind. 642, 34 N. E. Rep. 503; *Chicago etc. R. R. Co. v. Ellithorpe*, 78 Ia. 415, 43 N. W. Rep. 277; *Union Pacific R. R. Co. v. Kindred*, 43 Kan. 134, 23 Pac. Rep. 112; *Beatty v. Beethe*, 23 Neb. 210, 36 N. W. Rep. 494; *Croft v. Bennington etc. R. R. Co.*, 64 Vt. 1, 23 Atl. Rep. 922; *Quackenbush v. Dist. of Columbia*, 9 Mackey 300; *Ft. Wayne v. Ft. Wayne etc. R. R. Co.*, 149 Ind. 25; *Hentzler v. Bradbury*, 5 Kan. App. 1; *Peterson v. Hopewell*, 55 Neb. 670, 76 N. W. Rep. 451; *Lexington Print Works v. Canton*, 167 Mass. 341, 45 N. E. Rep. 746; *Pagel v. County Comrs.*, 17 Mon. 586; *Grady v. Dundon*, 30 Or. 333; *Sime v. Spencer*, 30 Or. 340. Some cases limit the relief to where the invalidity depends upon extrinsic facts. *Miller v. Mobile*, 47 Ala.

void,⁴ or which does not confer the power of eminent domain.⁵ So an injunction will be granted to prevent the taking of property which is not within the power granted,⁶ or after the power has been exhausted,⁷ or after the right has been lost by delay.⁸ Where property has long been in the possession of the plaintiff, an injunction will lie against public officers to prevent them from taking the same under the claim that it is part of a public street, until the right has been tried at law.⁹ Where the width of a right of way as originally established was indefinite but its width has been defined by user, an injunction will lie to prevent any

163; *Baldwin v. Buffalo*, 35 N. Y. 375.

⁴ *Parham v. Justices etc.*, 9 Ga. 341; *Wild v. Dieg*, 43 Ind. 455; *Carbon Coal & Min. Co. v. Drake*, 26 Kan. 345; *Morse v. Stocker*, 1 Allen 150; *Watson Exr. v. Trustees etc.*, 21 Ohio St. 667; *Rhine v. McKinney*, 53 Tex. 354; *Savannah etc. R. R. Co. v. Savannah*, 96 Ga. 680, 23 S. E. Rep. 847; *Welton v. Dickson*, 38 Neb. 767, 57 N. W. Rep. 559; *Mitchell v. White Plaines*, 62 Hun 231, 41 N. Y. St. Rep. 787, 16 N. Y. Supp. 828; *Moore v. Sanford*, 151 Mass. 285, 24 N. E. Rep. 323.

⁵ *Brunswick etc. R. R. Co. v. Waycross*, 94 Ga. 102. Contra: *Birmingham Traction Co. v. Birmingham R. R. & Elec. Co.*, 119 Ala. 137, 24 So. Rep. 502.

⁶ *Butler v. Thomasville*, 74 Ga. 570; *Forbes v. Delagmutt*, 68 Ia. 164; *Trustees v. Walsh*, 57 Ill. 363; *Flanders v. Wood*, 24 Wis. 572; *Hughes v. Trustees of Modern College*, 1 Ves. Sr. 188; *Little Nestucca Road Co. v. Tillamook County*, 31 Or. 1; *Day v. Springfield*, 102 Mass. 310; *Henry v. Perry Township*, 48 Ohio St. 172, 30 N. E. Rep. 1122. But,

where it appeared the plaintiff would suffer no damage, the injunction was refused. *Brown v. Gardner*, Harr. Ch. (Mich.) 291. It has been held that an injunction will lie to prevent the taking of an unnecessary or excessive amount of property. *Coe v. Aiken*, 61 Fed. Rep. 24; *Webb v. Manchester etc. R. R. Co.*, 4 Mylne & C. 116; *Flower v. London etc. R. R. Co.*, 2 Drewry & Smale 330. See ante, §§ 279, 280.

⁷ *Moorhead v. Little Miami R. Co.*, 17 Ohio 340.

⁸ *Myers v. Daubenbiss*, 84 Cal. 1, 23 Pac. Rep. 1027; *Breese v. Poole*, 16 Brad. 551.

⁹ *Tate v. Sacramento*, 50 Cal. 242; *Champlin v. Morgan*, 18 Ill. 293; *Owens v. Crossett*, 105 Ill. 354; *Chadbourne v. Zilsdorf*, 34 Minn. 43; *Devaux v. Detroit*, Harr. Ch. (Mich.) 98; *Baldwin v. Buffalo*, 29 Barb. 396; *Ostrom v. San Antonio*, 77 Tex. 345 14 S. W. Rep. 66; *Paine Lumber Co. v. Oshkosh*, 86 Wis. 397, 56 N. W. Rep. 1088. In *Commissioners v. Green*, 156 Ill. 504, 41 N. E. Rep. 154, where a highway was opened partly on the plain-

encroachment beyond the limits as so fixed.¹⁰ Where an appeal was taken by certain parties from the decision of commissioners in proceedings to establish a highway, upon grounds going to the validity of the whole proceedings, and the case would be tried *de novo* in the appellate court, it was held that the appeal suspended the whole proceeding and that an entry in the meantime upon property belonging to persons who had not appealed would be enjoined.¹¹ A statute authorized the supervisor to enter upon lands adjoining a highway and construct drains, where suitable drains could not be made on the highway. It was provided that the owner should be requested to point out the place where the drain should be made, but if he refused then the supervisor could make the selection. It was held that the owner could enjoin the construction of a drain, if a suitable one could be made on the highway, or if he had pointed out a suitable place for it and the supervisor proposed to construct it elsewhere.¹² The owner of the fee in a railroad right of way may enjoin the construction of a telegraph line thereon, intended for general commercial use.¹³

§ 632. **The grounds of jurisdiction in such cases.**—The grounds upon which equity takes jurisdiction in such cases are not always plainly defined and differ in different jurisdictions. Perhaps a majority of the cases are put upon the ground of irreparable injury and the consequent lack of an adequate remedy at law.¹⁴ In a few cases the relief has been denied on the ground that the remedy at law was ade-

tiff's land, none of which was included in the location, and the defendants, highway commissioners, had repeatedly torn down the plaintiff's fences built upon the boundary of his land, it was held that the plaintiff could not maintain a bill to enjoin further interference with his possession, there being no showing of insolvency of the defendants.

¹⁰ Commissioners of Highways v. Harrison, 108 Ill. 398; Pres-

cott v. Beyer, 34 Minn. 493; Warner v. Railroad Co., 39 Ohio St. 70.

¹¹ Pool v. Breese, 114 Ill. 594.

¹² Cauble v. Hultz, 118 Ind. 13, 20 N. E. Rep. 515. See Wilson v. Bondurant, 142 Ill. 645, 32 N. E. Rep. 498.

¹³ American Tel. & Tel. Co. v. Smith, 71 Md. 535, 18 Atl. Rep. 910, 1 Am. R. R. & Corp. Rep. 73.

¹⁴ Grigsby v. Burtnett, 31 Cal. 406; Erwin v. Fulk, 94 Ind. 235;

quate.¹⁵ But in most of these there were other circumstances which rendered it inequitable to grant the relief, while, in many of the cases in which injunctions were granted on the ground of irreparable injury, it was plain enough that the injury could have been readily repaired or fully compensated in money.

It seems to us that the jurisdiction of equity in such cases may be placed upon broader grounds; namely, that where the power of eminent domain has been delegated to public officers or others who are threatening to make a permanent appropriation of private property to public uses, in excess of the power granted or without complying with the conditions upon which the right to make the appropriation is given, a court of equity will prevent the threatened wrong without regard to the question of irreparable damages or the existence of legal remedies which may afford a money compensation.¹⁶ The remedy in equity protects both the

McMillan v. Baker, 20 Kan. 50; Carpenter v. Grisham, 59 Mo. 247; McPike v. West, 71 Mo. 199; Champion v. Sessions County Comrs., 1 Nev. 478; Folley v. Passaic, 26 N. J. Eq. 216; Pierpont v. Harrisville, 9 W. Va. 215; Forsyth v. Wheeling, 19 W. Va. 318; Wilson v. Mineral Point, 39 Wis. 160; Uren v. Walsh, 57 Wis. 98; Bonaparte v. Camden & Amboy R. R. Co., 1 Bald. C. C. 205; Eidemiller v. Wyandotte City, 2 Dill. 376; Boulo v. New Orleans etc. R. R. Co., 55 Ala. 480; Welton v. Dickson, 38 Neb. 767, 57 N. W. Rep. 559; Church v. Joint School District, 55 Wis. 399.

¹⁵ Nichols v. Sutton, 22 Ga. 369; Lewis v. Rough, 26 Ind. 398; Smith v. Weldon, 73 Ind. 454; Mercer v. Williams, Walker Ch. (Mich.) 85; Brown v. Gardner, Harr. (Mich.) 291; Anderson v. St. Louis, 47 Mo. 479; McLaughlin v. Sandusky, 17 Neb. 110; Chesapeake & Ohio R. R. Co. v.

Patton, 5 W. Va. 234; Commissioners of Highways v. Green, 156 Ill. 504, 41 N. E. Rep. 154.

¹⁶ Cobb v. Illinois etc. Co., 68 Ill. 233; Bolton v. McShane, 67 Ia. 207; Western R. R. Co. v. Owings, 15 Md. 199; Frederick v. Groshon, 30 Md. 436; Pennsylvania R. R. Co.'s Appeal, 115 Pa. St. 514; Kern v. Isgrigg, 132 Ind. 4, 31 N. E. Rep. 455; Baltimore B. R. Co. v. Lee, 75 Md. 596, 23 Atl. Rep. 901; Vanderlip v. Grand Rapids, 79 Mich. 322, 41 N. W. Rep. 677; Welton v. Dickson, 38 Neb. 767, 57 N. W. Rep. 559; Weidenfeld v. Sugar Run R. R. Co., 48 Fed. Rep. 615; Wilson v. Port Hope, 2 Grant U. C. 370. In Browning v. Camden & Amboy R. R. Co., 4 N. J. Eq. 47, 57, the court say: "If his (the plaintiff's) rights of property are about to be destroyed without the authority of law, or if lawless danger impends over them by persons acting under the col-

owner and those acting under the authority, and is more speedy and efficacious in its operation than the ordinary legal remedies.¹⁷ The Supreme Court of Alabama, in discussing the question, uses the following language: "The principle upon which a court of equity proceeds, in interfering to prevent bodies corporate having compulsory power to enter upon, take and appropriate for their own uses, the lands of others, differs materially from the principle upon which it intervenes to prevent the commission or continuance of waste, or of nuisances, or of trespasses, when only private rights, or the acts of persons, natural or artificial, not having such powers are involved. In the latter class of cases, if the right be strictly legal, and there is no relation of privity between the parties, it is of the essence of the jurisdiction of the court, that a case of irreparable injury be shown; a case for which the courts of law do not furnish an adequate remedy. The constitution not only compels all corporate bodies, public or private, or all individuals who may be armed with the power of taking private property, but it compels the State and all its agencies and instrumentalities, to the duty of first making just compensation to the owner. * * * It is most essential to the preservation of the rights of private property, to the protection of the citizen, and to the preservation of the best interests of the community, that all who are invested with the right of eminent domain, with the extraordinary power of depriving persons, natural or artificial, without their consent, of their property, and its possession and enjoyment, should be kept in the strict line of the authority with which they are clothed, and compelled to implicit obedience to the mandates of the constitution. A court of equity will intervene to keep them within the line of authority, and to compel

or of law, when the law gives them no power, or when it is abused, misapplied, exceeded, or not strictly pursued, and the act impending would subject the party committing it to damages in a court of law for a trespass,

a court of equity will enjoin its commission." The text is approved in *Bass v. Met. West Side El. R. R. Co.*, 82 Fed. Rep. 857.

¹⁷ *Bolton v. McShane*, 67 Ia. 207.

obedience to the constitution, because of the necessity that they should be kept within control, and in subjection to the law, rather than upon the theory that they are trespassers, or that the injury which they are inflicting is irreparable. The owner of the land has the right to say that, unless they keep within the strict limits prescribed by law, they shall not disturb him in the possession and enjoyment of his property. The power is so capable of abuse, and those who are invested with it are often so prone to its arbitrary and oppressive exercise, that a court of equity, without inquiring whether there is irreparable injury, or injury not susceptible of adequate redress by legal remedies, will intervene for the protection of the owner."¹⁸

§ 633. **When the relief will be refused.**—The relief in equity will be denied where it is based upon mere irregularities in the proceedings which do not render them invalid,¹⁹ or where the plaintiff's title is in dispute.²⁰ The plaintiff in such cases must make a clear right to the relief sought,

¹⁸ East etc. R. R. Co. v. East Tenn. etc. R. R. Co., 75 Ala. 275, 280, 281. And see especially: Kern v. Isgrigg, 132 Ind. 4, 31 N. E. Rep. 455; Baltimore B. R. Co. v. Lee, 75 Md. 596, 23 Atl. Rep. 901; Vanderlip v. Grand Rapids, 79 Mich. 322, 41 N. W. Rep. 677; Welton v. Dickson, 38 Neb. 767, 57 N. W. Rep. 559.

¹⁹ Indiana Oolitic Limestone Co. v. Louisville, New Albany & Chicago R. R. Co., 107 Ind. 301; Caskey v. Greensburg, 78 Ind. 233; Savings Fund & Loan Association v. Schmidt, 15 Ia. 213; Thorp v. Witham, 65 Ia. 566; Commissioners v. Espen, 12 Kan. 531; Nichols v. Salem, 14 Gray 490; Walker v. Mad River etc. R. R. Co., 8 Ohio 38; Ottawa v. Chicago etc. R. R. Co., 25 Ill. 43; Keigwin v. Drainage Comrs., 115 Ill. 347; Whittaker v. Guth-

eridge, 52 Ill. App. 460; McDonald v. Payne, 114 Ind. 359; Rockwell v. Bowers, 88 Ia. 88, 55 N. W. Rep. 1; Taylor v. Todd, 48 Mo. App. 550; Hopkins v. Keller, 16 Neb. 569; Morris v. New York, 55 Hun 476, 29 N. Y. St. Rep. 376, 8 N. Y. Supp. 763; Hopkins v. Cravey, 85 Tex. 189, 19 S. W. Rep. 1067. Where the injury to the owner would be slight and the detriment to the public great if the work was interrupted, an injunction was denied. Great Falls Manf. Co. v. Garland, 25 Fed. Rep. 521.

²⁰ Chesapeake & Ohio Canal Co. v. Young, 3 Md. 480; Hammerslough v. City of Kansas, 57 Mo. 219; Lanterman v. Blairstown R. R. Co., 28 N. J. Eq. 1; Lamasco City v. Brinkmeyer, 12 Ind. 349; Morris Canal etc. Co. v. Central R. R. Co., 16 N. J. Eq.

or it will be denied.²¹ Where the condemnation of property was sought by a railroad company and, pending proceedings, the same was purchased by the president of a rival company for the purpose of obstructing the former in its acquisition of the property, it was held that a court of equity would not aid such purchaser, either by enjoining the proceedings or by enjoining an entry before compensation was made.²² The fact that plaintiff had filed a petition for damages, was held not to bar his right to contest the right to take by a bill in equity.²³ The defendant may condemn and thus avoid the injunction.²⁴ Where the exact location of a highway, which had been laid out but not opened, was in dispute and the owner builds on the location as claimed by the city, which proves to be the true one, and after warning by the city, the owner cannot enjoin opening the highway through his building.²⁵ Where an owner appears in condemnation proceedings and abandons his defense, he cannot afterwards enjoin an entry upon grounds which might have been litigated in the condemnation proceedings.²⁶

§ 634. Injunction to prevent the continued use of property until the damages are paid when condemnor already

419; Appeal of Patterson, 129 Pa. St. 109, 18 Atl. Rep. 563; Jones v. Florida etc. R. R. Co., 41 Fed. Rep. 70.

²¹ Gleason v. Jefferson, 78 Ill. 399; Worthington v. Bicknell, 1 Bland 186. In the following cases the relief was denied on various grounds: McDaniel v. Columbus, 87 Ga. 440, 13 S. E. Rep. 745; Hawkins v. Stanford, 138 Ind. 267, 37 N. E. Rep. 794; Taeger v. Rieppe, 90 Ia. 484, 57 N. W. Rep. 1125; Blakeslee v. Missouri Pac. R. R. Co., 43 Neb. 61, 61 N. W. Rep. 118; Wellington etc. R. R. Co. v. Cashie etc. Co., 116 N. C. 924, 20 S. E. Rep. 964; Heston v. Canal Comrs., 1 Pa. Rep. 25; Smart v. Johnston, 17

R. I. 778, 24 Atl. Rep. 830; Campbell v. Point Pleasant etc. R. R. Co., 23 W. Va. 448; Nicolai v. Vernon, 88 Wis. 551, 60 N. W. Rep. 999.

²² Piedmont & Cumberland Ry. v. Speelman, 67 Md. 260. To same effect: Ocean City R. R. Co. v. Bray, 57 N. J. Eq. 164.

²³ Moore v. Sanford, 151 Mass. 285, 24 N. E. Rep. 283. And see Youhioghenny Riv. Coal Co. v. Robertson, 12 Pa. Co. Ct. 1.

²⁴ Evans v. Santana etc. Co., 81 Tex. 622, 17 S. W. Rep. 232.

²⁵ Verga v. Miller, 45 N. J. Eq. 93, 15 Atl. Rep. 835.

²⁶ Shoppert v. Martin, 137 Mo. 455.

in possession. —Where a wrongful entry is made upon property for the purpose of appropriating it to public uses, and the owner acts with diligence, he may enjoin the further use of the property until compensation is made.²⁷ But, if the entry is made with the consent of the owner, upon some understanding as to the future adjustment of compensation, or if the owner acquiesces in a possession taken without his knowledge, he cannot enjoin the use of his property until he has exhausted his legal remedies or they are shown to be inadequate.²⁸ In Minnesota it has been held that mere delay will not prevent the owner asserting any legal or equitable remedy.²⁹

²⁷ *Gay v. New Orleans Pacific Ry. Co.*, 32 La. An. 277; *Organ v. Memphis etc. R. R. Co.*, 51 Ark. 235, 11 S. W. Rep. 96; *Koenig v. C. & Q. R. R. Co.*, 27 Neb. 699, 43 N. W. Rep. 423. But in some cases, where the remedy by ejectment or for compensation was deemed adequate, the injunction was refused. *Thorn v. Sweeny*, 12 Nev. 251; *Jersey City v. Gardner*, 23 N. J. Eq. 622, reversing S. C., 32 N. J. Eq. 586; *Thomas v. Grand View Beach R. R. Co.*, 76 Hun 601, 28 N. Y. Supp. 201.

²⁸ *Richards v. Des Moines Valley R. R. Co.*, 18 Ia. 259; *Hibbs v. C. & S. W. R. R. Co.*, 39 Ia. 340; *Irish v. B. & S. W. R. R. Co.*, 44 Ia. 380; *Evans v. Missouri, Ia. & Neb. Ry. Co.*, 64 Mo. 453; *Provolt v. Chicago, R. I. & P. R. Co.*, 69 Mo. 633; *Sturtevant v. Milwaukee etc. R. R. Co.*, 11 Wis. 63; *Stretton v. Great Western & Brentford Ry. Co.*, 40 L. J. Eq. 50; *Organ v. Memphis etc. R. R. Co.*, 51 Ark. 235, 11 S. W. Rep. 96; *Midland R. R. Co. v. Smith*, 113 Ind. 233;

Sunderland v. Martin, 113 Ind. 411; *Midland R. R. Co. v. Smith*, 135 Ind. 348, 35 N. E. Rep. 284; *Pennsylvania Co. v. Platt*, 47 Ohio St. 366, 25 N. E. Rep. 1028; *Kelley v. Green Bay etc. R. R. Co.*, 89 Wis. 328; *Carnochan v. Norwich etc. R. R. Co.*, 26 Beav. 169; *Pell v. Northampton etc. R. R. Co.*, L. R. 2 Ch. App. 100.

²⁹ *Wayzata v. Great Northern R. R. Co.*, 46 Minn. 505, 49 N. W. Rep. 205. The court says: "One who enters upon and possesses land of another without right—a mere trespasser, and knowing that he is such—cannot, no matter to what use he may put it, nor how much he may improve or expend upon it, claim that the owner is estopped, by mere delay in ousting him, to seek any remedy, legal or equitable, appropriate to the case. In such case, so long as the latter remains the owner, such remedies are open to him, unless barred by statute. Whatever the trespasser does upon the land he does at his own risk, and, if he does what makes it incon-

Where an entry is made in good faith, as upon the consent of one representing himself as owner,³⁰ or upon a mistaken belief of ownership,³¹ and an injunction would be of little value to the owner and a great detriment to the defendant, one will not be granted. In Ohio it has been held that, where the owner agreed with a railroad company that it might enter and construct its road and that damages should be fixed by arbitration and that if not paid within sixty days after being so fixed the company should forfeit all rights under the agreement, the owner could not enjoin the use of his property on account of non-payment for sixty days, but must be left to his legal remedies.³² It has been held that, where the action for damages was barred by the statute, an injunction would not lie to prevent the use of the property.³³ A statute of Wisconsin, passed in 1858, provided that, if a railroad company should take possession of land and should fail for six months to have the damages assessed and paid, the owner might enjoin the use of his property until such payment was made.³⁴ The statute was held not to apply to a case where the owner conveyed to the company for a consideration to be paid, which the company afterwards failed to pay.³⁵ In the same State a law was held valid which provided that no injunction should issue until the damages had been ascertained and the company had failed to pay, the owner having the right to institute proceedings.³⁶

The restraining order in any case should not be too broad in its terms. Thus an order restraining a city from opening

venient for him to have the appropriate remedies enforced, he and not the owner must suffer the inconvenience. He has brought it on himself." And see *Illinois Cent. R. R. Co. v. Railroad Co.*, 85 Ill. 211.

³⁰ *Pickert v. Richfield Park R. R. Co.*, 25 N. J. Eq. 316.

³¹ *Erie R. R. Co. v. Delaware etc. R. R. Co.*, 21 N. J. Eq. 283.

³² *Coe v. Columbus etc. R. R.*

Co., 10 Ohio St. 372, 411. But see *Thornton v. Sheffield etc. R. R. Co.*, 84 Ala. 109.

³³ *Mooers v. Kennebec & Portland R. R. Co.*, 58 Me. 279.

³⁴ *Davis v. La Crosse & Miss. R. R. Co.*, 12 Wis. 16, 25.

³⁵ *Vilas v. Milwaukee etc. R. R. Co.*, 15 Wis. 233.

³⁶ *Andrews v. Farmers' Loan & Trust Co.*, 22 Wis. 288.

or causing to be opened a certain street was held erroneous.³⁷ The order should restrain the entry or threatened injury under the particular claim or color of right, or until the right has been acquired by a compliance with the law.³⁸

§ 635. To prevent the laying or operating of commercial railroads in streets.³⁹—Upon this subject the authorities are conflicting. It is generally held that, where the fee of the street is in the abutting owner, he may have the same remedies to prevent the use or occupation of his land as though the street did not exist, and consequently may enjoin its use by a railroad company until the right has been lawfully acquired by condemnation or otherwise.⁴⁰ In Florida and West Virginia a contrary doctrine is held, although in the latter State it is said that peculiar circumstances might

³⁷ *Chicago v. Wright*, 69 Ill. 318. See also *Appeal of Borough of Verona*, 108 Pa. St. 83. In *Curran v. Shattuck*, 24 Cal. 427, it was held that a perpetual injunction against opening a road would not prevent its being afterwards opened pursuant to regular proceedings for that purpose.

³⁸ *Champion v. Sessions County Comrs.*, 2 Nev. 271.

³⁹ On the subject of railroads in streets generally, and the rights of abutting owners therein, see ante, §§ 110-125.

⁴⁰ *Columbus & Western Ry. Co. v. Witherow*, 82 Ala. 190; *Cox v. Louisville R. R. Co.*, 48 Ind. 178; *Schurmeier v. St. Paul & Pacific R. R. Co.*, 10 Minn. 82; *Harrington v. St. Paul & Sioux City R. R. Co.*, 17 Minn. 215; *Williams v. New York Central R. R. Co.*, 16 N. Y. 97; *Washington Cemetery Co. v. Prospect Park etc. R. R. Co.*, 68 N. Y. 591; S. C., 7 Hun 655; *Merrill v. Calkins*, 74 N. Y. 1; *Henderson v. New York*

Central R. R. Co., 78 N. Y. 423; S. C., 17 Hun 344; *Fanning v. Osborne*, 34 Hun 121; *People v. Law*, 22 How. Pr. 109; *Ford v. Chicago & Northwestern Ry. Co.*, 14 Wis. 609; *Harbach v. Des Moines etc. R. R. Co.*, 80 Ia. 593, 44 N. W. Rep. 348, 1 Am. R. R. & Corp. Rep. 449; *Lamming v. Galusha*, 135 N. Y. 239, 31 N. E. Rep. 1024; *Eldridge v. Rochester City etc. R. R. Co.*, 54 Hun 194; *Syracuse Solar Salt Co. v. Rome etc. R. R. Co.*, 67 Hun 153, 22 So. Rep. 321, 22 N. Y. Supp. 321; *Wright v. Syracuse etc. R. R. Co.*, 92 Hun 32, 36 N. Y. Supp. 901; *Willamette Iron Works v. Oregon R. & N. Co.*, 26 Or. 224, 37 Pac. Rep. 1016; *Hodges v. Seaboard etc. R. R. Co.*, 88 Va. 653, 14 S. E. Rep. 380; *O'Connor v. So. Pac. R. R. Co.*, 122 Cal. 681; *Bond v. Penn. R. R. Co.*, 171 Ill. 508; *Illinois Cent. R. R. Co. v. Thomas*, 75 Miss. 54; *Coatsworth v. Lehigh Valley R. R. Co.*, 156 N. Y. 451; *Hopkins v. Calasauqua Mfg. Co.*, 180 Pa.

exist which would authorize an injunction in such cases.⁴¹ But the result of the later cases in that State is that the railroad will not be enjoined, unless it will practically destroy the value of the abutting property and so amount in reality to a taking of the property.⁴² Where the fee of the street is in the public, it is held by some authorities that the abutting owner has private easements therein and that he may have an injunction to prevent an interference therewith by the laying of a railroad in the street.⁴³ Other cases hold the contrary, even where it is conceded that the abutting owner is entitled to compensation for the damage to his property.⁴⁴ In some cases it is held that the abutting owner may enjoin a railroad in a street whether he has the fee or not, or without reference to the ownership of the fee,⁴⁵ while

St. 199, 36 Atl. Rep. 735; *Wilkins v. Gaffney City etc. R. R. Co.*, 54 S. C. 199, 32 S. E. Rep. 299.

⁴¹ *Garnett v. Jacksonville etc. R. R. Co.*, 20 Fla. 889; *Spencer v. Point Pleasant & Ohio R. R. Co.*, 23 W. Va. 406; *Smith v. Same*, 23 W. Va. 451; *Hale v. Same*, 23 W. Va. 454.

⁴² *Arbenz v. Wheeling etc. R. R. Co.*, 33 W. Va. 1, 10 S. E. Rep. 14; *Yates v. West Grafton*, 34 W. Va. 783, 12 S. E. Rep. 1075; *Ohio Riv. R. R. Co. v. Ward*, 35 W. Va. 481, 14 S. E. Rep. 142.

⁴³ *Pratt v. Buffalo City Ry. Co.*, 19 Hun 30; *Fanning v. Osborne*, 34 Hun 121; *Falker v. New York, West Shore & Buffalo Ry. Co.*, 17 Abb. N. C. 279; *Third Ave. R. R. Co. v. New York El. R. R. Co.*, 19 Abb. N. C. 261; *Glover v. Manhattan Ry. Co.*, 51 N. Y. Supr. Ct. 1; and cases cited in the next section.

⁴⁴ *Glover v. Manhattan Ry. Co.*, 66 How. Pr. 77; *Chicago & Pacific R. R. Co. v. Francis*, 70 Ill. 238; *Stetson v. Chicago & Evans-*

ton R. R. Co., 75 Ill. 74; *Patterson v. Chicago, D. & V. R. R. Co.*, 75 Ill. 588; *Peoria & Rock Island Ry. Co. v. Schertz*, 84 Ill. 135; *Truesdale v. Peoria Grape Sugar Co.*, 101 Ill. 561; *Mills v. Parlin*, 106 Ill. 60; *Denver etc. R. R. Co. v. Domke*, 10 Col. 247; *O'Brien v. Baltimore Belt R. R. Co.*, 74 Md. 363, 22 Atl. Rep. 141; *Burrus v. Columbus*, 105 Ga. 42, 31 S. E. Rep. 124; *H. B. Anthony Shoe Co. v. West Jersey R. R. Co.*, 57 N. J. Eq. 607; *Black v. Brooklyn Heights R. R. Co.*, 32 App. Div. N. Y. 468; *Burlington Gas Light Co. v. Burlington etc. R. R. Co.*, 165 U. S. 370, 17 S. C. Rep. 359.

⁴⁵ *Savannah, Albany & Gulf R. R. Co. v. Shiels*, 33 Ga. 601; *Macon v. Harris*, 75 Ga. 761; *Dubach v. Hannibal & St. Joseph R. R. Co.*, 89 Mo. 483; *Railway Co. v. Lawrence*, 38 Ohio St. 41; *Pennsylvania R. R. Co.'s Appeal*, 115 Pa. St. 514; *Kavanagh v. Mobile etc. R. R. Co.*, 78 Ga. 271; *Savannah etc. R. R. Co. v. Fort*, 84 Ga. 300, 10 S. E. Rep.

other cases hold exactly the opposite doctrine.⁴⁶ In some cases the remedy in equity has been denied because the injury was slight and the remedy for compensation was deemed ample.⁴⁷ In Missouri, while the relief by injunction is ordinarily denied, it will be granted where the street is narrow and the railroad will practically destroy it as a thoroughfare and deprive abutters of access to their property,⁴⁸ or where the railroad is located close to the plaintiff's prop-

1014; Georgia etc. R. R. Co. v. Ray, 84 Ga. 376, 11 S. E. Rep. 352; Savannah etc. R. R. Co. v. Woodruff, 86 Ga. 94, 13 S. E. Rep. 156; Bez v. Chicago etc. R. R. Co., 23 Ill. App. 137; Coombs v. Salt Lake etc. R. R. Co., 9 Utah 322, 34 Pac. Rep. 248.

⁴⁶ New Albany & Salem R. R. Co. v. O'Dailey, 12 Ind. 551; Harrison v. New Orleans Pacific R. R. Co., 34 La. An. 462; Corcoran v. Chicago etc. R. R. Co., 149 Ill. 291, 37 N. E. Rep. 68, affirming S. C. 37 Ill. App. 417; Roelker v. St. Louis etc. R. R. Co., 50 Ind. 127; Decker v. Evansville Suburban etc. R. R. Co., 133 Ind. 493, 33 N. E. Rep. 349; McMahon v. St. Louis etc. R. R. Co., 41 La. An. 827, 6 So. Rep. 640; Planet P. & F. Co. v. St. Louis etc. R. R. Co., 115 Mo. 613, 22 S. W. Rep. 616; Henry Gauss & Sons Mfg. Co. v. St. Louis etc. R. R. Co., 113 Mo. 308, 20 S. W. Rep. 658, 7 Am. R. R. & Corp. Rep. 235; Osborne v. Missouri Pac. R. R. Co., 147 U. S. 248, 13 S. C. Rep. 299; Osborne v. Missouri Pac. R. R. Co., 35 Fed. Rep. 84; Denver etc. R. R. Co. v. Barsaloux, 15 Col. 290, 25 Pac. Rep. 165; Denver etc. R. R. Co. v. Toohey, 15 Col. 297, 25 Pac. Rep. 166; Burkham v. Ohio etc.

R. R. Co., 122 Ind. 344, 23 N. E. Rep. 799; Dulaney v. Louisville etc. R. R. Co., 100 Ky. 628.

⁴⁷ Schurmeier v. St. Paul & Pacific R. R. Co., 8 Minn. 113; Zabriskie v. Jersey City etc. R. R. Co., 13 N. J. Eq. 314; Booraem v. North Hudson County R. R. Co., 40 N. J. Eq. 557; Hamilton v. New York & Harlem R. R. Co., 9 Paige 171; Western Railway of Ala. v. Ala. G. T. R. R. Co., 96 Ala. 272, 11 So. Rep. 483; Garrett v. Lake Roland El. R. R. Co., 79 Md. 277, 29 Atl. Rep. 830, 10 Am. R. R. & Corp. Rep. 39; Pratt v. New York Central etc. R. R. Co., 90 Hun 83, 35 N. Y. Supp. 557; and see Herbert v. Pennsylvania R. R. Co., 43 N. J. Eq. 21, 10 Atl. Rep. 872.

⁴⁸ Lockwood v. Wabash R. R. Co., 122 Mo. 86, 26 S. W. Rep. 698; Sherlock v. Kansas City Belt R. R. Co., 142 Mo. 172; Corby v. Chicago etc. R. R. Co., 150 Mo. 457. And see Commonwealth v. Frankfort, 92 Ky. 149, 17 S. W. Rep. 287; Chicago etc. R. R. Co. v. Eisert, 127 Ind. 156, 26 N. E. Rep. 759; Hendrie v. Toronto etc. R. R. Co., 26 Ontario 667; Hepting v. New Orleans etc. R. R. Co., 36 La. An. 898.

erty,⁴⁹ or where it is for private use.⁵⁰ A right of way along a street does not justify its use for storing cars, and such use was enjoined at the instance of the abutting owner.⁵¹ The abutting owner can only enjoin the use of the street for railroad purposes in front of his own premises.⁵² The passage of an ordinance giving authority to a company to occupy a street will not be enjoined, since the passage of the ordinance alone results in no injury to private property.⁵³ It is held that the attorney general may maintain an information to restrain a railroad company from laying a track in a public street without authority.⁵⁴ As to whether a city or county can maintain such a bill, the authorities are conflicting.⁵⁵ Of course, the right to use a public street for railroad purposes may be acquired in any case by obtaining the consent of the public authorities and making just compensation to the owners.⁵⁶ If the plaintiff does not own the fee of the street and his property is not damaged, an injunction will not be granted.⁵⁷ Where the tracks had

⁴⁹ Knapp, Stout & Co. v. St. Louis Transfer R. R. Co., 126 Mo. 26, 28 S.W.Rep. 627; Schulenburg etc. Lumber Co. v. St. Louis etc. R. R. Co., 129 Mo. 455, 33 S. W. Rep. 796.

⁵⁰ Glaessner v. Anheuser-Busch Brewing Ass., 100 Mo. 508, 13 S. W. Rep. 707, 2 Am. R. R. & Corp. Rep. 420. The following are similar cases in which relief by injunction was granted: Gustafson v. Hamm, 56 Minn. 334, 57 N. W. Rep. 1054; Appeal of Hartman Steel Co., 129 Pa. St. 551, 18 Atl. Rep. 553; Barker v. Hartman Steel Co., 6 Pa. Co. Ct. 183.

⁵¹ Pennsylvania R. R. Co. v. Angel, 41 N. J. Eq. 316; Pennsylvania R. R. Co. v. Thompson, 45 N. J. Eq. 870, 19 Atl. Rep. 622, 14 Atl. Rep. 897.

⁵² Moran v. Lydecker, 11 Abb. N. C. 298.

⁵³ Whitney v. New York, 28 Barb. 233.

⁵⁴ Attorney General v. Morris & Essex R. R. Co., 19 N. J. Eq. 386.

⁵⁵ Yes: Brooklyn Steam Transit Co. v. Brooklyn, 78 N. Y. 524; Northern Central R. R. Co. v. Baltimore, 21 Md. 93. No: Kings County v. Sea View Ry. Co., 23 Hun 180; Milwaukee v. Milwaukee & Beloit R. R. Co., 7 Wis. 85.

⁵⁶ Heath v. Des Moines & St. Louis Ry. Co., 61 Ia. 11.

⁵⁷ Hogan v. Central Pacific R. R. Co., 71 Cal. 83. See Indianapolis & St. Louis R. R. Co. v. Calvert, 110 Ind. 555; and compare Pennsylvania R. R. Co.'s Appeal, 115 Pa. St. 514.

been in use in the street for ten years without objection, it was held too late to enjoin.⁵⁸

§ 635a. To prevent the construction or operation of elevated railroads in streets.—Some courts make a distinction between elevated railroads and surface railroads, as respects the right of the abutting owner to compensation.⁵⁹ But the right of the abutter to enjoin the construction or operation of such a road until his compensation has been paid stands upon the same footing as in the case of the commercial railroad. The right to injunctive relief in such cases has been affirmed in numerous cases in New York.⁶⁰ But if the road has been duly authorized the injunction will not be made absolute in the first instance, but the defendant will be given an opportunity to condemn the plaintiff's easements,⁶¹ or the court will itself ascertain the

⁵⁸ *Baltimore & Ohio R. R. Co. v. Strauss*, 37 Md. 237.

⁵⁹ *Fobes v. Rome etc. R. R. Co.*, 121 N. Y. 505, 24 N. E. Rep. 919, 3 Am. R. R. & Corp. Rep. 182.

⁶⁰ *Shepard v. Manhattan R. R. Co.*, 117 N. Y. 442, 23 N. E. Rep. 30; *Pappenheim v. Metropolitan El. R. R. Co.*, 128 N. Y. 436, 28 N. E. Rep. 518, 5 Am. R. R. & Corp. Rep. 378; *Macey v. Met. El. R. R. Co.*, 59 Hun 365, 36 N. Y. St. Rep. 245, 12 N. Y. Supp. 804; S. C. affirmed 128 N. Y. 624; *Knox v. Met. El. R. R. Co.*, 58 Hun 517, 36 N. Y. St. Rep. 2, 12 N. Y. Supp. 848; S. C. affirmed 128 N. Y. 625; *Kearney v. Metropolitan El. R. R. Co.*, 129 N. Y. 76, 29 N. E. Rep. 70; *American Bank Note Co. v. New York El. R. R. Co.*, 129 N. Y. 252, 29 N. E. Rep. 302, 5 Am. R. R. & Corp. Rep. 583; *Lynch v. Met. El. R. R. Co.*, 129 N. Y. 274, 29 N. E. Rep. 315; *Bohm v. Met. El. R. R. Co.*, 129 N. Y.

576, 29 N. E. Rep. 802, 5 Am. R. R. & Corp. Rep. 416; *Hughes v. Met. El. R. R. Co.*, 57 N. Y. Supr. Ct. 378, 8 N. Y. Supp. 535; S. C. affirmed 130 N. Y. 14; *Minton v. New York El. R. R. Co.*, 130 N. Y. 332, 29 N. E. Rep. 319; *Thompson v. Manhattan R. R. Co.*, 130 N. Y. 360, 29 N. E. Rep. 264; *Mitchell v. Met. El. R. R. Co.*, 56 Hun 543, 31 N. Y. St. Rep. 625, 9 N. Y. Supp. 829; S. C. affirmed 134 N. Y. 11; *Woolsey v. New York El. R. R. Co.*, 134 N. Y. 323, 30 N. E. Rep. 387; *Eno v. Met. El. R. R. Co.*, 56 N. Y. Supr. Ct. 313, 8 N. Y. Supp. 197; *Shepard v. Manhattan R. R. Co.*, 57 N. Y. Supr. Ct. 5, 5 N. Y. Supp. 189.

⁶¹ *Jacquelin v. Manhattan R. R. Co.*, 9 Misc. 329, 29 N. Y. Supp. 1113; *In re Brooklyn El. R. R. Co.*, 76 Hun 79, 27 N. Y. Supp. 493; *Stroub v. Manhattan R. R. Co.*, 59 N. Y. Supr. Ct. 505, 15 N. Y. Supp. 135; *Blumenthal v. New York El. R. R. Co.*,

just compensation to be paid the plaintiff and make the injunction conditional on the failure to pay the sum so ascertained.⁶² In Illinois and Maryland an injunction will be refused whether the railroad is duly authorized or not.⁶³ In Pennsylvania, where there was an attempt to construct an elevated railroad under a statute which was held not to authorize it, the court enjoined the work at the suit of an abutting owner.⁶⁴ Where an elevated railroad company was authorized to construct its road in a certain street, it was held that such authority did not justify the occupation of any part of an intersecting street outside the limits of the first street, and a mandatory injunction was granted for the removal of the stairs in such side street.⁶⁵ But where the station projected two feet into the side street, and was no substantial injury to the plaintiff, the granting of a mandatory injunction for its removal was held error.⁶⁶ Where a company had no authority to construct wooden stations but had erected one in front of the plaintiff's property which was a special damage to him, an injunction for its removal was granted.⁶⁷ The use of a street by an ele-

60 N. Y. Supr. Ct. 95; *Bolger v. Met. El. R. R. Co.*, 61 N. Y. Supr. Ct. 459. And see *Henney v. Brooklyn El. R. R. Co.*, 75 Hun 543, 27 N. Y. Supp. 1112; *Watson v. Met. El. R. R. Co.*, 57 N. Y. Supr. Ct. 364, 8 N. Y. Supp. 533; *Renwick v. New York El. R. R. Co.*, 59 N. Y. Supr. Ct. 591, 13 N. Y. Supp. 600.

⁶² See ante, § 625a.

⁶³ *Garrett v. Lake Roland El. R. R. Co.*, 79 Md. 277, 29 Atl. Rep. 830, 10 Am. R. R. & Corp. Rep. 39; *Doane v. Lake Street El. R. R. Co.*, 165 Ill. 510, 46 N. E. Rep. 520; *Phelps v. Same*, 165 Ill. 526, 46 N. E. Rep. 765; *Cummings v. Union El. R. R. Co.*, 169 Ill. 33; *Phelps v. Lake Street El. R. R. Co.*, 60 Ill. App.

471; *Strong v. N. W. El. R. R. Co.*, 64 Ill. App. 533; *Palmer v. Union El. R. R. Co.*, 64 Ill. App. 534; *Blodgett v. N. W. El. R. R. Co.*, 80 Fed. Rep. 601.

⁶⁴ *Potts v. Quaker City El. R. R. Co.*, 161 Pa. St. 396, 29 Atl. Rep. 108; S. C. 12 Pa. Co. Ct. 593.

⁶⁵ *Mattlage v. New York El. R. R. Co.*, 14 Daly 1, 67 How. Pr. 232.

⁶⁶ *Adler v. Met. El. R. R. Co.*, 138 N. Y. 173, 33 N. E. Rep. 935, reversing S. C. 61 N. Y. Supr. Ct. 85.

⁶⁷ *Porth v. Manhattan R. R. Co.*, 58 N. Y. Supr. Ct. 366, 11 N. Y. Supp. 633; affirmed without an opinion, 134 N. Y. 615, 32 N. E. Rep. 649.

vated railroad for storing and washing cars and for a house for trainmen, was enjoined.⁶⁸

§ 636. To prevent the laying or operating of surface street railroads. —It has already been shown that a distinction is made in some of the States between street railroads and commercial roads, the former being held to be a legitimate use of a street as a public highway.⁶⁹ According to this view, the abutting owner has no more ground of complaint in case a street railroad is laid down and operated in front of his property than he would have if a line of omnibuses was operated on the street.⁷⁰ But, where street railroads are put in the same category with commercial roads, the same rules and principles will apply in respect to the rights of abutting owners. They may enjoin the use of the street for such purposes in front of their property until the right has been obtained in the usual way.⁷¹ Where a statute gave compensation, it was held the abutter could enjoin until com-

⁶⁸ *Waldmuller v. Brooklyn El. R. Co.*, 40 App. Div. N. Y. 242.

⁶⁹ *Ante*, §§ 111-115k, 124, 125.

⁷⁰ *Hinchman v. Paterson Horse R. R. Co.*, 17 N. J. Eq. 75; *Hogencamp v. Same*, 17 N. J. Eq. 83; *Texas & Pacific Ry. Co. v. Rose-dale Street Ry. Co.*, 64 Tex. 80; *Randall v. Jacksonville St. R. R. Co.*, 19 Fla. 409; *Detroit City R. R. Co. v. Mills*, 85 Mich. 634, 48 N. W. Rep. 1007; *Nieman v. Detroit Suburban St. R. R. Co.*, 103 Mich. 256, 61 N. W. Rep. 519; *Halsey v. Rapid Transit St. R. R. Co.*, 47 N. J. Eq. 380, 20 Atl. Rep. 859; *Van Horne v. Newark Pass. R. R. Co.*, 48 N. J. Eq. 332, 21 Atl. Rep. 1034; *Lockart v. Craig St. R. R. Co.*, 139 Pa. St. 419, 21 Atl. Rep. 26; *Rafferty v. Central Traction Co.*, 147 Pa. St. 579, 23 Atl. Rep. 884, 6 Am. R. R. & Corp. Rep. 287;

Lockart v. Craig St. R. R. Co., 8 Pa. Co. Ct. 470; *Heilman v. Lebanon etc. R. R. Co.*, 10 Pa. Co. Ct. 241; *Dilley v. Wilkes-Barre Pass. R. R. Co.*, 12 Pa. Co. Ct. 270; *Williams v. City Electric St. R. R. Co.*, 41 Fed. Rep. 556; *Stewart v. Chicago General Street R. R. Co.*, 166 Ill. 61; *Haskell v. Denver Tramway Co.*, 23 Col. 60, 46 Pac. Rep. 21; *Placke v. Union Depot Co.*, 140 Mo. 634.

⁷¹ *Milbau v. Sharp*, 27 N. Y. 611; *Craig v. Rochester City etc. R. R. Co.*, 39 N. Y. 404; *S. C.* 39 Barb. 494; *Wetmore v. Story*, 22 Barb. 414; *People v. Law*, 34 Barb. 494; *Thayer v. Rochester City etc. R. R. Co.*, 15 Abb. N. C. 52; *Cincinnati etc. Street R. R. Co. v. Cummins ville*, 14 Ohio St. 523; *Roberts v. Easton*, 19 Ohio St. 78; *Nichols v. Ann Arbor etc. R. R. Co.*, 87 Mich. 361,

pensation was made.⁷² The construction of a railroad without lawful authority or after the authority has expired may be enjoined by the abutting owner.⁷³ Courts which hold as a general rule that street railroads are a legitimate street use, have nevertheless enjoined the construction of such a road where it would be especially injurious to the abutter,

49 N. W. Rep. 538; *Tracy v. Troy* etc. R. R. Co., 54 Hun 550, 27 N. Y. St. Rep. 633, 7 N. Y. Supp. 892; *Spofford v. Southern Boul.* R. R. Co., 15 Daly 162, 4 N. Y. Supp. 388; *Pennsylvania R. R. Co. v. Montgomery County Pass.* R. R. Co., 167 Pa. St. 62, 31 Atl. Rep. 468; S. C. 14 Pa. Co. Ct. 88, 3 Pa. Dist. Ct. 58. In Pennsylvania a distinction is made between city streets and country roads as will be seen by comparing the cases cited in this and the preceding note. In Illinois the remedy at law is held to be adequate and equitable relief is denied. *Tibbets v. West & So. Towns St. R. R. Co.*, 54 Ill. App. 180; *North Chi. St. R. R. Co. v. Chetham*, 58 Ill. App. 318; *Stewart v. Chicago General St. R. R. Co.*, 58 Ill. App. 446; *Kirchman v. West & So. Towns St. R. R. Co.*, 58 Ill. App. 515. See *Williams v. City Electric St. R. R. Co.*, 41 Fed. Rep. 556; *Mt. Adams etc. R. R. Co. v. Winslow*, 3 Ohio C. C. 425; *Mahoney v. Beaver Meadow etc. R. R. Co.*, 13 Pa. Co. Ct. 344.

⁷² *Taylor v. Bay City St. R. R. Co.*, 80 Mich. 77, 45 N. W. Rep. 335.

⁷³ *Atchison St. R. R. Co. v. Nave*, 38 Kan. 744, 17 Pac. Rep. 587; *Van Horne v. Newark Pass. R. R. Co.*, 48 N. J. Eq. 332, 21

Atl. Rep. 1034; *Thomas v. Inter-County St. R. R. Co.*, 167 Pa. St. 120, 31 Atl. Rep. 476; *Watkin v. West Phil. Pass. R. R. Co.*, 11 Pa. Co. Ct. 648, 1 Pa. Dist. Ct. 463; *Jolly v. Pittsburgh etc. R. R. Co.*, 16 Pa. Co. Ct. 1; *Haines v. 22d St. C. R. R. Co.*, 1 Pa. Dist. Ct. 506; *Hart v. Buchner*, 54 Fed. Rep. 925, 5 C. C. A. 1; *City of Detroit v. Detroit City R. R. Co.*, 56 Fed. Rep. 867; *Philadelphia v. Thirteenth etc. R. R. Co.*, 8 Phil. 648; *Shipley v. Continental R. R. Co.*, 13 Phil. 128; *Eldert v. Long Island Electric R. R. Co.*, 28 App. Div. N. Y. 451. But where the lack of authority was supplied pending suit the injunction was denied. *Heilman v. Lebanon etc. St. R. R. Co.*, 175 Pa. St. 188, 34 Atl. Rep. 647. And where the road has been built and is a great public convenience the abutter will be left to his remedy at law. *Heilman v. Lebanon etc. R. R. Co.*, 180 Pa. St. 627, 37 Atl. Rep. 199. In Illinois if the abutter has not the fee he cannot enjoin an unauthorized railroad therein of any kind. *Tibbets v. West & South Towns St. Ry. Co.*, 153 Ill. 147, 38 N. E. Rep. 664; and see cases cited in New York: *Trelford v. Coney Island etc. R. R. Co.*, 5 App. Div.

as where it was constructed with cuts and fills,⁷⁴ or, where there were already two tracks in the street.⁷⁵ In one case a mandatory injunction was granted to compel the removal of a trolley pole so placed as to unnecessarily injure plaintiff.⁷⁶ Where the company is required by ordinance to place its tracks in the center of the street, a different location may be enjoined by abutters.⁷⁷ An injunction will not lie to prevent a boulevard company from constructing its boulevard with rails suitable for street car service, when the company disclaim any right or intent to use them without the plaintiff's consent.⁷⁸ The right to an injunction may be barred by laches,⁷⁹ and may be refused in the discretion of the court, where it is doubtful whether the plaintiff's property is damaged at all.⁸⁰ One who is interested as a taxpayer merely and does not own property upon the street in question has not sufficient interest to maintain the bill.⁸¹

§ 636 a. **Summary as to injunctive relief in case of railroads in streets.** — There is a tendency in the later authorities to disregard distinctions based upon differences in the construction, motive power and traffic of railroads, as respects

464, 39 N. Y. Supp. 20; 6 App. Div. 204, 40 N. Y. Supp. 1150.

⁷⁴ *Nichols v. Ann Arbor etc. R. R. Co.*, 87 Mich. 361, 49 N. W. Rep. 538; *Westheffer v. Lebanon etc. R. R. Co.*, 163 Pa. St. 54, 29 Atl. Rep. 873; *Zehren v. Milwaukee Elec. R. & L. Co.*, 99 Wis. 83; *Mt. Auburn Cable R. R. Co. v. Neare*, 54 Ohio St. 153, 42 N. E. Rep. 768; *Beeson v. Chicago*, 75 Fed. Rep. 880.

⁷⁵ *Dooley Block v. Salt Lake Rapid Transit Co.*, 9 Utah, 31, 33 Pac. Rep. 229, 8 Am. R. R. & Corp. Rep. 327. And see *Watson v. Robertson Ave. R. R. Co.*, 69 Mo. App. 548; *Placke v. Union Depot R. R. Co.*, 140 Mo. 634.

⁷⁶ *Snyder v. Ft. Madison Street Ry. Co.*, 105 Ia. 284.

⁷⁷ *Kennedy v. Detroit R. R.*

Co., 108 Mich. 390.

⁷⁸ *Redman v. Boulevard Company*, 189 Pa. St. 437, 42 Atl. Rep. 133.

⁷⁹ *Westheffer v. Lebanon etc. R. R. Co.*, 163 Pa. St. 54, 29 Atl. Rep. 873; *S. C. 3 Pa. Dist. Ct.* 56; *Becker v. Lebanon etc. Street R. R. Co.*, 188 Pa. St. 484, 41 Atl. Rep. 612.

⁸⁰ *Fouche v. Rome St. R. R. Co.*, 84 Ga. 233, 10 S. E. Rep. 726, 1 Am. R. R. & Corp. Rep. 188; *Ivey v. Georgia etc. R. R. Co.*, 84 Ga. 536, 11 S. E. Rep. 128. In these cases a temporary injunction was refused upon the defendant giving bond to pay any damages sustained by the plaintiff.

⁸¹ *Davis v. New York*, 14 N. Y. 506. And see *Seitz v. Lafayette*

their being legitimate street uses and as respects the rights and remedies of abutting owners.⁸² There is also a tendency to disregard distinctions based upon the ownership of the fee of streets, as respects the same matters.⁸³ If a railroad of any kind is laid and operated in a public street without lawful authority it is a public nuisance and an abutting owner, who suffers special damages therefrom, may, according to the weight of authority, enjoin its operation and compel its removal.⁸⁴ It is immaterial on what the want of authority depends. It may be the lack of any valid or sufficient legislative or municipal grant, or the expiration of the franchise, or the fact that it is for private use.⁸⁵ So the construction of a railroad without authority may be prevented.⁸⁶ If the abutter's easements of light, air and access are interfered with, or the rentable or salable value of the abutting property diminished, there is a special damage within the rule.⁸⁷ If a railroad in a street is duly authorized so far as the public right and easement is con-

Traction Co., 5 Pa. Co. Ct. 469.

⁸² Ante, § 110a.

⁸³ Ante, §§ 91k, 91l.

⁸⁴ Atchison Street R. R. Co. v. Nave, 38 Kan. 744, 17 Pac. Rep. 587; Gustafson v. Hamm, 56 Minn. 334, 57 N. W. Rep. 1054; Glaessner v. Anheuser-Busch Brewing Ass., 100 Mo. 508, 13 S. W. Rep. 707, 2 Am. R. R. & Corp. Rep. 420; Van Horne v. Newark Pass. R. R. Co., 48 N. J. Eq. 332, 21 Atl. Rep. 1034; Goelet v. Metropolitan Transit Co., 48 Hun 520, 1 N. Y. Supp. 74; Wright v. Syracuse, 92 Hun 32, 36 N. Y. Supp. 901; Potts v. Quaker City El. R. R. Co., 161 Pa. St. 396, 29 Atl. Rep. 108, affirming 12 Pa. Co. Ct. 593; Thomas v. Inter-County St. R. R. Co., 167 Pa. St. 120, 31 Atl. Rep. 476; Appeal of Hartman Steel Co., 129 Pa. St. 551, 18 Atl. Rep.

553, affirming 6 Pa. Co. Ct. 183; Shipley v. Continental R. R. Co., 13 Phil. 128; Jolly v. Pittsburgh etc. R. R. Co., 16 Pa. Co. Ct. 1; Watkin v. West Philadelphia Pass. R. R. Co., 1 Pa. Dist. Ct. 463; Haines v. 22d St. etc. R. R. Co., 1 Pa. Dist. Ct. 506; Hart v. Buchner, 54 Fed. Rep. 925, 5 C. C. A. 1; Detroit v. Detroit City R. R. Co., 56 Fed. Rep. 867; Ante, §§ 635, note 50, 636, note 73.

⁸⁵ And see Matlage v. New York El. R. R. Co., 67 How. Pr. 232, 14 Daly 1; Adler v. Met. El. R. R. Co., 138 N. Y. 173, 33 N. E. Rep. 935, reversing 61 N. Y. Supr. Ct. 85; Porth v. Manhattan R. R. Co., 58 N. Y. Supr. Ct. 366, 11 N. Y. Supp. 633; S. C. affirmed in 134 N. Y. 615, 32 N. E. Rep. 649.

⁸⁶ Ibid.

⁸⁷ Post, 653e.

cerned, then the rights of the abutting owner depend upon whether the railroad in question, whatever it may be, is a legitimate street use. If it is a legitimate street use and is properly constructed and operated the abutter has no legal ground of complaint, whatever the effect may be upon his property. Most courts hold that surface street railroads are such a use and some hold the same as to commercial railroads.⁸⁸ It follows that in such jurisdictions the abutter has no remedy at law or equity, unless one is given by statute.⁸⁹ On the other hand, if the railroad in question is held not to be a legitimate street use and the abutter owns the fee of the street, he may enjoin its construction or operation, the same as though it was built over his enclosure.⁹⁰ If he does not own the fee, the weight of authority still is that the abutter is entitled to compensation for the interference with his easements,⁹¹ and that he may enjoin such use of the street until such compensation has been made.⁹² In some jurisdictions in which, as a general rule relief is denied, an injunction will be granted on the ground that the railroad in question, as constructed or proposed to be constructed, constitutes an unreasonable use of the street, as when the street is narrow, or the road is located close to the abutting property, or there are already tracks in the

⁸⁸ Ante, §§ 111-115k.

⁸⁹ *Randall v. Jacksonville St. R. R. Co.*, 19 Fla. 409; *Detroit City R. R. Co. v. Mills*, 85 Mich. 634, 48 N. W. Rep. 1007; *Nieman v. Detroit Suburban St. R. R. Co.*, 103 Mich. 256, 61 N. W. Rep. 519; *Halsey v. Rapid Transit R. R. Co.*, 47 N. J. Eq. 380, 20 Atl. Rep. 859; *Mt. Adams etc. R. R. Co. v. Winslow*, 3 Ohio C. C. 425; *Rafferty v. Central Traction Co.*, 147 Pa. St. 579, 23 Atl. Rep. 884, 6 Am. R. R. & Corp. Rep. 287; *Lockhart v. Craig St. R. R. Co.*, 139 Pa. St. 419, 21 Atl. Rep. 26; *Heilman v. Lebanon etc. R. R. Co.*, 10 Pa. Co. Ct. 241; Ante,

§ 636, notes 69 and 70.

⁹⁰ *Pennsylvania R. R. Co. v. Montgomery County Pass. R. R. Co.*, 167 Pa. St. 62, 31 Atl. Rep. 468; *Hodges v. Seaboard etc. R. R. Co.*, 88 Va. 653, 14 S. E. Rep. 380; *Spofford v. Southern Boulevard R. R. Co.*, 15 Daly 162, 4 N. Y. Supp. 388; *Syracuse Solar Salt Co. v. Rome etc. R. R. Co.*, 67 Hun 153, 22 N. Y. Supp. 321; Ante, § 635, notes 40-42.

⁹¹ Ante, §§ 114 et seq.

⁹² *Kavanagh v. Mobile etc. R. R. Co.*, 78 Ga. 271; *Harbach v. Des Moines etc. R. R. Co.*, 80 Ia. 593, 44 N. W. Rep. 348, 1 Am. R. R. & Corp. Rep. 449;

street, or the road is constructed with cuts or fills.⁹³ If a railroad is so operated or managed as to become a nuisance, an abutter, suffering special damage, may enjoin the continuance of the nuisance.⁹⁴ Where the right to compensation depends wholly upon a statute, if the statute gives a remedy it will be exclusive.⁹⁵ If the statute provides no remedy open to the abutter he may enjoin the construction or use until compensation is made.⁹⁶

§ 636 b. Some questions of practice in bills to enjoin railroads in streets. —The owners in severalty of separate lots on the same street may join in a bill to sustain the construction or operation of a railroad in the street.¹ The owner

Shepard v. Manhattan R. R. Co., 117 N. Y. 442, 23 N. E. Rep. 30; Pappenheim v. Met. El. R. R. Co., 128 N. Y. 436, 28 N. E. Rep. 518, 5 Am. R. R. & Corp. Rep. 378; Knox v. Met. El. R. R. Co., 58 Hun 517, 12 N. Y. Supp. 848; S. C. affirmed 128 N. Y. 625; Bohm v. Met. El. R. R. Co., 129 N. Y. 576, 29 N. E. Rep. 802, 5 Am. R. R. & Corp. Rep. 416; ante, §§ 635, notes 43-46, 635a, 636, note 74.

⁹³ Chicago etc. R. R. Co. v. Eisert, 127 Ind. 156, 26 N. E. Rep. 759; Hepting v. New Orleans Pac. R. R. Co., 36 La. An. 898; Nichols v. Ann Arbor etc. R. R. Co., 87 Mich. 361, 49 N. W. Rep. 538; Lockwood v. Wabash R. R. Co., 122 Mo. 86, 26 S. W. Rep. 698; Knapp, Stout & Co. v. St. Louis Transfer R. R. Co., 126 Mo. 26, 28 S. W. Rep. 627; Schulenburg etc. Co. v. St. Louis etc. R. R. Co., 129 Mo. 455, 31 S. W. Rep. 796; Westheffer v. Lebanon etc. R. R. Co., 163 Pa. St. 54, 29 Atl. Rep. 873; Dooley Block v. Salt Lake Rapid Transit Co., 9 Utah 31, 33 Pac.

Rep. 229, 8 Am. R. R. & Corp. Rep. 327; Hendrie v. Toronto etc. R. R. Co., 26 Ontario 667; Ante, §§ 635, notes 48, 49, 636, notes 77, 78.

⁹⁴ Pennsylvania R. R. Co. v. Thompson, 45 N. J. Eq. 870, 19 Atl. Rep. 622; Pennsylvania R. R. Co. v. Angel, 41 N. J. Eq. 316.

⁹⁵ O'Brien v. Baltimore Belt R. R. Co., 74 Md. 363, 22 Atl. Rep. 141; Garrett v. Lake Roland El. R. R. Co., 79 Md. 277, 29 Atl. Rep. 830, 10 Am. R. R. & Corp. Rep. 39.

⁹⁶ Georgia etc. R. R. Co. v. Ray, 84 Ga. 376, 11 S. E. Rep. 352; Harbach v. Des Moines etc. R. R. Co., 80 Ia. 593, 44 N. W. Rep. 348, 1 Am. R. R. & Corp. Rep. 449; Taylor v. Bay City St. R. R. Co., 80 Mich. 77, 45 N. W. Rep. 335; Willamette Iron Works v. Oregon R. & N. Co., 26 Or. 224, 37 Pac. Rep. 1016; ante, § 636, note 75.

¹ Taylor v. Bay City etc. R. R. Co., 80 Mich. 77, 45 N. W. Rep. 335; Rafferty v. Central Traction Co., 147 Pa. St. 579, 23 Atl. Rep.

of an undivided half of a lot granted the right to lay a railroad in a street. Afterwards he acquired the other undivided half of the lot. Held, that he could maintain a bill to enjoin the road.² The fact that plaintiff has received freight over the road he seeks to enjoin,³ or that he has recently purchased the lot in question or his motives in so doing, form no bar to his suit.^{4*}

§ 637. To prevent other uses of streets or other interference with the abutting owner's rights.—The abutting owner may, in general, enjoin any use of a street which is unlawful or which is foreign to its purpose as a public highway and is calculated to produce special damage to his property. He may prevent the occupation of a street by a railroad for depot purposes,⁵ or a passenger platform,⁶ or by a private railroad leading to an elevator,⁷ or by poles and wires for electric purposes.⁸ The authorities are conflicting as to whether a telegraph or telephone line, or poles and wires for conducting electricity for private use, are a legitimate street

884, 6 Am. R. R. & Corp. Rep. 287. Contra: *Fogg v. Nevada etc. R. R. Co.*, 20 Nev. 429, 23 Pac. Rep. 840.

² *Eldridge v. Rochester City etc. R. R. Co.*, 54 Hun 194.

³ *Knapp, Stout & Co. v. St. Louis Transfer R. R. Co.*, 126 Mo. 26, 28 S. W. Rep. 627.

⁴ *Savannah etc. R. R. Co. v. Woodruff*, 86 Ga. 94, 13 S. E. Rep. 156.

⁵ *Barney v. Keokuk*, 4 Dill. 593; aff. 94 U. S. 324; *Harvey v. Georgia Southern etc. R. R. Co.*, 90 Ga. 66, 15 S. E. Rep. 783.

⁶ *Higbee v. Camden & Amboy R. R. Co.*, 19 N. J. Eq. 276; but in this case the injunction was dissolved on final hearing on the ground that the platform had been there for twenty years, that the inconvenience to the plain-

tiff was slight and his remedy at law ample. *S. C.* 20 N. J. Eq. 435.

⁷ *Mikesell v. Durkee*, 34 Kan. 509.

⁸ *Tiffany v. United States Illuminating Co.*, 67 How. Pr. 73; *S. C.* 51 N. Y. Supr. Ct. 280; *Carpenter v. Capitol Electric Co.*, 178 Ill. 29; *Palmer v. Larchmont Electric Co.*, 6 App. Div. 12, 39 N. Y. Supp. 522. In *Metropolitan Telephone & Telegraph Co. v. Colwell Lead Co.*, 50 N. Y. Supr. Ct. 488 (*S. C.*, 67 How. Pr. 365), an injunction to prevent the defendant, the abutting owner, from interfering with its poles was denied. In *Bouke v. American Telephone Co.*, 41 N. J. Eq. 35, an injunction was refused at the suit of the abutting owner on the ground that his

use.⁹ If they are not a legitimate street use, then the abutting owner may enjoin such use until compensation is made.¹⁰ If they are a proper use of the street, an injunction will not lie,¹¹ but the abutter may prevent a location or mode of construction that is unnecessarily injurious to him.¹² A ditch along the highway in front of the plaintiff's property for the purpose, not of improving the highway, but of draining private property, was enjoined.¹³ Also the laying of pipes for conducting natural gas,¹⁴ the erection of a public market,¹⁵ and of a building for a market, jail and pound.¹⁶ Those acting by authority of the public have been restrained from removing materials from the highway in front of the plaintiff's premises;¹⁷ also from unnecessarily removing trees therefrom.¹⁸ A city was restrained from boring a well in a street to procure a supply of water for

right was doubtful and the injury not irreparable; but in *Broome v. New York & N. J. Tel. Co.*, 42 N. J. Eq. 141, a mandatory injunction was granted for the removal of telephone poles in front of plaintiff's premises and the erection of others forbidden. An injunction for the same purpose was refused in *Hewitt v. Western Union Tel. Co.*, 4 Mack. 424. See *Pierce v. Drew*, 136 Mass. 75; *Wirth v. Postal Tel. Cable Co.*, 7 Ohio C. C. 290.

⁹ Ante, §§ 131, 131a.

¹⁰ *Willis v. Erie Tel. & Tel. Co.*, 37 Minn. 347, 34 N. W. Rep. 337; *Stowers v. Postal Tel. Cable Co.*, 68 Miss. 559, 9 So. Rep. 356; *Smith v. Central District Print. & Tel. Co.*, 2 Ohio C. C. 259.

¹¹ *Loeber v. Butte General Electric Co.*, 16 Mon. 1, 39 Pac. Rep. 912, 11 Am. R. R. & Corp. Rep. 260; *Hershfield v. Rocky Mt. Bell Tel. Co.*, 12 Mon. 102, 29 Pac. Rep. 883.

¹² *Russ v. Pennsylvania Tel. Co.*, 15 Pa. Co. Ct. 226.

¹³ *Conrad v. Smith*, 32 Mich. 429.

¹⁴ *Sterling's Appeal*, 111 Pa. St. 35; *Kincaid v. Indianapolis Natl. Gas Co.*, 124 Ind. 577, 24 N. E. Rep. 1066, 3 Am. R. R. & Corp. Rep. 1; *Mallory v. City of Bradford*, 1 Pa. Dist. Ct. 670; ante, § 129.

¹⁵ *State v. Mobile*, 5 Porter 279; *Atwater v. Mayer*, 29 Alb. L. J. 483.

¹⁶ *Lutterloh v. Cedar Keys*, 15 Fla. 306.

¹⁷ *Smith v. Rome*, 19 Ga. 89; *Althen v. Kelly*, 32 Minn. 280; *Robert v. Sadler*, 104 N. Y. 229. As to the right to materials in the public streets, see ante, § 590.

¹⁸ *Bills v. Belknap*, 36 Ia. 583; *Everett v. Council Bluffs*, 46 Ia. 66; *City of Atlanta v. Holliday*, 96 Ga. 546, 23 S. E. Rep. 509; *Mt. Carmel v. Bell*, 52 Ill. App. 427; *Mt. Carmel v. Shaw*, 52 Ill.

waterworks.¹⁹ The unlawful appropriation of a highway by a turnpike company was enjoined at the suit of an abutting owner.²⁰ One who has sold lots with reference to a street, though the same has not been legally opened or dedicated, may be enjoined from closing or obstructing the street by his grantees or those claiming under such grantees.²¹ The use of a street for market purposes, by permitting wagons loaded with produce, to stand therein, has been enjoined at the suit of the abutting owner.²²

§ 637 a. To prevent the vacation of a street.—The vacation of a street or part of the same may cause damage to those abutting on the vacated part or near it. Whether one so damaged is entitled to compensation is a question elsewhere considered.²³ In most cases which have been brought to enjoin the vacation it has been held either that the plaintiff had no remedy,²⁴ or that the remedy at law was adequate.²⁵ Where a street could not be vacated without a petition by all the owners of lots and lands abutting thereon, an attempted vacation without such a petition was en-

App. 429; *Crimson v. Deck*, 84 Ia. 344, 51 N. W. Rep. 55; *Cross v. Morristown*, 18 N. J. Eq. 305, 313; *Taintor v. Morristown*, 19 N. J. Eq. 46.

¹⁹ *O'Neal v. Sherman*, 77 Tex. 182, 14 S. W. Rep. 31.

²⁰ *Groff v. Bird-in-Hand Turnpike Co.*, 128 Pa. St. 621, 18 Atl. Rep. 431; S. C. affirmed on rehearing 144 Pa. St. 150, 22 Atl. Rep. 834. See *Palmer v. Logansport etc. Road Co.*, 108 Ind. 137.

²¹ *Newell v. Sass*, 142 Ill. 104, 31 N. E. Rep. 176; *White v. Flannigan*, 1 Md. 542; *Shields v. Titus*, 46 Ohio St. 528, 22 N. E. Rep. 717; *Ferguson's Appeal*, 117 Pa. St. 426, 11 Atl. Rep. 885; *Pennsylvania S. V. R. R. Co. v. Reading Paper Mills*, 149 Pa. St. 18, 24 Atl. Rep. 205.

²² *City of Richmond v. Smith*, 148 Ind. 294.

²³ *Ante*, § 134.

²⁴ *Dodge v. Pennsylvania R. R. Co.*, 43 N. J. Eq. 351, 11 Atl. Rep. 751; S. C. affirmed (no opinion), 45 N. J. Eq. 366, 19 Atl. Rep. 622; *Glasgow v. St. Louis*, 107 Mo. 198, 17 S. W. Rep. 743, 5 Am. R. R. & Corp. Rep. 192.

²⁵ *Parker v. Catholic Bishop*, 146 Ill. 158, 34 N. E. Rep. 473; *Holm v. Windsor*, 38 Ill. App. 650; *World's Columbian Exposition v. Brennan*, 51 Ill. App. 128; *Bailey v. Culver*, 84 Mo. 531; *Christian v. St. Louis*, 127 Mo. 109, 29 S. W. Rep. 996; *Meredithe v. Sayre*, 32 N. J. Eq. 557; *Williams v. Carey*, 73 Ia. 194, 34 N. W. Rep. 813; *Mobile etc. R. R.*

joined.²⁶ And generally an unauthorized vacation or closing of a street or alley may be enjoined.²⁷ The closing of an alley pursuant to an act of the legislature was enjoined at the suit of the abutting owners thereon, because no provision was made for compensation.²⁸

§ 638. To prevent changing the grade of a street.—The damages occasioned to abutting property by a change of grade not being a taking within the constitution, no remedy exists either to prevent such changes or recover damages therefor, unless given by statute or some special provision of the constitution.²⁹ Where by statute compensation is required to be made to abutting owners for all damages to their property by reason of the change, it is held that the change will be enjoined until the compensation is made.³⁰ An attempt to change the grade of a street under a void statute or ordinance or without lawful authority may be enjoined.³¹ Under recent constitutions which require compensation to be made for property damaged or injured as well as for property taken, the right exists to recover for property damaged by a change of grade. Usually no provision has been made by statute for the assessment and payment of such damages at the instance of the public authorities. The authorities, therefore, must either agree with the owner, or refrain from making a change, or else take their chances of such suits as may be brought by those aggrieved.

Co. v. Ala. Mid. R. R. Co., 116 Ala. 51, 23 So. Rep. 57.

²⁶ James v. Darlington, 71 Wis. 173, 36 N. W. Rep. 834.

²⁷ Georgia etc. R. R. Co. v. Harvey, 84 Ga. 372, 10 S. E. Rep. 971; Buchanan v. Beaver, 171 Pa. St. 567, 33 Atl. Rep. 115.

²⁸ Banon v. Rohmeiser, 90 Ky. 48, 13 S. W. Rep. 444.

²⁹ Ante, § 96. Markham v. Atlanta, 23 Ga. 402; Columbus v. Storey, 33 Ind. 195. In Louisville v. Louisville Rolling Mill Co., 3 Bush. 416, an injunction was granted under somewhat peculiar

circumstances to prevent a change of grade, but this case is commented upon elsewhere. Ante, § 99. Cutting down a street by private parties was enjoined in Price v. Knott, 8 Or. 438, at the suit of the abutting owner.

³⁰ Columbus v. Hydraulic Woolen Mills Co., 33 Ind. 435; Kokomo v. Mahan, 100 Ind. 242; Phillips v. Council Bluffs, 63 Ia. 576; Wilkin v. St. Paul, 33 Minn. 181; Hurford v. Omaha, 4 Neb. 336; Huntington v. Griffith, 142 Ind. 280, 41 N. E. Rep. 8, 589.

³¹ Koeffler v. Milwaukee, 85

The usual remedy invoked is a suit by the abutting owner for damages in which it has been customary to give entire damages, that is, the just compensation for the injury to which he is entitled under the constitution. In Georgia it is held that the owner should be left to this remedy rather than that public improvements should be interrupted.³² But since, under a proper interpretation of the constitution, compensation must be made before private property is taken or damaged,³³ a court of equity may take jurisdiction to prevent such damage until compensation is made. *McElroy v. Kansas City*³⁴ is an interesting case of this sort. The defendant was about to cut down the street in front of plaintiff's property some fourteen feet, to its very serious damage. The plaintiff filed his bill to prevent its being done. The constitution of Missouri then in force required the compensation for property taken or damaged to be first made. The legislature, however, had made no provision by means of which the city could have such damages ascertained, and consequently it could not comply with the constitution except by paying the owner whatever he demanded. The injunction was granted upon terms. The reasoning and decision of Brewer, J., are so just and admirable that we quote at length from his opinion on the question:

"First. A chancellor, in determining an application for an injunction, must regard not only the rights of the complainant which are sought to be protected, but the injuries which may result to the defendant or to others from the granting of the injunction. If the complainant's rights are of a trifling character, if the injury which he would sustain from the act sought to be enjoined can be fully and easily compensated, while, on the other hand, the defendant would suffer great damage, and especially if the public would suffer a large inconvenience if the contemplated act

Wis. 397, 55 N. W. Rep. 400;
Schaufele v. Doyle, 86 Cal. 107,
 24 Pac. Rep. 834.

³² *Moore v. Atlanta*, 70 Ga. 611.

³³ *Ante*, § 459.

³⁴ 21 Fed. Rep. 257, 261. In

*McMurray-Judge Architectural
 Iron Works*, 138 Mo. 608, 39 S.
 W. Rep. 467, a change of grade
 was enjoined until compensa-
 tion was made.

was restrained, the lesser right must yield to the larger benefit; the injunction should be refused, and the complainant remitted to his action for damages. This rule has been enforced in a multitude of cases, and under a variety of circumstances, and it is one of such evident justice as needs no citation of authorities for its support.

“Second. When the defendant has an ultimate right to do the act sought to be restrained, but only upon some condition precedent, and compliance with the condition is within the power of the defendant, injunction will almost universally be granted until the condition is complied with. This principle lies at the foundation of the multitude of cases which have restrained the taking of property until after the payment of compensation, for in all those cases the legislature has placed at the command of the defendant means for ascertaining the value of the property. In those cases the courts have seldom stopped to inquire whether the value of the property sought to be taken was little or great, whether the injury of the complainant was large or small, but have contented themselves with holding that, as the defendant had full means for ascertaining such compensation, it was his first duty to use such means, determine and pay the compensation, and until he did so the taking of the property would be enjoined.

“Third. Where the defendant has an ultimate right to do the act sought to be enjoined upon certain conditions, and the means of complying with such conditions are not at his command, the courts will endeavor to adjust their orders so on the one hand as to give the complainant the substantial benefit of such conditions, while not restraining the defendant from the exercise of its ultimate rights. Thus, in the case at bar, the defendant has of course the ultimate right to grade this street. As a condition of such right is a payment of damages; no tribunal has been created, no provision of law made, for their ascertainment. Hencé, if possible, the court should provide for securing to the defendant this ultimate right, and at the same time give to the complainant the substantial benefit of the prior conditions.

“Fourth. In applying the rule first stated to a case like

the one at bar, the court should have principal regard to three matters:

“(1.) The amount of injury to the complainant. It is obvious that a grade of a single foot in front of a city lot would work but trifling injury, while on the other hand the grade might be such as practically to destroy the value of the adjacent property. In the one case it would seem a great hardship to tie up public improvement because of some trifling injury to the complainant, the amount of which injury was not attainable by any established means, and therefore that the party might justly be left to his action for damages; while in the other case the court might well insist that the value of complainant's property should not be wholly wrecked until such value has been paid to him.

“(2.) The court will consider the solvency of the defendant. If some irresponsible corporation should seek, in the exercise of the power of eminent domain, and under the guise of the contemplated public improvement, to do serious damage to property, the court should properly say that the owner was not bound to take the chance of collecting his damages from such a corporation, and imperatively require the prior adjustment and payment of such damages; while, if the party attempting the improvement was a corporation of established and permanent solvency, the court might say that the complainant would run little risk in pursuing simply his action for damages.

“(3.) If the improvement was one of great public importance, the court would justly regard that as a reason for not lightly interfering with the work, while if the improvement was more of a personal speculation and for private gain, the prior protection of the complainant would be most rigorously insisted on. Thus, if in the center of a large and thriving city like the defendant some improvement was contemplated which the necessities of business proclaimed to be urgent, the court on no slight consideration should interfere to delay or restrain it; while, on the other hand, if it was some matter in the outskirts of the city, having obviously principal reference to the private speculation of the individual, and of no earnest or urgent demand

of public good, the attention of the court would be properly directed to the full protection of the complainant's prior right. I think such considerations as these, and others of a similar nature, when properly regarded by the courts, will afford ample protection to individual rights, without unnecessary interference with needed public improvements; and that until the legislature makes suitable provision for the ascertainment of damages to property not taken, the courts should be guided by them in determining all applications of this nature for an injunction.

"Now, looking at the facts of this particular case, it is evident that the injury to complainant's lot will be serious; that the solvency of the defendant is unquestionable, and that any judgment against it can be easily collected; and also that the improvement is not one of pressing public necessity, but in the outskirts of the city, and having reference mainly to private benefit and individual speculation. I think, therefore, that the complainant is entitled to a restraining order, but at the same time it should not be absolute and unconditional.

"The section of the constitution provides that this compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders. It is within the power of a court of chancery to provide a board of commissioners. The order, therefore, will be that, upon the giving of a bond in the sum of \$3,000, and the filing of a stipulation to accept such damages as shall be ascertained in the manner hereinafter provided in full satisfaction of all claims against the defendant, the defendant will be restrained from grading said street: provided, that at any time the defendant may, upon twenty days' notice, apply to either of the judges of this court for the appointment of a board of commissioners of three freeholders to ascertain and report the amount of damages which complainant will sustain by reason of the grading of said street, and upon the payment of the damages so reported by such commissioners, the injunction will be vacated. The report of a majority of the commissioners will be the report of the board, and either party

may appeal to the judge appointing such commissioners for a review of their report."

Where the constitution expressly requires that property shall not be damaged without compensation is first made, an injunction will be granted to prevent a change in violation of its terms.³⁵

§ 639. To prevent the construction of works in a particular manner. —The rights acquired by the party condemning, with respect to the use of the property taken, have already been discussed.³⁶ The rule of the authorities is that it is bound to construct its works with a reasonable degree of care and skill, having regard to the rights and interests of adjoining proprietors. In England a railway was enjoined from constructing an insufficient arch over a mill-race,³⁷ and in another case from excavating near the plaintiff's house without taking the necessary and proper precautions to prevent the plaintiff's house from falling.³⁸ So in this country it has been held that the construction of a railroad across a stream or water course with an insufficient culvert, which will result in flooding the plaintiff's land, may be enjoined.³⁹ In such cases the court will ascertain what mode of construction will prevent the overflow and will permit the construction in that mode.⁴⁰ Where, in a proceeding to assess damages for a right of way for a railroad, the company represented that it would cross certain low lands and a lane upon a bridge, and the owner's damages were assessed on that basis, and afterwards the company changed its plan to an embankment which would interrupt access and be more injurious to the property, it was held that the owner was

³⁵ Searle v. Lead, 10 S. D. 312.

³⁶ Ante, § 585.

³⁷ Coats v. Clarence Railway Co., 1 Russ. & Mylne, 181. To same effect, Mauser v. Northern etc. R. R. Co., 2 Eng. R. R. Cases, 380.

³⁸ Briscoe v. Great Eastern Ry. Co., L. R. 16 Eq. Cas. 636.

³⁹ Lake Erie etc. R. R. Co. v. Young, 135 Ind. 426, 35 N. E.

Rep. 177; Toledo etc. R. R. Co. v. Chicago etc. R. R. Co., 155 Ill. 9, 39 N. E. Rep. 809; Campbell v. Pennsylvania S. V. R. R. Co., 2 Mont. Co. L. R. 139; Appeal of Campbell, 4 Mont. Co. L. R. 47. But in Ely v. Rochester, 26 Barb. 133, it was held that plaintiff would be left to his remedy at law.

⁴⁰ Ibid.

entitled to an injunction to prevent the construction as proposed until additional compensation was made.⁴¹

§ 640. To prevent the occupation or use of adjacent property not included in the condemnation.—We have already seen that by the condemnation no rights are acquired beyond the limits of the property taken.⁴² Any encroachment upon private property beyond those limits is wholly unauthorized and will be enjoined.⁴³ Where a city was engaged in raising the grade of a street and allowed the filling to fall upon the plaintiff's property and against his house, an injunction was granted to prevent such encroachment.⁴⁴ The taking of materials from adjoining land for the repair of a highway will not ordinarily be enjoined.⁴⁵ Where a highway was opened on a different line from the one legally established and used for ten years, it was held that an attempt to open it after that time on the true line would be enjoined.⁴⁶

§ 641. To prevent an interference with water rights.—What interference with water rights amounts to a taking, within the meaning of the constitution, is a question which has been fully discussed in a former chapter.⁴⁷ Such an interference will be enjoined at the suit of the party injured, the right to the relief being placed upon the same grounds as any other taking before complying with the statutory and

⁴¹ *Carpenter v. Easton & Amboy R. R. Co.*, 24 N. J. Eq. 249; *S. C.* 24 N. J. Eq. 408 and 26 N. J. Eq. 168; see also ante, § 481; *Newago Mfg. Co. v. Chicago etc. R. R. Co.*, 64 Mich. 114, 30 N. W. Rep. 910; *Boyd v. Negley*, 53 Pa. St. 387.

⁴² Ante, § 599.

⁴³ *Deere v. Cole*, 118 Ill. 165; *Rutledge v. Drainage Comrs.*, 16 Ill. App. 655; *Sidener v. Morristown etc. Turnpike Co.*, 23 Ind. 623; *Lake Erie etc. R. R. Co. v. Michener*, 117 Ind. 465, 20 N. E. Rep. 254; *Bass v. Ft. Wayne*, 121

Ind. 389, 23 N. E. Rep. 259, 1 Am. R. R. & Corp. Rep. 173; and see *Shand v. Henderson*, 2 Dow 519. An injunction was refused in *Commissioners v. Green*, 156 Ill. 504, 41 N. E. Rep. 154.

⁴⁴ *Vanderlip v. Grand Rapids*, 79 Mich. 322, 41 N. W. Rep. 677.

⁴⁵ *Thornton v. Roll*, 118 Ill. 350; *Jerome v. Ross*, 7 Johns. Ch. 315; *Cherry v. Matthews*, 25 Or. 484, 36 Pac. Rep. 529.

⁴⁶ *Babcock v. Welsh*, 71 Cal. 400.

⁴⁷ Ante, § 585.

constitutional conditions. Thus injunctions have been granted to prevent the diversion of water from a stream or pond above the plaintiff's premises,⁴⁸ or the obstructing⁴⁹ or increasing of the flow by artificial means,⁵⁰ or the pollution

⁴⁸ *Lux v. Haggin*, 69 Cal. 255; *Emporia v. Soden*, 25 Kan. 588; *Acquackanonk Water Co. v. Watson*, 29 N. J. Eq. 366; *Higgins v. Flemington Water Co.*, 36 N. J. Eq. 538; *Gardner v. Newburgh*, 2 Johns. Ch. 162; *Garwood v. New York Central & Harlem River R. R. Co.*, 17 Hun 356; *Smith v. Rochester*, 38 Hun 612; *Avery v. Fox*, 1 Abb. U. S. 246; *Heilbron v. Canal Co.*, 75 Cal. 426; *Atchison etc. R. R. Co. v. Long*, 46 Kan. 701, 27 Pac. Rep. 182; *Proprietors of Mills v. Braintree Water Supply Co.*, 149 Mass. 478, 21 N. E. Rep. 761; *Salazar v. Smart*, 12 Mon. 395, 30 Pac. Rep. 676; *Parny v. Citizens Water Works Co.*, 59 Hun 196, 14 N. Y. Supp. 471; *Gilzinger v. Saugerties Water Co.*, 66 Hun 173, 21 N. Y. Supp. 121; *Saunders v. Bluefield Water Works Co.*, 58 Fed. Rep. 133; *Ferrand v. Bradford*, 21 Beav. 412; *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587; *Stock v. Jefferson*, 114 Mich. 357, 72 N. W. Rep. 132; *Duesler v. Johnstown*, 24 App. Div. N. Y. 608; *Gallagher v. Kingston Water Co.*, 25 App. Div. N. Y. 82; *Neal v. Rochester*, 156 N. Y. 213; *Appeal of Haupt*, 125 Pa. St. 211, 17 Atl. Rep. 436; *Pine v. New York*, 76 Fed. Rep. 418; *United States Freehold L. & E. Co. v. Gallegos*, 89 Fed. Rep. 769. But see *Spangler's Appeal*, 64 Pa. St. 387, where an injunction was denied because the

remedy at law was deemed adequate. Also see *Warfel v. Cochran*, 34 Pa. St. 381.

⁴⁹ *Middleton v. Flat River Booming Co.*, 27 Mich. 533; *Holyoke Water Power Co. v. Connecticut River Co.*, 22 Blatch. 131; but see *Arnold v. Klipper*, 24 Mo. 273; *Lake Erie etc. R. R. Co. v. Young*, 135 Ind. 426, 35 N. E. Rep. 177.

⁵⁰ *Baltimore v. Apphold*, 42 Md. 442; *Koopman v. Blodgett*, 70 Mich. 610, 38 N. W. Rep. 649; *Carlson v. St. Louis etc. Co.*, 73 Minn. 128, 75 N. W. Rep. 1044; *Malott v. Mersea*, 9 Ontario 611; *Plattsmouth Water Co. v. Smith*, 57 Neb. 579, 78 N. W. Rep. 275; In the Michigan case the court says: "It has always been settled that the owner of realty is entitled to the aid of equity to prevent permanent and continually recurring injuries to the enjoyment of his property. To deprive him of such enjoyment is to deprive him of the property itself, wholly or to the extent of the mischief. Neither can it be allowable for wrong-doers to rely upon their own wrong to change or lessen his means of redress. When they do mischief, it is their own fault if they render a stringent remedy necessary, and they, and not the party injured, must take the consequences. If the remedy is difficult, it is made so by their conduct."

of the current,⁵¹ or filling it with debris.⁵² So collecting surface water in a channel and turning it upon the plaintiff's premises where it was not accustomed to flow,⁵³ or discharging a sewer upon private property,⁵⁴ or cutting off access to

⁵¹ *Baltimore v. Warren Mfg. Co.*, 59 Md. 96; *Lind v. San Luis Obispo*, 109 Cal. 340, 42 Pac. Rep. 437; *Jessup etc. Co. v. Ford*, 6 Del. Ch. 52; *Dwight v. Hayes*, 150 Ill. 273, 37 N. E. Rep. 218; *Chapman v. Rochester*, 110 N. Y. 273, 18 N. E. Rep. 88; *Schrivver v. Johnstown*, 71 Hun 232, 24 N. Y. Supp. 1083; *Commonwealth v. Russell*, 172 Pa. St. 506, 33 Atl. Rep. 709; *Silver Spring etc. Co. v. Wanshuck Co.*, 13 R. I. 611; *Van Egmond v. Seaforth*, 6 Ontario 599; *Goldsmid v. Tunbridge Wells Impr. Co.*, L. R. 1 Ch. App. 349, L. R. 1 Eq. 161; *Attorney General v. Colney Hatch Lunatic Asylum*, L. R. 4 Ch. App. 146; *People v. San Luis Obispo*, 116 Cal. 617, 48 Pac. Rep. 723; *Peterson v. Santa Rosa*, 119 Cal. 387; *Nolan v. New Britain*, 69 Conn. 668; *Barrett v. Mt. Greenwood Cem. Ass.*, 159 Ill. 385, 42 N. E. Rep. 891; *Middlesex Co. v. Lowell*, 149 Mass. 509, 21 N. E. Rep. 872; *Abraham v. Fremont*, 54 Neb. 391, 74 N. W. Rep. 834; *Moody v. Saratoga Springs*, 17 App. Div. N. Y. 207; *Lefrois v. Monroe County*, 24 App. Div. N. Y. 421. Contra: *Valparaiso v. Hagen*, 153 Ind. 337. In the case of *Hutchinson v. DeLong*, 46 Kan. 345, 26 Pac. Rep. 740, it was held that the apprehended fouling or pollution of a stream of water in the future by the sewage of a part of a city from sewers, which have

been legally, scientifically, and properly constructed, but which has not yet taken place, and of which there is no immediate or imminent danger, and which depends upon a contingency that may not happen, does not present a case for an injunction. Compare *Dwight v. Hayes*, 150 Ill. 273, 37 N. E. Rep. 218, and *Robb v. LaGrange*, 158 Ill. 21, 42 N. E. Rep. 77.

⁵² *Waterman v. Buck*, 58 Vt. 519.

⁵³ *Sullivan v. Phillips*, 110 Ind. 320; *Field v. West Orange*, 36 N. J. Eq. 118; *West Orange v. Field*, 37 N. J. L. 600; *Patoka v. Hopkins*, 131 Ind. 142, 30 N. E. Rep. 896; *State v. Fillmore County*, 32 Neb. 870, 49 N. W. Rep. 769; *Miller v. Morristown*, 47 N. J. Eq. 62, 2 Atl. Rep. 61; *Soule v. Passaic*, 47 N. J. Eq. 28, 20 Atl. Rep. 346; *Whipple v. Fair Haven*, 63 Vt. 221, 21 Atl. Rep. 533; *Young v. Comrs.*, 134 Ill. 569, 25 N. E. Rep. 689; *Jewett v. Sweet*, 178 Ill. 96; *Holmes v. Calhoun County*, 97 Ia. 360, 66 N. W. Rep. 145. Compare *Hotz v. Hoyt*, 34 Ill. App. 488; *City of Scranton's Appeal*, 121 Pa. St. 97, 15 Atl. Rep. 483.

⁵⁴ *Haskell v. New Bedford*, 108 Mass. 208; *Breed v. Lynn*, 126 Mass. 367; *Morgan v. Binghamton*, 32 Hun 602; *Van Rennselaer v. Albany* 15 Abb. N. C. 457; *S. C. 2 How. Pr. N. S.* 42; *New York Central etc. R.R. Co. v.*

navigable waters,⁵⁵ will be restrained by injunction. A riparian owner upon a lake or pond is entitled to have the water remain at its natural level and may enjoin works on the outlet which will raise or lower the level.⁵⁶ A city was enjoined from changing the course of a natural stream within its limits, so as to make it flow in a public street and impede access to abutting property.⁵⁷ The removal of a dam upon a salt water creek, built by authority of the legislature and maintained to prevent the flooding of meadows, was enjoined.⁵⁸

§ 642. To prevent the infringement of a franchise or exclusive right.—The grant of an exclusive right to maintain a bridge,⁵⁹ ferry,⁶⁰ railroad⁶¹ or canal,⁶² within certain

Rochester, 127 N. Y. 591, 28 N. E. Rep. 416.

⁵⁵ Shirley v. Bishop, 67 Cal. 543; Stevens v. Erie R. R. Co., 21 N. J. Eq. 259. Compare Payne v. English, 79 Cal. 540, 21 Pac. Rep. 952.

⁵⁶ Troe v. Larson, 84 Ia. 649, 51 N. W. Rep. 179; Hebron Gravel Road Co. v. Harvey, 90 Ind. 192; Cedar Lake Hotel Co. v. Cedar Lake Hydraulic Co., 79 Wis. 297, 48 N. W. Rep. 371.

⁵⁷ Geurkink v. Petaluma, 112 Cal. 306, 44 Pac. Rep. 570.

⁵⁸ Glover v. Powell, 10 N. J. Eq. 211. After nearly 100 years the legislature passed an act declaring the stream navigable and directing the removal of the dam.

The following miscellaneous cases are noted: Toledo etc. R. R. Co. v. Chicago etc. R. R. Co., 155 Ill. 9, 39 N. E. Rep. 809; Hill v. Sayles, 12 Cush. 454; Clark v. Cambridge etc. Co., 45 Neb. 799, 64 N. W. Rep. 239; Connecticut Riv. Lumber Co. v. Olcott Falls Co., 65 N. H. 290, 21 Atl. Rep. 1090; Newark Aque-

duct Board v. Passaic, 45 N. J. Eq. 393, 18 Atl. Rep. 106; Sheldon v. Rockwell, 9 Wis. 166.

⁵⁹ Enfield Toll Bridge Co. v. Hartford & New Haven R. R. Co., 17 Conn. 40; Piscataqua Bridge Co. v. New Hampshire Bridge Co., 7 N. H. 35; Gifford v. New Jersey R. R. Co., 10 N. J. Eq. 171; Red River Bridge Co. v. Clarksville, 1 Sneed 176; Micon v. Tallahassee Bridge Co., 47 Ala. 652. See Kansas etc. R. R. Co. v. Payne, 49 Fed. Rep. 114, 1 C. C. A. 183; Kansas etc. R. R. Co. v. LeFlore, 49 Fed. Rep. 119, 1 C. C. A. 192.

⁶⁰ Golconda v. Field, 108 Ill. 419; Power v. Athens, 99 N. Y. 592; S. C. 26 Hun 282; McRoberts v. Washburne, 10 Minn. 23; New York v. Starin, 106 N. Y. 1.

⁶¹ Boston & Lowell R. R. Co. v. Salem & Lowell R. R. Co., 2 Gray 1; St. Louis R. R. Co. v. Northwestern St. Louis Ry. Co., 69 Mo. 65.

⁶² Hudson & Delaware Canal Co. v. New York & Erie R. R. Co., 9 Paige 323.

limits, will be protected by injunction from infringement by rival or competing enterprises. Such infringement is a taking within the meaning of the constitution, for which compensation must be made.⁶³ If the right is not exclusive, there is no ground for an injunction.⁶⁴ The exclusive privilege of operating a horse railroad on certain streets of a city was protected by an injunction from interference by a dummy railroad.⁶⁵ An injunction will be granted to prevent the infringement of an exclusive right to supply gas.⁶⁶

The laying out of a public road intersecting a chartered turnpike so as to enable travelers to avoid toll was restrained as a violation of the contract with the company.⁶⁷

§ 643. To prevent the taking of property already devoted to public use. —The taking of property already devoted to a public use for the same or a different use, unless the authority is expressly given or necessarily implied, will be prevented by injunction. The laying of a railroad longitudinally along the right of way of another,⁶⁸ opening a highway through the depot grounds or yards of a railroad,⁶⁹ con-

⁶³ Ante, § 137.

⁶⁴ Charles River Bridge Co. v. Warren Bridge, 6 Pick. 376; Levisay v. Delp, 9 Bax. 415.

⁶⁵ Denver & S. R. R. Co. v. Denver City Ry. Co., 2 Col. 673.

⁶⁶ City of Newport v. Newport Light Co., 84 Ky. 166.

⁶⁷ Franklin & Columbia Turnpike Co. v. County Court, 8 Humph. 342. And generally a franchise, though not exclusive, will be protected from unlawful competition. Patterson v. Wollman, 5 N. D. 608, 67 N. W. Rep. 1040.

⁶⁸ Housatonic R. R. Co. v. Lee & Hudson R. R. Co., 118 Mass. 391; Worcester & Nashua R. R. Co. v. Railroad Comrs., 118 Mass. 561; Boston & Maine R. R. Co. v. Lowell etc. R. R. Co., 124 Mass. 368; Hoke v. Georgia R. & B.

Co., 89 Ga. 215, 15 S. E. Rep. 124.

⁶⁹ Milwaukee & St. Paul R. R. Co. v. Faribault, 23 Minn. 167; Prospect Park & Coney Island R. R. Co. v. Williamson, 91 N. Y. 552; S. C. 24 Hun 216; Mohawk & Hudson R. R. Co. v. Artcher, 6 Paige 83; Ft. Wayne v. Lake Shore etc. R. R. Co., 132 Ind. 558, 32 N. E. Rep. 215; Cincinnati etc. R. R. Co. v. Anderson, 139 Ind. 490, 38 N. E. Rep. 167, 10 Am. R. R. & Corp. Rep. 17; Rochester etc. R. R. Co. v. Rochester, 17 App. Div. N. Y. 257. But see Chicago, R. I. & P. R. R. Co. v. Town of Lake, 71 Ill. 333. So one railroad was enjoined from laying its tracks through the yards of another. Appeal of Pittsburgh Junction R. R. Co., 122 Pa. St. 511, 16 Atl.

structing a public ditch⁷⁰ or a line of telegraph,⁷¹ or a highway,⁷² upon a railroad right of way, or taking a ferry for a public highway⁷³ under a general grant of authority, are illegal and will be enjoined. The question of right to take in such cases is discussed elsewhere.⁷⁴ As a general rule if the right does not exist the taking will be enjoined.⁷⁵ But if condemnation proceedings are pending and the want of authority can be taken advantage of as a defence therein, an injunction will be denied.⁷⁶ The attempt of one horse railroad to use the tracks of another,⁷⁷ or of a railroad to cross a turnpike⁷⁸ without making compensation as required by law, may also be enjoined.

§ 644. To prevent one railroad from crossing another.—One railroad cannot prevent another's crossing its tracks where the statutory authority exists and the conditions imposed by law are complied with.⁷⁹ But such crossing will be

Rep. 564; Appeal of Sharon R. Co., 122 Pa. St. 533, 17 Atl. Rep. 234.

⁷⁰ Baltimore, Ohio & Chicago R. R. Co. v. North, 103 Ind. 486.

⁷¹ Southwestern R. R. Co. v. Southern & Atlantic Tel. Co., 46 Ga. 43.

⁷² Union Pac. R. R. Co. v. Kindred, 43 Kan. 134, 23 Pac. Rep. 112; Seymour v. Jeffersonville etc. R. R. Co., 126 Ind. 466, 26 N. E. Rep. 188.

⁷³ Board of Supervisors v. McFadden, 57 Miss. 618.

⁷⁴ Ante, §§ 266-276.

⁷⁵ See cases already cited in this section, also, Zabel v. Harshman, 68 Mich. 273, 36 N. W. Rep. 71; Scranton Gas & Water Co. v. Northern Coal & Iron Co., 192 Pa. St. 80.

In the following cases injunctions were refused on various grounds: East etc. R. R. Co. v. East Tenn. etc. R. R. Co., 75 Ala. 275; Mobile etc. R. R. Co.

v. Alabama Midland R. R. Co., 87 Ala. 520, 6 So. Rep. 407; United N. J. R. & C. Co. v. Standard Oil Co., 35 N. J. Eq. 123; Raleigh etc. R. R. Co. v. Glendon etc. R. R. Co., 112 N. C. 661, 17 S. E. Rep. 77; Lake Shore etc. R. R. Co. v. New York etc. R. R. Co., 8 Fed. Rep. 858; Magee v. London etc. R. R. Co., 8 Grant U. C. 170.

⁷⁶ Cumberland etc. R. R. Co. v. Pennsylvania R. R. Co., 57 Md. 267.

⁷⁷ Jersey & C. R. R. Co. v. Jersey City & Hoboken H. R. Co., 20 N. J. Eq. 61. This case was reversed in the Court of Errors on grounds not affecting the principle here stated. See 21 N. J. Eq. 550.

⁷⁸ Baltimore & Havre de Grace Turnpike Co. v. Union R. R. Co., 35 Md. 224; Jamaica etc. Plank Road Co. v. New York etc. Ry. Co., 25 Hun 585.

⁷⁹ Lake Shore & Michigan

enjoined until compensation is made,⁸⁰ or if attempted in a manner or at a place not authorized by law.⁸¹ If a steam railroad is laid in a public street upon due authority, it has property rights in its tracks which cannot be taken without compensation, and a crossing will be enjoined until compensation is made.⁸² So of horse railroads in streets.⁸³ A court of equity will enjoin a mode of crossing which is unnecessarily injurious to the plaintiff company,⁸⁴ at least until the right has been established at law.⁸⁵ It is held that a street railroad may cross a steam railroad without making compensation, consequently such a crossing cannot be enjoined.⁸⁶

Southern Ry. Co. v. Chicago & Western Indiana R. R. Co., 97 Ill. 506; *East St. Louis Connecting Ry. Co. v. East St. Louis Union Ry. Co.*, 108 Ill. 265.

⁸⁰ *Chicago & Eastern Illinois R. R. Co. v. Englewood Connecting R. R. Co.*, 17 Ill. App. 141; *Grand Rapids etc. R. R. Co. v. Grand Rapids & Indiana R. R. Co.*, 35 Mich. 265; *Georgia Midland etc. R. R. Co. v. Columbus S. R. R. Co.*, 89 Ga. 205, 15 S. E. Rep. 305; *Chicago etc. R. R. Co. v. Milwaukee etc. R. R. Co.*, 95 Wis. 561.

⁸¹ *Pennsylvania R. R. Co.'s Appeal*, 93 Pa. St. 150; *Central Vermont R. R. Co. v. Woodstock R. R. Co.* 50 Vt. 452; *Missouri etc. Ry. Co. v. Texas & St. Louis Ry. Co.*, 4 Wood 360.

⁸² *Chicago & Western Indiana R. R. Co. v. St. Louis etc. R. R. Co.*, 15 Ill. App. 587.

⁸³ *Pennsylvania R. R. Co.'s Appeal*, 93 Pa. St. 150.

⁸⁴ *Humeston etc. R. R. Co. v. Chicago etc. R. R. Co.*, 74 Ia. 554, 38 N. W. Rep. 413; *Atchison St. R. R. Co. v. Missouri Pac. R. R. Co.*, 31 Kan. 660.

⁸⁵ *Mississippi etc. R. R. Co. v. Texas etc. R. R. Co.*, 4 Wood 360.

⁸⁶ *New York etc. R. R. Co. v. Bridgeport Traction Co.*, 65 Conn. 410, 32 Atl. Rep. 953; *Chicago etc. R. R. Co. v. West Chicago St. R. R. Co.*, 156 Ill. 255, 40 N. E. Rep. 1008; *Pittsburgh etc. R. R. Co. v. West Chicago St. R. R. Co.*, 54 Ill. App. 273; *Chicago etc. R. R. Co. v. General Elec. R. R. Co.*, 79 Ill. App. 569; *West Jersey R. R. Co. v. Camden etc. R. R. Co.*, 52 N. J. Eq. 32, 29 Atl. Rep. 423. But a street railroad will be enjoined from crossing a commercial railroad, elsewhere than on a highway, without compensation. *Birmingham Traction Co. v. Birmingham Ry. & Elec. Co.*, 119 Ala. 129, 24 So. Rep. 368; *Northern Central R. R. Co. v. Harrisburg Elec. Co.*, 177 Pa. St. 142, 35 Atl. Rep. 624. One street railroad cannot enjoin another from crossing its tracks. *South Chicago City Ry. Co. v. Calumet Elec. St. R. R. Co.*, 70 Ill. App. 254; *Consolidated Traction Co. v. South Orange etc. R. R. Co.*, 56 N. J. Eq. 569, 40 Atl. Rep. 15.

§ 645. **To prevent injury or damage to property not taken.**—It is now well settled in England that an injunction will not lie for the protection of property which is merely injuriously affected.⁸⁷ The right to an injunction in such cases depends upon the nature of the damages and of the acts which cause it. Some instances have already been discussed in the previous sections of this chapter. The actual invasion of one's premises by discharging upon them water, sewage or noxious vapors may undoubtedly be restrained.⁸⁸ If the damage results from the construction of works which are already executed, an injunction would be unavailing and the use of the works would not be enjoined.⁸⁹ The cutting down the grade of a street was enjoined until compensation was made at the suit of the abutting owner, the constitution re-

And see Chicago etc. R. R. Co. v. Whiting etc. R. R. Co., 139 Ind. 297, 38 N. E. Rep. 604, 11 Am. R. R. & Corp. Rep. 507; Calvert v. State, 34 Neb. 616, 52 N. W. Rep. 687; Highland Ave. etc. R. R. Co. v. Birmingham Union R. R. Co., 93 Ala. 505, 9 So. Rep. 568; National Docks etc. R. R. Co. v. Penn. R. R. Co., 54 N. J. Eq. 10, 33 Atl. Rep. 219.

⁸⁷ Sutton Harbor Improvement Co. v. Hitchens, 1 DeG. McN. & G. 161; S. C. 21 L. J. Ch. N. S. 73; East and West India Docks etc. Co. v. Gattke, 3 McN. & G. 155; London & N. W. Ry. Co. v. Bradley, 3 McN. & G. 336; South Staffordshire Ry. Co. v. Hall, 1 Sim. N. S. 373; Lancashire & Yorkshire R. R. Co. v. Evans, 15 Beav. 322; Duke of Norfolk v. Tennant, 9 Hare 744; Monchet v. Great Western Ry. Co., 1 Ry. Cas. 567; Glover v. North Staffordshire Ry. Co., 5 Eng. L. & Eq. 335; Macey v. Metropolitan Board of Works, 33

L. J. Ch. 377; Bush v. Trowbridge Water Works Co., L. R. 10, Ch. App. 459. But see London & North Western Ry. Co. v. Smith, 1 McN. & G. 216; Hutton v. London & S. W. Ry. Co., 18 L. J. Ch. N. S. 345; Stainton v. Met. Board of Works, 26 L. J. Ch. 300; Shelfer v. London Electric Lighting Co., L. R. (1895) 1 Ch. D. 287.

⁸⁸ Beach v. Elmira, 22 Hun 158; Vick v. Rochester, 46 Hun 607.

⁸⁹ Bruce v. Canal Co., 19 Barb. 371; Buchner v. Chicago, Mil. & N. W. Ry. Co., 56 Wis. 403.

Injunctions were denied in the following cases of apprehended damage: Bacon v. Walker, 77 Ga. 336; Powell v. Macon etc. R. R. Co., 92 Ga. 209, 17 S. E. Rep. 1027; Robb v. LaGrange, 57 Ill. App. 386; Barrett v. Mt. Greenwood Cem. Ass., 57 Ill. App. 401; Delaware County's Appeal, 119 Pa. St. 159, 13 Atl. Rep. 62; Union Steamboat Co. v. Chicago, 37 Fed. Rep. 723,

quiring that compensation should be first made for property taken or damaged.⁹⁰ The obstruction of a public alley leading to plaintiff's place of business, by placing a depot over it, was enjoined.⁹¹ The operation of a village crematory was enjoined as a nuisance,⁹² also the use of a turntable⁹³ and of elevated coal bins⁹⁴ by a railroad company.

§ 645a. Some questions of practice in cases to enjoin the taking or damaging of property.—In accordance with the general rule the plaintiff must make out a clear right to the relief sought.¹ If the plaintiff's title is in dispute a preliminary injunction will be refused.² The damages must be immediate, certain and substantial and not merely remote or speculative.³ As a general rule an injunction will not be granted where relief may be had by certiorari or appeal,⁴ or where the remedy at law is adequate.⁵ As to where the

⁹⁰ *Brown v. Seattle*, 5 Wash. 35, 31 Pac. Rep. 313, 32 Pac. Rep. 214, 7 Am. R. R. & Corp. Rep. 64.

⁹¹ *Harvey v. Georgia Southern etc. R. R. Co.*, 90 Ga. 66, 15 S. E. Rep. 783.

⁹² *Kobbe v. New Brighton*, 23 App. Div. N. Y. 243.

⁹³ *Garvey v. Long Island R. R. Co.*, 159 N. Y. 323, 54 N. E. Rep. 57; *Same v. Same*, 9 App. Div. 254, 41 N. Y. Supp. 397.

⁹⁴ *Spring v. Delaware etc. R. R. Co.*, 88 Hun 385, 34 N. Y. Supp. 810.

¹ *Hotz v. Highway Comrs.*, 135 Ill. 388, 25 N. E. Rep. 753; *Tracy v. Troy & L. R. R. Co.*, 54 Hun 550, 7 N. Y. Supp. 892; *Baltimore v. Coates*, 85 Md. 531, 37 Atl. Rep. 18; *Barnard v. Comrs.*, 172 Ill. 391, 50 N. E. Rep. 120. See *Hagemeyer v. St. Michael*, 70 Minn. 482, 73 N. W. Rep. 412; *Harley v. Meshoppen Water Co.*, 174 Pa. St. 416, 34 Atl. Rep. 568.

² *Davis v. Covington etc. R. R. Co.*, 77 Ga. 322; *Appeal of Paterson*, 129 Pa. St. 109, 18 Atl. Rep. 563; *Murphy v. Southern Ry. Co.*, 99 Ga. 207, 24 S. E. Rep. 867.

³ *Doolittle v. East Tenn. etc. R. R. Co.*, 80 Ga. 658; *Commissioners of Highways v. Young*, 34 Ill. App. 178; *Newark Aqueduct Board v. Passaic*, 46 N. J. Eq. 552, 20 Atl. Rep. 54, 22 Atl. Rep. 55; *O'Reilly v. New York El. R. R. Co.*, 148 N. Y. 347, 42 N. E. Rep. 1063; *Mattlage v. New York El. R. R. Co.*, 14 Misc. 291, 35 N. Y. Supp. 707; *Rich v. New York El. R. R. Co.*, 16 Daly 518, 14 N. Y. Supp. 167; *Pratt v. New York Central etc. R. R. Co.*, 90 Hun 83, 35 N. Y. Supp. 557; *Heilbron v. Canal Co.*, 75 Cal. 426; *Rosser v. Randolph*, 7 Porter 238.

⁴ *Old Colony R. R. Co. v. Fall River*, 147 Mass. 455.

⁵ *Krone v. Kings County El.*

remedy at law will be deemed adequate the authorities differ. But the correct rule would seem to be that where there is a proposed or threatened permanent occupation of the plaintiff's property for public use, or where the existence or use of the works complained of will produce a continuous injury to the plaintiff and a continuous interference with his rights, resulting in substantial damage, an injunction should be granted, even though the value of the property taken or the damage done or threatened may be capable of estimation in money.⁶ Where the defendant is authorized by law to take the property or do the damaged complained of and the court has jurisdiction to grant an injunction, it may in its discretion award a money compensation in lieu of an injunction, or as an alternative to such relief.⁷ So the court may refuse the injunction upon the defendant giving security to pay any damages which may be recovered at law,⁸ or upon the defendant proceeding within a reasonable time to condemn and pay for the property or rights infringed upon.⁹ Of course the court may leave the plaintiff to his

R. R. Co., 50 Hun 431, 3 N. Y. Supp. 149.

⁶ Ante, § 632. In a suit to enjoin the pollution of a stream of water with sewerage discharged into the stream just above plaintiff's farm, the relief was granted, though the plaintiff had offered to take a specified sum of money in settlement of his claim for damages. *Dwight v. Hayes*, 150 Ill. 273, 37 N. E. Rep. 218.

⁷ *Chattanooga etc. R. R. Co. v. Jones*, 80 Ga. 264; *Miller v. Conwell*, 71 Mich. 270, 38 N. W. Rep. 912; *Eno v. Metropolitan R. R. Co.*, 56 N. Y. Supr. Ct. 313, 8 N. Y. Supp. 197; *Covington St. R. R. Co. v. Covington etc. St. R. R. Co.*, (Ky.) 19 Am. Law Reg. N. S. 765, 1 Ky. Law

Rep. 341; *Fuselier v. Great Southern Tel. & Tel. Co.*, 50 La. An. 799, 24 So. Rep. 274; ante §§ 625a, 635a.

⁸ *Fouche v. Rome St. R. R. Co.*, 84 Ga. 233, 10 S. E. Rep. 726, 1 Am. R. R. & Corp. Rep. 188; *Ivey v. Georgia etc. R. R. Co.*, 84 Ga. 536, 11 S. E. Rep. 128; *Central Pa. T. & S. Co. v. Wilkes-Barre etc. R. R. Co.*, 11 Pa. Co. Ct. 417; *Campbell v. Point Pleasant etc. R. R. Co.*, 23 W. Va. 448; *Kansas etc. R. R. Co. v. Payne*, 49 Fed. Rep. 114, 1 C. C. A. 183; *Kansas etc. R. R. Co. v. LeFlore*, 49 Fed. Rep. 119, 1 C. C. A. 192.

⁹ *Young v. Harrison*, 6 Ga. 130; *Gammage v. Georgia Southern R. R. Co.*, 65 Ga. 614; *Lohman v. St. Paul, Stillwater etc. R. R.*

legal remedies where the damages are not substantial.¹⁰ The right to an injunction may be lost by delay, during which the defendant has expended large sums of money and the public have acquired an interest.¹¹ But the cases

Co., 18 Minn. 174; *White v. Nashville etc. R. R. Co.*, 7 Heisk. 518.

¹⁰ *Gray v. Manhattan R. R. Co.*, 128 N. Y. 499; 28 N. E. Rep. 498; ante, note 97.

¹¹ *Clark v. Cambridge etc. Irr. & Imp. Co.*, 45 Neb. 799, 64 N. W. Rep. 239; *Kincaid v. Indianapolis Nat. Gas Co.*, 124 Ind. 577, 24 N. E. Rep. 1066, 3 Am. R. R. & Corp. Rep. 1; *Fisk v. Hartford*, 70 Conn. 720; *Heilman v. Lebanon etc. R. R. Co.*, 180 Pa. St. 627, 37 Atl. Rep. 199; *Manning v. Port Reading R. R. Co.*, 54 N. J. Eq. 46, 33 Atl. Rep. 802. In the first case cited the suit was by a riparian proprietor on the Republican river to enjoin the diversion of the waters of the stream for irrigation purposes. The plaintiff's right to compensation was clear but the bill was not filed until the works were nearly completed and the injunction was for that reason refused. The court says: "It does not, however, follow that equity will interfere to prevent the use of the water, in this instance, at the suit of the plaintiff, although actions to prevent the invasion of private rights by persons claiming public powers is a favored subject of equitable cognizance. It is clearly established by the proofs that the construction of the irrigating ditch was undertaken and carried out by the defendant company

in good faith, in accordance with the purpose of its creation, at a cost of many thousands of dollars, and in the belief on the part of its promoters and managing officers that it was entitled to divert the water of the Republican river. It is also practically undisputed that the plaintiff was, from the first, fully advised of both the undertaking and the purpose of the defendant, and it is certain that he interposed no objection thereto until after the substantial completion of the work. The rule which denies relief in equity to one who has slept upon his rights applies in all its force to cases where the defendant is engaged in a work of public interest. In fact, there is no principle more firmly established in the jurisprudence of this country than that a suitor who has, by his laches, made it impossible to restrain the completion or use of public works without great injury to his adversary or the public, will be left to pursue his ordinary legal remedies." Citing: *Erie Ry. Co. v. Delaware, L. & W. R. R. Co.*, 21 N. J. Eq. 283; *Traphagan v. Mayor*, 29 N. J. Eq. 206; *Campbell v. Railroad Co.*, 110 Ind. 490, 11 N. E. Rep. 482; *Railway Co. v. Smith*, 113 Ind. 233, 15 N. E. Rep. 256; *Organ v. Railroad Co. (Ark.)*, 11 S. W. Rep. 96; *Goodin v. Canal Co.*, 18 Ohio St. 169; *Curtis v. Water*

are not uniform and in many such delay has been held to be no bar.¹² Equity, having jurisdiction to grant an injunction, may give complete relief, and may therefore make an award for past damages.¹³ Where pending a suit to enjoin the taking of water under a defective location, a corrected location was filed, the bill was retained for the purposes of assessing the damages which accrued up to the filing of the new certificate.¹⁴ Owners of separate tracts damaged by the same work or improvement may join in a bill to restrain the injury.¹⁵

§ 645b. **Injunction to prevent misuse or diversion of public streets and grounds.**—Where lands are laid out or dedicated as public parks or grounds, their diversion to other uses may be enjoined by those whose property is injuriously affected by such diversion.¹⁶ A square was dedicated to the public and used for more than a hundred years for county buildings and for standing room for wagons and horses. The city within which it was situated passed an ordinance to improve it as a park with grass plots, walks, etc. The county filed a bill to prevent such changes and pre-

Co., 20 Or. 34, 23 Pac. Rep. 808, and 25 Pac. Rep. 373; High Inj. § 643; Ror. R. R. 741-757; Wood Ry. Law 794.

¹² Thus it has been held that one may enjoin the pollution of a stream by sewerage though he made no objection while the sewer was being constructed, or even though he orally consented to its being built and discharged into the stream. *Chapman v. Rochester*, 110 N. Y. 273, 18 N. E. Rep. 88; *Dwight v. Hayes*, 150 Ill. 273, 37 N. E. Rep. 218. And see *Perkins v. Morristown & C. Turnpike Co.*, 48 N. J. Eq. 499, 22 Atl. Rep. 180; *Coombs v. Salt Lake etc. R. R. Co.*, 9 Utah 322, 34 Pac. Rep. 248; *Bigler's Exrs. v. Penn. Canal Co.*, 177 Pa. St. 28, 35 Atl. Rep. 112.

¹³ *Lynch v. Met. El. R. R. Co.*, 129 N. Y. 274, 29 N. E. Rep. 315; *Lamming v. Galusha*, 135 N. Y. 239, 31 N. E. Rep. 1024; *Whipple v. Fair Haven*, 63 Vt. 221, 21 Atl. Rep. 533. Where a decree for past damages is sought all persons interested therein should be parties. *Shepard v. Manhattan R. R. Co.*, 57 N. Y. Supr. Ct. 5, 5 N. Y. Supp. 189.

¹⁴ *Lexington Print Works v. Canton*, 171 Mass. 414, 50 N. E. Rep. 931.

¹⁵ *Guerkink v. Petaluma*, 112 Cal. 306, 44 Pac. Rep. 570.

¹⁶ *Douglass v. Montgomery*, 118 Ala. 599, 24 So. Rep. 745; *Pierce v. Roberts*, 57 Conn. 31, 17 Atl. Rep. 275; *Princeville v. Auten*, 77 Ill. 325; *Chicago v.*

vailed.¹⁷ So the diversion or misuse of public grounds will be restrained at the suit of the municipality, State or attorney general.¹⁸ The same rules apply to streets with even greater force.¹⁹

§ 645c. **Bill to protect the possession or rights of condemnor.**—An injunction was granted to prevent the erection of a building on a railroad right of way within seven or eight feet of the track.²⁰ Where a railroad company has perfected its right to take certain property for its right of way its priority will be protected by injunction.²¹ A company lawfully in possession for a public use may enjoin a disturbance of the possession that will interfere with such use.²² In one case where land had been condemned for railroad purposes and the compensation deposited pursuant to statute, the owner was restrained from threatened acts of

Ward, 169 Ill. 392; Platt v. Chicago etc. R. R. Co., 74 Ia. 127 37 N. W. Rep. 107; Flaten v. Moorhead, 51 Minn. 518, 53 N. W. Rep. 807; Brice v. Thompson, 48 Mo. 361; Cumming v. St. Louis, 90 Mo. 259; Foster v. Buffalo, 64 How. Pr. 127; Clercq v. Gallipolis, 7 Ohio (Pt. 1) 217; Herrick v. Cleveland, 7 Ohio C. C. 470; Bell v. Ohio etc. R. R. Co., 1 Grant 105; Sequin v. Ireland, 57 Tex. 183; Gilman v. Milwaukee, 55 Wis. 328. Compare Clark v. Providence, 16 R. I. 337, 15 Atl. Rep. 763; Mowry v. Providence, 16 R. I. 422, 16 Atl. Rep. 511.

¹⁷ Board of Supervisors v. Winchester, 84 Va. 467, 4 S. E. Rep. 844.

¹⁸ Avondale Land Co. v. Avondale 111 Ala. 523, 21 So. Rep. 318; Attorney General v. Tarr, 148 Mass. 309, 19 N. E. Rep. 358; United States v. Illinois Cent. R. R. Co., 2 Biss. 174. See United States v. Illinois Cent. R. R. Co., 154 U. S. 225, 14 S. C.

Rep. 1015; People v. Mould, 37 App. Div. N. Y. 35.

¹⁹ Springfield v. Robertson Ave. R. R. Co., 69 Mo. App. 544; Gray v. New York & Phila. Traction Co., 56 N. J. Eq. 463, 40 Atl. Rep. 21; Burlington v. Penn. R. R. Co., 56 N. J. Eq. 259, 38 Atl. Rep. 849. Also many cases cited in sections 635 to 638 of this chapter, and see People v. General Electric Ry. Co., 172 Ill. 129, 50 N. E. Rep. 158; Pennsylvania R. R. Co. v. Chicago, 181 Ill. 289.

²⁰ Cunningham v. Rome etc. R. R. Co., 27 Ga. 499. And see Delaware etc. R. R. Co. v. Newton Coal Min. Co., 6 Luzerne Leg. Reg. Rep. 21; East Tenn. etc. R. R. Co. v. Sellers, 85 Ga. 853, 11 S. E. Rep. 543.

²¹ Rochester etc. R. R. Co. v. New York etc. R. R. Co., 110 N. Y. 128, 17 N. E. Rep. 680.

²² Southern Pacific R. R. Co. v. Ferris, 93 Cal. 263, 28 Pac. Rep. 828; Kansas City etc. R. R. Co.

violence towards the agents of the company.²³ Where a company is in possession of property in actual use for public purposes, and its title is disputed, and a suit in ejectment has been begun to oust it from possession, a court of equity will entertain a bill to enjoin the ejectment suit and settle the rights of the parties.²⁴

§ 645d. **Bill to protect franchises in public streets.**—Where a railroad has been lawfully laid in a public street a bill will lie to prevent the public authorities tearing it up or otherwise interfering therewith.²⁵ It has been held that a bill will lie to prevent an interference with the tracks of a street railway by laying a sewer in the center of a street where it appears that the sewer can just as well be laid on one side of the street.²⁶ One street railroad company may be enjoined from unlawfully interfering with the construction or operation of another.²⁷ So one company may enjoin another from using its tracks without compensation,²⁸ and a horse railroad company may enjoin a coach company from

v. Kansas City etc. R. R. Co., 129 Mo. 62, 31 S. W. Rep. 451; Southern Pac. R. R. Co. v. Oakland, 58 Fed. Rep. 50.

²³ Montgomery etc. R. R. Co. v. Walton, 14 Ala. 207.

²⁴ Foltz v. St. Louis etc. R. R. Co., 60 Fed. Rep. 316, 8 C. A. 635; Paterson v. Railroad Co., 47 N. J. Eq. 331, 21 Atl. Rep. 954; South & North Ala. R. R. Co. v. Ala. G. S. R. R. Co., (Ala.) 14 So. Rep. 747; Norwich R. R. Co. v. Wodehouse, 11 Beav. 382.

²⁵ Chicago v. Union Stock Yards & Transit Co., 164 Ill. 224, 45 N. E. Rep. 430; Columbus v. Columbus etc. R. R. Co., 37 Ind. 294; Harrisburg City Pass. R. R. Co. v. Harrisburg, 149 Pa. St. 465, 24 Atl. Rep. 56; Mobile v. Louisville etc. R. R. Co., 84 Ala. 115.

²⁶ Des Moines City R. R. Co. v. Des Moines, 90 Ia. 770, 58 N. W. Rep. 906, 9 Am. R. R. & Corp. Rep. 326; Clapp v. Spokane, 53 Fed. Rep. 514. And see Milwaukee St. R. R. Co. v. Adams, 85 Wis. 142, 55 N. W. Rep. 181, 8 Am. R. R. & Corp. Rep. 320. Contra: Spokane Street R. R. Co. v. Spokane, 5 Wash. 634, 32 Pac. Rep. 456.

²⁷ Chicago General R. R. Co. v. West Chicago St. R. R. Co., 63 Ill. App. 464. And see Union St. R. R. Co. v. Hazelton etc. R. R. Co., 154 Pa. St. 423, 26 Atl. Rep. 557; Thirteenth Street etc. R. R. Co. v. Southern Pass. R. R. Co., 15 Pa. Co. Ct. 145; Tamaqua etc. R. R. Co. v. Inter-County St. R. R. Co., 4 Pa. Dist. Ct. 20.

²⁸ Fidelity Trust & Safety Vault Co. v. Mobile St. R. R.

using its tracks in carrying on a competing business.²⁹ A street railroad company lawfully occupying a street may enjoin another company from occupying the same street without authority.³⁰ A toll bridge company was prevented by injunction from interfering with its use by a street railroad company having due authority to occupy the street of which the bridge was a part.³¹ A city was prevented by injunction from preventing the laying of gas pipes in a street by a company having authority to do so.³² Some cases to enjoin electrical interference are referred to in the margin.³³

§ 645e. Suit by public authorities to prevent unlawful use of street or to recover for damage thereto.—A municipal corporation charged with the duty of maintaining a street or highway can maintain a bill to prevent its use by a railroad company without authority.³⁴ Where a railroad company unlawfully occupied and destroyed a public highway it was held the county could recover the cost of a new way

Co., 53 Fed. Rep. 687; Second St. etc. R.R. Co. v. Green & Coats Sts. Pass. R. R. Co., 3 Phil. 430.

²⁹ Citizens Coach Co. v. Camden Horse R. R. Co., 33 N. J. Eq. 267, affirming 31 N. J. Eq. 525. See S. C. 28 N. J. Eq. 145, 29 N. J. Eq. 229.

³⁰ Germantown Pass. R. R. Co. v. Citizens Pass. R. R. Co., 48 Leg. Intel. 220; Central Crosstown R. R. Co. v. Met. Street Ry. Co., 16 App. Div. N. Y. 229; Same v. Same, 17 Misc. 716, 40 N. Y. Supp. 1095.

³¹ Pittsburgh etc. R. R. Co. v. Point Bridge Co., 165 Pa. St. 37, 30 Atl. Rep. 511.

³² Metropolitan Gas Co. v. Hyde Park, 27 Ill. App. 361; People's Nat. Gas. Co. v. Pittsburgh, 1 Pa. Co. Ct. 311.

³³ Birmingham Traction Co. v. Southern Bell Tel. & Tel. Co., 119 Ala. 144, 24 So. Rep. 731; Western Union Tel. Co. v. G. &

S. Elec. Light Co., 46 Mo. App. 120; Cumberland Tel. & Tel. Co. v. United Electric R. R. Co., 42 Fed. Rep. 272; Cases cited in § 139a.

³⁴ Stamford v. Stamford H. R. Co., 56 Conn. 381; Brunswick etc. R. R. Co. v. Waycross, 88 Ga. 68, 13 S. E. Rep. 835; Northern Central R. R. Co. v. Baltimore, 21 Md. 93; Stearns' County v. St. Cloud etc. R. R. Co., 36 Minn. 425; Brooklyn Steam Transit Co. v. Brooklyn, 78 N. Y. 524; Philadelphia v. Philadelphia etc. R. R. Co., 19 Phil. 507, 7 Pa. Co. Ct. 390; Williamsport v. Williamsport Pass. R. R. Co., 3 Pa. Co. Ct. 39; Steelton v. East Harrisburg Pass. R. R. Co., 11 Pa. Co. Ct. 161; Scranton v. Del. & H. Canal Co., 12 Pa. Co. Ct. 283. Also cases cited in § 645b, note 19.

But see Kings County v. Sea View R. R. Co., 23 Hun 180;

to answer the same purpose.³⁵ So where a bridge was destroyed by a dam.³⁶ Quo warranto was held not to be a proper remedy to test the right of a railroad company to occupy a street.³⁷

§ 646. **Enjoining condemnation proceedings.**—A bill in equity will not lie to enjoin proceedings for condemnation, for the reason that the mere taking of such proceedings does no injury to property,³⁸ and for the further reason that the grounds relied upon for an injunction may be urged in defence of the proceedings.³⁹ The making of a public improvement cannot be enjoined on the ground that it is

Milwaukee v. Milwaukee etc. R. R. Co., 7 Wis. 85; Galen v. Clyde etc. Plank Road Co., 27 Barb. 543; Dover v. Portsmouth Bridge, 17 N. H. 200.

³⁵ Louisville etc. R. R. Co. v. Whitley County Court, 95 Ky. 215, 24 S. W. Rep. 604. And see Weymouth v. Port Townsend etc. R. R. Co., 6 Wash. 575, 34 Pac. Rep. 154.

³⁶ Hooksett v. Amoskeag Mfg. Co., 44 N. H. 105. To same effect, Andover v. Sutton, 12 Met. 182.

³⁷ People v. Lake St. El. R. R. Co., 54 Ill. App. 348.

³⁸ Doughty v. Somerville etc. R. R. Co., 7 N. J. Eq. 51; Tift v. County of Dougherty, 74 Ga. 340.

³⁹ Williams v. Etting Woolen Co., 33 Conn. 353; Dickerson v. Comrs. of Highways, 18 Ill. App. 88; Rich v. Gow, 19 Ill. App. 81; Winkler v. Winkler, 40 Ill. 179; Lake Shore & Michigan Southern Ry. Co. v. Chicago & W. I. R. R. Co., 96 Ill. 125; Western Md. R. R. Co. v. Patterson, 37 Md. 125; Kip v. New York & Harlem R. R. Co., 6 Hun. 24; Cooper v. Anniston etc.

R. R. Co., 85 Ala. 106; Dierks v. Commissioners, 142 Ill. 197, 31 N. E. Rep. 496; Chicago etc. R. R. Co. v. Chicago, 143 Ill. 641, 32 N. E. Rep. 178; Chicago etc. R. R. Co. v. Chicago, 151 Ill. 348, 37 N. E. Rep. 842; Keokuk etc. R. R. Co. v. Donnell, 77 Ia. 221, 42 N. W. Rep. 176; Conner v. Covington Transfer R. R. Co., (Ky.) 19 S. W. Rep. 597; Detroit etc. R. R. Co. v. Detroit, 91 Mich. 444, 52 N. W. Rep. 52. A contrary conclusion was reached in Central City Horse Ry. Co. v. Fort Clark Horse Ry. Co., 81 Ill. 523, but the decision is opposed to both earlier and later decisions in that State. And see District of Columbia v. Prospect Hill Cemetery, 5 App. Cas. D. C. 497; Edgewood Water Co. v. Troy Water Co., 7 Pa. Co. Ct. 476. In Chicago & Southwestern R. R. Co. v. Swinney, 38 Ia. 182, it was held that a railroad company which had a valid agreement for a right of way could restrain the owner from prosecuting a writ of ad quod damnum for his damages. Condemnation proceedings were enjoined in Schneider v. Rochester, 160 N.

unnecessary or is being made to further private ends.⁴⁰ But where the ground relied upon cannot be litigated in the condemnation proceedings an injunction will be granted.⁴¹

§ 647. **Ejectment for land taken or occupied for public use.**—Ejectment is a proper remedy to recover possession of property which has been wrongfully taken or is wrongfully retained by one claiming to act under the power of eminent domain. It may be maintained where property is entered upon without any attempt to agree with the owner or to have it condemned under the statute,⁴² or where an entry is

Y. 165; *People v. Adirondack R. Co.*, 160 N. Y. 225.

⁴⁰ *Dunham v. Hyde Park*, 75 Ill. 371; *Baldwin v. Bangor*, 36 Me. 518.

⁴¹ *Youghiogheny Riv. Coal Co. v. Robertson*, 12 Pa. Co. Ct. 1; *Eversfield v. Mid-Sussex R. R. Co.*, 3 DeG. & J. 286; *Bentinck v. Norfolk Estuary Co.*, 8 DeG. M. & G. 714.

⁴² *Smith v. Inge*, 80 Ala. 283; *Graham v. Columbus & Indianapolis Central R. R. Co.*, 27 Ind. 260; *Daniels v. Chicago & North Western R. R. Co.*, 35 Ia. 129; *Conger v. Burlington & S. R. R. Co.*, 41 Ia. 419; *Walker v. Chicago, Rock Island & Pacific R. R. Co.*, 57 Mo. 275; *McClinton v. Pittsburgh, Fort Wayne & Chicago R. R. Co.*, 68 Pa. St. 404; *Justice v. Nesquehoning Valley R. R. Co.*, 87 Pa. St. 28; *Cincinnati etc. R. R. Co. v. Clifford*, 113 Ind. 460; *Prior v. Hardwick*, 94 Ky. 408, 22 S. W. Rep. 545; *Shoemaker v. Cedar Rapids etc. R. R. Co.*, 45 Minn. 366, 48 N. W. Rep. 191; *Watson v. Chicago etc. R. R. Co.*, 46 Minn. 321, 48 N. W. Rep. 1129; *Armstrong v. St. Louis*, 69 Mo. 309; *Eels v. Amer-*

ican Tel. & Tel. Co., 65 Hun 516, 20 N. Y. Supp. 600; *Green v. Tacoma*, 51 Fed. Rep. 622; *Hays v. T. & P. Co.*, 62 Tex. 397; *Tompkins v. Augusta etc. R. R. Co.*, 37 S. C. 382, 16 S. E. Rep. 149; *Mobley v. Breed*, 48 Ga. 44; *Louisville etc. R. R. Co. v. Rudd*, (Ky.) 30 S. W. Rep. 604; *Illinois Cent. R. R. Co. v. LeBlanc*, 74 Miss. 650.

See *Kremer v. Chicago etc. R. R. Co.*, 54 Minn. 157, 55 N. W. Rep. 928; *Tomkins v. Augusta etc. R. R. Co.*, 33 S. C. 216, 11 S. E. Rep. 692; *San Antonio etc. R. R. Co. v. Knoepfli*, 82 Tex. 270, 17 S. W. Rep. 1052; *Paris etc. R. R. Co. v. Greimer*, 84 Tex. 443, 19 S. W. Rep. 564; *Lynch v. Rutland*, 66 Vt. 570, 29 Atl. Rep. 1015; *Jolly v. Wimbledon etc. R. R. Co.*, 1 B. & S. 807, 101 E. C. L. R. 815.

Of course valid condemnation proceedings will be a good defense. *Brock v. Old Colony R. R. Co.*, 146 Mass. 194; *Roosa v. St. Joseph etc. R. R. Co.*, 114 Mo. 309, 21 S. W. Rep. 1124; *Secombe v. Railroad Co.*, 23 Wall. 108; *Norvall v. Canada Southern R. R. Co.*, 28 U. C. C. P. 309.

made under proceedings which are void for any reason,⁴³ or where a rightful entry is made and the party condemning refuses to pay the compensation which has been assessed or agreed upon,⁴⁴ or where an entry is made by agreement and upon promises which have not been fulfilled,⁴⁵ or under a parol license which has been revoked,⁴⁶ or pending pro-

⁴³ *Smith v. Chicago etc. R. R. Co.*, 67 Ill. 191; *Memphis etc. Ry. Co. v. Parson's Town Co.*, 26 Kan. 503; *Harris v. Marblehead*, 10 Gray 40; *Kanne v. Minneapolis & St. Louis Ry. Co.*, 33 Minn. 419; *Ellis v. Pacific R. R. Co.*, 51 Mo. 200; *Moses v. St. Louis Sectional Dock Co.*, 84 Mo. 242; *Hull v. Chicago, Burlington & Quincy R. R. Co.*, 21 Neb. 371; *Adams v. Saratoga & W. R. R. Co.*, 10 N. Y. 328; *Bothe v. Railway Co.*, 37 Ohio St. 147; *Jacksonville etc. R. R. Co. v. Adams*, 27 Fla. 443, 9 So. Rep. 2; *Chicago etc. R. R. Co. v. Galt*, 133 Ill. 657, 23 N. E. Rep. 425, 24 N. E. Rep. 674, 1 Am. R. R. & Corp. Rep. 365; *Kansas Pac. R. R. Co. v. Streeter*, 8 Kan. 133; *Missouri Pac. R. R. Co. v. Houseman*, 41 Kan. 300, 21 Pac. Rep. 284; *McCarty v. Clark County*, 101 Mo. 179, 14 S. W. Rep. 51; *In re Girard Ave.*, 18 Phil. 499; *Nashville etc. R. R. Co. v. Hobbs*, 120 Ala. 600.

⁴⁴ *White v. Wabash, St. Louis & Pacific Ry. Co.*, 64 Ia. 281; *St. Joseph & Denver City R. R. Co. v. Callender*, 13 Kan. 496; *Blackshire v. Atchison, Topeka & Santa Fe R. R. Co.* 13 Kan. 514; *Kanne v. Minneapolis & St. Louis Ry. Co.*, 30 Minn. 423; *Bartleson v. Minneapolis*, 33 Minn. 468; *Wheeling etc. R. R. Co. v. Warrell*, 122 Pa. St. 613,

16 Atl. Rep. 20. But see § 648.

⁴⁵ *Hooper v. Columbus & Western Ry. Co.*, 78 Ala. 213; *Pittsburgh & Steubenville R. R. Co. v. Jones*, 59 Pa. St. 433; *Philadelphia, Newton & N. Y. R. R. Co. v. Cooper*, 105 Pa. St. 239; *Avery v. Kansas City etc. R. R. Co.*, 113 Mo. 561, 21 S. W. Rep. 90; *Daubert v. Pennsylvania R. R. Co.*, 155 Pa. St. 178, 26 Atl. Rep. 108. Contra: *Missouri Pac. R. R. Co. v. Gano*, 47 Kan. 457; *Rankin v. Great Western R. R. Co.*, 4 U. C. C. P. 463; *Doe v. Leeds etc. R. R. Co.*, 20 L. J. Q. B. 486; *Atlanta etc. R. R. Co. v. Barker*, 105 Ga. 534, 31 S. E. Rep. 452.

⁴⁶ *Denver etc. R. R. Co. v. School District*, 14 Col. 327, 23 Pac. Rep. 978; *Kremer v. Chicago etc. R. R. Co.*, 51 Minn. 15, 52 N. W. Rep. 977; *Minneapolis Mill Co. v. Minneapolis etc. R. R. Co.*, 51 Minn. 304, 53 N. W. Rep. 639; *Minneapolis Western R. R. Co. v. Minneapolis etc. R. R. Co.*, 58 Minn. 128, 59 N. W. Rep. 983; *Beck v. Louisville etc. R. R. Co.*, 65 Miss. 172, 3 S. E. Rep. 252; *Pittsburgh etc. R. R. Co. v. Oliver*, 131 Pa. St. 408, 19 Atl. Rep. 47. Contra: *Kanaga v. St. Louis etc. R. R. Co.*, 76 Mo. 207; *Dodd v. St. Louis etc. R. R. Co.*, 108 Mo. 581, 18 S. W. Rep. 1117; *Snyder v. Chicago etc. R. R. Co.*, 112 Mo. 527, 20

ceedings when no provision is made for it by statute.⁴⁷ Where a railroad company went into possession under a lease for a term of years and until ninety days after notice to quit, it was held that, after the term had expired and notice had been given, ejectment could be maintained, though the road had been foreclosed in the meantime and was being operated by a different company.⁴⁸ Where land was taken by a railroad for its use, which afterwards conveyed it to the city of Brooklyn for a street, it was held that ejectment would lie.⁴⁹ Where plaintiff granted a right of way one hundred feet wide to a railroad company and the latter granted part of the same to another company, it was held the plaintiff could recover in ejectment the land so granted to the second company.⁵⁰ Where a railroad company appropriated more land than it was entitled to do by law, the owner may recover the excess in ejectment.⁵¹ Where a right of way was granted by the life tenant, it was held that the reversioner could maintain ejectment after the termination of the life estate.⁵² While a railroad was in the hands of a receiver, certain property was entered upon and used without condemnation, and this use was continued by the company after the receiver was discharged. It was held that the owner could recover in ejectment, and was not barred by the fact that the receiver had given notice to present all claims and the owner had presented none.⁵³ Where possession is permitted, pending an appeal, upon making a deposit of the damages awarded, the deposit must

S. W. Rep. 885; *Scarritt v. Kansas City etc. R. R. Co.*, 127 Mo. 298, 29 S. W. Rep. 1020; *Texas etc. R. R. Co. v. Jarrell*, 60 Tex. 267; *Pryzbłowicz v. Miss. Riv. R. R. Co.*, 3 McCrary 586. And see § 648.

⁴⁷ *Coburn v. Pacific Lumber & Mill Co.*, 46 Cal. 31; *Chicago, St. Louis & Western R. R. Co. v. Gates*, 120 Ill. 86.

⁴⁸ *Green v. Missouri Pacific Ry. Co.*, 82 Mo. 653.

⁴⁹ *Strong v. Brooklyn*, 68 N. Y. 1.

⁵⁰ *Blakely v. Chicago etc. R. R. Co.*, 34 Neb. 284, 51 N. W. Rep. 767; S. C. affirmed on rehearing. 46 Neb. 272, 64 N. W. Rep. 972.

⁵¹ *Robinson v. Pennsylvania R. R. Co.*, 161 Pa. St. 561, 29 Atl. Rep. 268.

⁵² *Bradley v. Missouri Pacific Ry. Co.*, 91 Mo. 493.

⁵³ *Bloomfield R. R. Co. v. Van Slike*, 107 Ind. 480.

be without conditions, and, when the amount is finally settled, the whole amount must be paid or ejectment will lie.⁵⁴ The deposit is at the risk of the depositor.⁵⁵ Where the owner appealed and the company deposited the damages awarded and took possession, and the proceedings were dismissed in the appellate court, it was held all rights under the proceedings ceased, and that ejectment would lie.⁵⁶ A lessee or vendee in possession who is not made a party can maintain ejectment.⁵⁷ A railroad company purchased a right of way pending a suit to foreclose a mortgage thereon. It was held the purchaser at foreclosure sale could maintain ejectment for the land.⁵⁸ Some courts hold that, upon judgment being entered for the plaintiff, execution may be stayed a reasonable time, to enable the defendant to condemn, if it wishes to,⁵⁹ while others maintain the contrary.⁶⁰ In those States in which compensation need not be first

⁵⁴ *Lake Erie & Western R. R. Co. v. Kinsey*, 87 Ind. 514; *White v. Wabash, St. Louis & Pacific Ry. Co.*, 64 Ia. 281; *St. Joseph & Denver City R. R. Co. v. Callender*, 13 Kan. 496; *Kanne v. Minneapolis & St. Louis Ry. Co.*, 30 Minn. 423; *Levering v. Philadelphia etc. R. R. Co.*, 8 W. & S. 459.

⁵⁵ *White v. Wabash, St. Louis & Pacific Ry. Co.*, 64 Ia. 281; *Blackshire v. Atchison, T. & S. F. R. R. Co.*, 13 Kan. 514.

⁵⁶ *Kiecher v. Killbuck Turnpike Co.*, 33 Ind. 333.

⁵⁷ *Owen v. St. Paul etc. R. R. Co.*, 12 Wash. 313, 41 Pac. Rep. 44; *Baltimore etc. R. R. Co. v. Parrette*, 55 Fed. Rep. 50. And see *Madden v. Louisville etc. R. R. Co.*, 66 Miss. 258, 6 So. Rep. 181.

⁵⁸ *Jackson v. Centerville etc. R. R. Co.*, 64 Ia. 292.

⁵⁹ *Conger v. Burlington & S.*

W. R. R. Co., 41 Ia. 419; *Pittsburgh & Steubenville R. R. Co. v. Jones*, 59 Pa. St. 433; *Justice v. Nesquehoning Valley R. R. Co.*, 87 Pa. St. 28; *Pittsburgh & Lake Erie R. R. Co. v. Bruce*, 102 Pa. St. 23; *Allegheny Valley R. R. Co. v. Colwell*, 2 Monaghan (Pa. Supm.) 300; *Ritchie v. Kansas etc. R. R. Co.*, 55 Kan. 38, 39 Pac. Rep. 718; *Illinois Cent. R. R. Co. v. Le Blanc*, 74 Miss. 650. Sometimes it is provided by statute that a railroad company when sued in ejectment may turn the suit into one to assess the just compensation. *Adolph v. Minneapolis etc. R. R. Co.*, 42 Minn. 170, 43 N. W. Rep. 848; *Bennett v. Minneapolis etc. R. R. Co.*, 42 Minn. 245, 44 N. W. Rep. 10.

⁶⁰ *Bartleson v. Minneapolis*, 33 Minn. 468; *Strong v. Brooklyn*, 12 Hun 453.

made, it is held that ejectment cannot be maintained, but that the owner is confined to his remedy for damages.⁶¹

§ 647a. **Ejectment in case of wrongful occupation of street.**—The owner of the fee of a highway can maintain ejectment against any person occupying the soil for any purpose not connected with its use as a highway.⁶² It will lie, therefore, against a railroad company which lays its tracks in the street without compensation to the owner of the fee, and though the road has been duly authorized by the public authorities.⁶³ But some cases hold that ejectment will not lie, if the road is duly authorized by the proper authorities.⁶⁴ So ejectment will lie against a telegraph or telephone company occupying the highway,⁶⁵ also for ground in a highway occupied by a toll house which has been disused.⁶⁶ Where pending the suit in ejectment the defendant condemns the right to occupy the street and pays the award, the judgment should be for damages only.⁶⁷ So it has been held that a city can maintain ejectment against a railroad wrongfully occupying a street.⁶⁸

§ 648. **When the owner is estopped to maintain ejectment.**—Some cases hold that, where land is entered upon by consent of the owner for the purpose of being devoted to

⁶¹ *Saunders v. Railroad Co.*, 101 Tenn. 206, 47 S. W. Rep. 155.

⁶² *Woodruff v. Neal*, 38 Conn. 165; *Smeberg v. Cunningham*, 96 Mich. 379, 56 N. W. Rep. 73; *Thomas v. Hunt*, 134 Mo. 392, 35 S. W. Rep. 581.

⁶³ *Weyl v. Sonoma Valley R. Co.*, 69 Cal. 202; *Carpenter v. Oswego & Seneca R. R. Co.*, 24 N. Y. 655; *Wager v. Troy Union R. R. Co.*, 25 N. Y. 526; *Reichert v. St. Louis etc. R. R. Co.*, 51 Ark. 491, 11 S. W. Rep. 696; *Louisville etc. R. R. Co. v. Liebfried*, 92 Ky. 407, 17 S. W. Rep. 870; *St. Louis v. Missouri Pac. R. R. Co.*, 114 Mo. 13, 21 S. W. Rep. 202; *Judge v. New York*

Central etc. R. R. Co., 56 Hun 60, 9 N. Y. Supp. 158.

⁶⁴ *Edwardsville R. R. Co. v. Sawyer*, 92 Ill. 377; *Montgomery v. Santa Ana etc. R. R. Co.*, 104 Cal. 186, 37 Pac. Rep. 786, 10 Am. R. R. & Corp. Rep. 25; *Postal Tel. Cable Co. v. Eaton*, 170 Ill. 520.

⁶⁵ *Eels v. Am. Tel. & Tel. Co.*, 143 N. Y. 133, 38 N. E. Rep. 202, 10 Am. R. R. & Corp. Rep. 69.

⁶⁶ *Fisher v. Coyle*, 3 Watts 407.

⁶⁷ *Judge v. New York Central etc. R. R. Co.*, 56 Hun 60, 9 N. Y. Supp. 158.

⁶⁸ *Chester v. Wabash etc. R. R. Co.*, 182 Ill. 382.

a public use,⁶⁹ or where an entry is made and works constructed with the knowledge and without objection on the part of the owner,⁷⁰ he will be estopped from maintaining ejectment for the land.⁷¹ So far as regards mere acquies-

⁶⁹ *Trenton Water Power Co. v. Chambers*, 9 N. J. Eq. 471; *Jersey City v. Fitzpatrick*, 30 N. J. Eq. 97; *New York etc. R. R. Co. v. Stanley*, 34 N. J. Eq. 55; *Patterson, Newark & New York R. R. Co. v. Kamlah*, 42 N. J. Eq. 93; *Provolt v. Chicago, R. I. & P. R. R. Co.*, 57 Mo. 256; *Baker v. Same*, 57 Mo. 265; *Kanaga v. St. Louis etc. R. R. Co.*, 76 Mo. 207; *Tompkins v. Augusta & Knoxville R. R. Co.*, 21 S. C. 420; *Texas & St. Louis R. R. Co. v. Farrell*, 60 Tex. 267; *McAuley v. Western Vermont R. R. Co.*, 33 Vt. 311; *Knapp v. McAuley*, 39 Vt. 275; *Taylor v. Chicago, Mil. & St. P. Ry. Co.*, 63 Wis. 327; *Griffin v. Jacksonville etc. R. R. Co.*, 33 Fla. 606, 15 So. Rep. 338; *Texas etc. R. R. Co. v. Jarrell*, 60 Tex. 267; *Cowan v. Southern Ry. Co.*, 118 Ala. 354, 23 So. Rep. 754; *Atlanta etc. R. R. Co. v. Barker*, 105 Ga. 534, 31 S. E. Rep. 452; *Chicago etc. R. R. Co. v. Englehart*, 57 Neb. 444, 77 N. W. Rep. 1092; *Fries v. Wheeling etc. R. R. Co.*, 56 Ohio St. 135; *Doe v. Leeds etc. R. R. Co.*, 20 L. J. Q. B. 486. See *Chicago etc. R. R. Co. v. Knox College*, 34 Ill. 195; *Hornback v. Cincinnati & Zanesville R. R. Co.*, 20 Ohio St. 81; *Hooper v. Bridgewater*, 102 Mass. 512.

⁷⁰ *New Orleans & Selma R. R. Co. v. Jones*, 68 Ala. 48; *St. Julien v. Morgan's La. & Tex. R. R. Co.*, 35 La. An. 924; *Pryzbłowicz v. Missouri Riv. R. R.*

Co., 3 McCrary 586; *Reichert v. St. Louis etc. R. R. Co.*, 51 Ark. 491; *St. Joseph Hydraulic Co. v. Cincinnati etc. R. R. Co.*, 109 Ind. 172; *Cincinnati etc. R. R. Co. v. Clifford*, 113 Ind. 460; *Indiana etc. R. R. Co. v. Allen*, 113 Ind. 581; *Indiana etc. R. R. Co. v. McBrown*, 114 Ind. 198; *Bravard v. Cincinnati etc. R. R. Co.*, 115 Ind. 1, 17 N. E. Rep. 183; *Louisville etc. R. R. Co. v. Beck*, 119 Ind. 124, 21 N. E. Rep. 471; *Strickler v. Midland R. R. Co.*, 125 Ind. 412, 25 N. E. Rep. 455; *Porter v. Midland R. R. Co.*, 125 Ind. 476, 25 N. E. Rep. 556, 3 Am. R. R. & Corp. Rep. 357; *Morgan v. Lake Shore etc. R. R. Co.*, 130 Ind. 101, 28 N. E. Rep. 548; *Louisville etc. R. R. Co. v. Berkey*, 136 Ind. 591, 36 N. E. Rep. 642; *Lawrence v. Morgan's R. & S. S. Co.*, 39 La. An. 427, 2 So. Rep. 69; *Dodd v. St. Louis etc. R. R. Co.*, 108 Mo. 581, 18 S. W. Rep. 1117; *Scarritt v. Kansas City etc. R. R. Co.*, 127 Mo. 298, 29 S. W. Rep. 1024; *Omaha etc. R. R. Co. v. Redick*, 16 Neb. 313; *St. Louis etc. R. R. Co. v. Foltz*, 52 Fed. Rep. 627; *Welland v. Buffalo etc. R. R. Co.*, 30 U. C. Q. B. 147; *McLean v. Great Western R. R. Co.*, 33 U. C. Q. B. 198; *Rankin v. Great Western R. R. Co.*, 4 U. C. Q. B. 463. See *Denver etc. R. R. Co. v. School District*, 14 Col. 327, 23 Pac. Rep. 978.

⁷¹ "In these great public works

cence as an estoppel, it seems to us the cases are not well founded. There is no law which compels a man to protest against a wrongful entry upon his land at the peril of being held to ratify it. Both parties know their rights. The law provides a mode in which the party seeking to obtain property for public use may do so lawfully. If such party disregards the mode prescribed and enters upon property without consent, it is a wrong-doer and can acquire no rights by expending money on the property. Nor does the owner lose any rights by mere delay.⁷² Failing to agree with the owner, land was condemned for a school-house and the house built. The owner made no objection and sent a child to the school. Afterwards he brought ejectment on the ground of irregularities in the proceedings and recovered.⁷³

Where works have been constructed and are in use, the public interest is sometimes urged as a reason why ejectment should not be sustained. But the individual cannot be deprived of his property for the public convenience.⁷⁴ Where the entry is by consent, the rights of the parties must be determined by the nature and terms of the consent. Some cases hold that a mere parol consent may be revoked and

the shortest period of clear acquiescence, so as fairly to lead the company to infer that the party intends to waive his claim for present payment, will be held to conclude the right to assert the claim in any such form as to stop the company in the progress of their works, and especially to stop the running of their road after it has been put in operation, whereby the public acquire important interests in its continuance." *McAuley v. Western Vermont R. R. Co.*, 33 Vt. 311, 321.

⁷² *St. Joseph & Denver City R. R. Co. v. Callender*, 13 Kan. 496; *Louisville etc. R. R. Co. v. Liebfried*, 92 Ky. 407, 17 S. W. Rep. 91.

⁷³ *Crosby v. Dracut*, 109 Mass. 206.

⁷⁴ *Hooper v. Columbus & Western Ry. Co.*, 78 Ala. 213; *Stratten v. Great Western & Bradford Ry. Co.*, 40 L. J. Eq. 50. In the latter case the court say: "With regard to what is said as to public interests, I am not inclined to listen to any suggestion of public interest as against private rights acquired in a lawful way. I do not think that the interest of the public in using something that is provided for their convenience is to be upheld at the price of saying that a person's property is to be confiscated for that purpose. A man who comes to this court is entitled to have his rights ascertained and de-

the property recovered in ejectment.⁷⁵ But the weight of authority is probably the other way.⁷⁶ The prosecution of his claim for compensation will estop the owner from maintaining ejectment.⁷⁷ "He cannot claim damages for the taking of his land and at the same time deny that his land is taken."⁷⁸ One in possession of land with a contract for a deed conveyed a right of way to a railroad company. Afterwards he assigned the contract and a deed was issued to the plaintiff, who had notice of the conveyance of the right of way. It was held he could not eject the company.⁷⁹

§ 649. **Trespass.**—Trespass will lie for any unlawful entry upon private property under color of the eminent domain power. It is an appropriate remedy whenever an entry is made under a statute which does not give authority to condemn,⁸⁰ or before the right to enter has been perfected in

clared, however inconvenient it may be to third persons to whom it may be a convenience to have the use of his property."

⁷⁵ *Kremer v. Chicago etc. R. R. Co.*, 51 Minn. 15, 52 N. W. Rep. 977; *Minneapolis Mill Co. v. Minneapolis etc. R. R. Co.*, 51 Minn. 304, 53 N. W. Rep. 639; *Minneapolis Western R. R. Co. v. Minneapolis etc. R. R. Co.*, 58 Minn. 128, 59 N. W. Rep. 983; *Beck v. Louisville etc. R. R. Co.*, 65 Miss. 172, 3 So. Rep. 252; *Pittsburgh etc. R. R. Co. v. Oliver*, 131 Pa. St. 408, 19 Atl. Rep. 47. And see *Holloway v. Louisville etc. R. R. Co.*, 92 Ky. 244, 17 S. W. Rep. 572; *Avery v. Kansas City etc. R. R. Co.*, 113 Mo. 561, 21 S. W. Rep. 90; *Danbert v. Pennsylvania R. R. Co.*, 155 Pa. St. 178, 26 Atl. Rep. 108.

⁷⁶ See notes 69 and 70 above, also the last section.

⁷⁷ *Pinkham v. Chelmsford*, 109 Mass. 225; *Gray v. St. Louis & San Francisco Ry. Co.*, 81 Mo.

126. In *Madden v. Louisville etc. R. R. Co.*, 66 Miss. 258, 6 So. Rep. 181, it appeared that condemnation proceedings were commenced against the husband, that pending the proceedings the husband conveyed to his wife, that the award was made and paid into court and attached by creditors of the husband. The wife intervened in the attachment suit and claimed the money and afterwards brought ejectment. It was held that she was not estopped to maintain the suit.

⁷⁸ *Pinkham v. Chelmsford*, 109 Mass. 225, 228.

⁷⁹ *Stratton v. Omaha etc. R. R. Co.*, 37 Neb. 477, 55 N. W. Rep. 1058.

⁸⁰ *Thatcher v. Dartmouth Bridge Co.*, 18 Pick. 501; *Schmidt v. Densmore*, 42 Mo. 225. So where there is no authority to take the particular property. *Fore v. Western N. C. R. R. Co.*, 101 N. C. 526, 8 S. E. Rep. 335.

the manner provided by law.⁸¹ Even in those States in which it is held that an entry may precede the making of compensation it has also been held that if the compensation is not made in a reasonable time the party making an entry

⁸¹ *Whitehead v. Arkansas Central R. R. Co.*, 28 Ark. 460; *Potter v. Ames*, 43 Cal. 75; *Alexander v. District of Columbia*, 3 Mackey (D. C.) 192; *Capers v. Augusta G. & S. R. R. Co.*, 76 Ga. 90; *Taylor v. Marcy*, 25 Ill. 518; *President etc. of Crawfordsville R. R. Co. v. Wright*, 5 Ind. 252; *Anderson etc. R. R. Co. v. Kern-dole*, 54 Ind. 314; *Board of Comrs. v. Miller*, 82 Ind. 572; *Henry v. Dubuque & Pacific R. R. Co.*, 10 Ia. 540; *Birge v. Chicago, Mil. and St. P. Ry. Co.*, 65 Ia. 440; *Atchison, T. & S. F. R. R. Co. v. Weaver*, 10 Kan. 344; *Harlow v. Pike*, 3 Me. 438; *Storer v. Hobbs*, 52 Me. 144; *Baltimore & Ohio R. R. Co. v. Boyd*, 63 Md. 325; *Kean v. Stetson*, 5 Pick. 492; *Inhabitants of the Eighth School District v. Copeland*, 2 Gray 414; *Wilson v. Lynn*, 119 Mass. 174; *Wamesit Power Co. v. Allen*, 120 Mass. 352; *Warren v. Spencer Water Co.*, 143 Mass. 9; *Prescott v. Patterson*, 44 Mich. 525; *Hursh v. First Division of St. Paul & Pacific R. R. Co.*, 17 Minn. 439; *Schroeder v. De Graff*, 28 Minn. 299; *Memphis & Charleston R. R. Co. v. Payne*, 37 Miss. 700; *Mueller v. St. Louis & Iron Mountain R. R. Co.*, 31 Mo. 262; *Republican Valley R. R. Co. v. Fink*, 18 Neb. 82; *Central R. R. Co. v. Hetfield*, 29 N. J. L. 206; *S. C.*, 29 N. J. L. 571; *Kelley v. Horton*, 2 Cow. 424; *Terpening*

v. Smith, 46 Barb. 208; *Secomb v. Milwaukee etc. R. R. Co.* 49 How. Pr. 75; *Pennsylvania R. R. Co. v. Eby*, 107 Pa. St. 166; *Buffalo Bayou etc. R. R. Co. v. Ferris*, 26 Tex. 588; *Tait v. Matthews*, 33 Tex. 112; *Wilson v. Carpenter*, 17 Wis. 512; *Loop v. Chamberlain*, 20 Wis. 135; *Ramsden v. Manchester etc. Ry. Co.*, 1 Exch. 723; *Goldie v. Oswald*, 2 Dow. 534; *Savannah etc. R. R. Co. v. Davis*, 25 Fla. 917, 7 So. Rep. 29; *Guptail v. Teft*, 16 Ill. 365; *Henderson v. Chicago etc. R. R. Co.*, 83 Ia. 221, 48 N. W. Rep. 1029; *Mathews v. St. Paul etc. R. R. Co.*, 18 Minn. 434; *Overman v. St. Paul*, 39 Minn. 120, 39 N. W. Rep. 66; *Halverson v. Bell*, 39 Minn. 240, 39 N. W. Rep. 324; *West v. West & East R. R. Co.*, 61 Miss. 536; *Natchez etc. R. R. Co. v. Currie*, 62 Miss. 506; *Currie v. Natchez etc. R. R. Co.*, 61 Miss. 725; *Canton etc. R. R. Co. v. French*, 68 Miss. 22, 8 So. Rep. 512; *Butler v. Barr*, 18 Mo. 357; *Dooley v. City of Kansas*, 82 Mo. 444; *Hayes v. Shackford*, 3 N. H. 10; *Dimmick v. Broadhead*, 75 Pa. St. 464; *Hurley v. Jones*, 165 Pa. St. 34, 30 Atl. Rep. 499; *Carley v. Sylvester*, 49 Wis. 429; *Keifer v. Bridgeport*, 68 Conn. 401, 36 Atl. Rep. 801; *Weber v. Stagrady*, 75 Mich. 32, 42 N. W. Rep. 665; *Studebaker v. New Castle Gas Co.*, 7 Pa. Supr. Ct. 641.

may be treated as a trespasser ab initio.⁸² The lessee may have trespass for any injury to his possession, though settlement has been made with the lessor, who has given a license to enter.⁸³ The owner of the fee of a street or highway may maintain this action against one occupying the soil for a railroad,⁸⁴ or telegraph,⁸⁵ or other purpose inconsistent with its use as a street.⁸⁶ The suit may be brought against the person or corporation authorizing the trespass, or against the officers, agents or servants who actually commit it,⁸⁷ or against any or all the parties concerned in it. Any encroachment beyond the limits of the property taken is unjustifiable and a trespass.⁸⁸ Where the statute requires a certain notice to be given to the owner, of the intention to occupy the land condemned, entry without giving such

⁸² *Cushman v. Smith*, 34 Me. 247; and see *Davis v. Russell*, 47 Me. 443. But the mere fact of entry before compensation is not a trespass. *Turrell v. Norman*, 19 Barb. 262; *Louisville & Nashville R. R. Co. v. Quinn*, 14 Lea 65.

⁸³ *Baltimore & Ohio R. R. Co. v. Thompson*, 10 Md. 76; *Brown v. Powell*, 25 Pa. St. 229; *Pennsylvania R. R. Co. v. Eby*, 107 Pa. St. 166; *Lafferty v. Schuylkill Riv. etc. R. R. Co.*, 124 Pa. St. 297, 16 Atl. Rep. 869; *Johnson v. Ontario etc. R. R. Co.*, 11 U. C. Q. B. 246.

⁸⁴ *Indianapolis etc. R. R. Co. v. Hartley*, 67 Ill. 439; *Trustees v. Auburn & Rochester R. R. Co.*, 3 Hill 567; *Seneca Road Co. v. Auburn & Rochester R. R. Co.*, 5 Hill 170; *Mahon v. New York Central R. R. Co.*, 24 N. Y. 658; *Hussner v. Brooklyn City R. R. Co.*, 30 Hun 409; *Starr v. Camden etc. R. R. Co.*, 24 N. J. L. 592; *Sherman v. Milwaukee etc. R. R. Co.*, 40 Wis. 645; *Blesch v. Chicago & Northwestern Ry. Co.*, 43

Wis. 183; *Witt v. St. Paul etc. R. R. Co.*, 38 Minn. 122, 35 N. W. Rep. 862; *Morrell v. Chicago etc. R. R. Co.*, 49 Minn. 526, 52 N. W. Rep. 140; *Clark v. Brooklyn City etc. R. R. Co.*, 30 Hun 409.

⁸⁵ *Board Trade Tel. Co. v. Barnett*, 107 Ill. 507; *Clay v. Postal Tel. Co.*, 70 Miss. 406, 11 So. Rep. 658; *Am. Tel. & Tel. Co. v. Jones*, 78 Ill. App. 372.

⁸⁶ *Ridge Turnpike Co. v. Stoerer*, 6 W. & S. 378.

⁸⁷ *Brady v. Bronson*, 45 Cal. 640; *Waller v. Martin*, 17 B. Mon. 181; *Kough v. Darcey*, 11 N. J. L. 237; *Welch v. Piercy*, 7 Ired. L. 365; *Loop v. Chamberlain*, 17 Wis. 504; *Loop v. Chamberlain*, 20 Wis. 135; *Chicago etc. R. R. Co. v. McCarthy*, 20 Ill. 385; *St. Louis etc. R. R. Co. v. Drennan*, 26 Ill. App. 263; *Chicago etc. R. R. Co. v. Watkins*, 43 Kan. 50, 22 Pac. Rep. 985.

⁸⁸ *Beyer v. Tanner*, 29 Ill. 135; *Eaton v. European & North Am. R. R. Co.*, 59 Me. 520; *Hazen v. Boston & Maine R. R. Co.*, 2 Gray 574; *Brigham v. Agricultural*

notice will be a trespass.⁸⁹ Where an entry was made by consent, but on a promise to adjust the compensation, which was not done, it was held the owner could maintain trespass.⁹⁰ It has been held that a mortgagee having the legal title and who has not been a party to the condemnation proceedings may have trespass for an entry under the proceedings.⁹¹ An entry under an erroneous order was held justifiable, though the error consisted in permitting an entry before compensation was made, in violation of the constitution.⁹² Where land was taken in excess of that required for public use and devoted to private use, it was held that trespass would lie by the owner.⁹³ Trespass will lie for diverting the waters of a stream,⁹⁴ also for increasing the flow thereof.⁹⁵

§ 650. **Mandamus.**—We have already noticed the application of this remedy for the purpose of compelling the assessment or payment of the damages for property taken or affected.¹ It is a proper remedy to compel a ministerial officer to perform an act which it is his duty to perform, or to compel a judge or other officer or tribunal to act when a proper case is presented. The remedy has been frequently

Branch R. R. Co., 1 Allen 316; Sheldon v. Kalamazoo, 24 Mich. 383; Bridges v. Dill, 97 N. C. 222. See ante, § 599.

⁸⁹ Kelley v. Horton, 2 Cow. 424; Chicago etc. R. R. Co. v. Griesser, 48 Kan. 663, 29 Pac. Rep. 1082; Kellar v. Earl, 98 Wis. 488.

⁹⁰ Perkins v. Maine Central R. R. Co., 72 Me. 95; Evansville etc. R. R. Co. v. Grady, 6 Bush. 144. Whether tort can be maintained where entry has been made by consent and works constructed upon the faith of such consent, see Baltimore & Hannover R. R. Co. v. Algire, 63 Md. 319; Currie v. Natchez, Jackson & Columbus

R. R. Co., 61 Miss. 725; S. C., 62 Miss. 506.

⁹¹ Wilson v. European & N. A. R. R. Co., 67 Me. 358.

⁹² Walker v. Lickens, 24 Mo. 298. And see Dussau v. Municipality No. 1, 6 La. An. 575.

⁹³ Mills v. St. Clair County, 8 How. 569.

⁹⁴ Hogg v. Connellsville Water Co., 168 Pa. St. 456, 31 Atl. Rep. 1010; Irving v. Media Borough, 10 Pa. Supr. Ct. 132.

⁹⁵ McKee v. Delaware & H. Canal Co., 125 N. Y. 353, 26 N. E. Rep. 305, affirming S. C., 52 Hun 52, 4 N. Y. Supp. 753; Owens v. Lancaster, 182 Pa. St. 257.

¹ Ante, §§ 613, 614.

invoked to compel the proper officers to open highways for use and travel where the right to do so has been perfected by proper proceedings.² In Illinois it has been held that any citizen of the town has sufficient interest to become a relator in such a proceeding,³ while directly the opposite doctrine has been held in Maine.⁴ In such cases mandamus will be refused where the land has not been properly condemned or otherwise acquired,⁵ or the compensation paid or released,⁶ or where the proceedings are invalid.⁷ Nor will mandamus lie where the tribunal or officer sought to be coerced has a discretion in the matter,⁸ nor where by reason of a change in circumstances the road has become unnecessary.⁹ An officer or court having a power and discretion to exercise, judicial or otherwise, may be compelled to act,¹⁰

² *People ex rel. etc. v. Champion*, 16 Johns. 61; *People ex rel. etc. v. Commissioners of Salem*, 1 Cow. 23; *Ex parte Sanders*, 4 Cow. 544; *People ex rel. etc. v. Commissioners of Highways*, 13 Wend. 310; *People ex rel. etc. v. Collins*, 19 Wend. 56; *People ex rel. etc. v. Griswold*, 67 N. Y. 59; S. C., 2 N. Y. Supm. Ct. 351; *State v. Wellman*, 83 Me. 282, 22 Atl. Rep. 170; *State v. Rapp*, 39 Minn. 65, 38 N. W. Rep. 926; *State v. Elkinton*, 30 N. J. L. 335; *People v. Collins*, 19 Wend. 56; *State v. Varnum*, 81 Wis. 593, 51 N. W. Rep. 958; *Commissioners of Highways v. People*, 38 Ill. 347. In the last case it was held that, where by law a road was required to be opened within a period of five years, the time consumed in litigation over the road was to be excluded.

³ *Hall v. People ex rel. etc.*, 57 Ill. 307.

⁴ *Sanger v. County Comrs.*, 25 Me. 291.

⁵ *Commissioners of Highways*

v. People ex rel. etc., 4 Ill. App. 391; *People ex rel. etc. v. Curyea*, 16 Ill. 547.

⁶ *Hall v. People ex rel. etc.*, 57 Ill. 307; *Warner v. Commissioners of Hennepin County*, 9 Minn. 139; *People ex rel. etc. v. Commissioners*, 1 N. Y. Supm. Ct. 193.

⁷ *People v. Comrs.*, 27 Barb. 94; *Stewart v. Wallis*, 30 Barb. 344; *People v. Ruby*, 59 Ill. App. 653.

⁸ *People ex rel. etc. v. Comrs. of Highways*, 103 Ill. 640; *Strathan v. County Court*, 65 Mo. 644; *People v. Commissioners*, 42 Hun 463; *Jones v. Stafford Justices*, 1 Leigh 584.

⁹ *Hill v. County Comrs.*, 4 Gray 414; *Hitchcock v. County Comrs.*, 131 Mass. 519.

¹⁰ *Illinois Central R. R. Co. v. Rucker*, 14 Ill. 353; *Carpenter v. County Commissioners*, 21 Pick. 258; *Ex parte Keenan*, 21 Ala. 558; *People ex rel. etc. v. Supervisors*, 7 Wend. 530; *Town of Woodstock v. Gallup*, 28 Vt. 587;

but not to act in a particular manner.¹¹ But a proper case must be presented requiring the officer or tribunal to act.¹²

§ 651. **Remedy for damages arising from the negligent or improper construction of works.**—As to the proper remedy for such damages, no controversy exists, and it is sufficient to say that all the appropriate legal and equitable remedies are open to the aggrieved party the same as though the persons responsible for the damages were not acting under the eminent domain power.¹³

§ 652. **Relief in equity on account of error, mistake, new evidence, etc.**—No relief can be had in equity on account of

State v. Railroad Comrs., 56 Conn. 308; Trustees v. Johnson, 2 Ind. 219; Barnstable Savings Bank, 127 Mass. 254; State v. Ford, 6 Wis. 291.

¹¹ Proprietors of Kennebunk Toll Bridge Petitioners, 11 Me. 263; Commonwealth v. Sessions of Norfolk, 5 Mass. 435; Stout v. Hopping, 17 N. J. L. 471; Board of Comrs. v. State, 38 Ind. 193; State v. Neville, 110 Mo. 345, 19 S. W. Rep. 491.

¹² People v. Judge of Recorder's Court, 40 Mich. 64; People v. Supervisors, 32 Barb. 473; State v. Graffarn, 74 Wis. 643, 43 N. W. Rep. 727.

¹³ Rogers v. Kennebec & Portland R. R. Co., 35 Me. 319; Eastabrooks v. Peterborough & Shirley R. R. Co., 12 Cush. 224; Mellen v. Western R. R. Co., 4 Gray 301; Brewer v. Boston etc. R. R. Co., 113 Mass. 52; Bagnall v. London & Northwestern Ry. Co., 1 H. & C. (Exch.) 544; Eufaula v. Simmons, 86 Ala. 515; Kansas City etc. R. R. Co. v. Cook, 57 Ark. 387, 21 S. W. Rep. 1066; Colorado Consol. L. & W. Co. v. Morris, 1 Col. App. 401, 29 Pac. Rep. 302;

Kankakee etc. R. R. Co. v. Horan, 131 Ill. 288, 23 N. E. Rep. 621; Ohio etc. R. R. Co. v. Wachter, 23 Ill. App. 415; Fenter v. Toledo etc. R. R. Co., 29 Ill. App. 250; St. Louis etc. R. R. Co. v. Brown, 34 Ill. App. 552; Peoria etc. R. R. Co. v. Barton, 38 Ill. App. 469; Chicago etc. R. R. Co. v. Henneberry, 42 Ill. App. 126; Wabash etc. R. R. Co. v. Sanders, 47 Ill. App. 436; Chicago etc. R. R. Co. v. Willi, 53 Ill. App. 603; Indiana etc. R. R. Co. v. Patchette, 59 Ill. App. 251; Sullens v. Chicago etc. R. R. Co., 74 Ia. 659, 38 N. W. Rep. 545; Boudier v. Morgans R. R. Co., 35 La. An. 947; Aldworth v. Lynn, 153 Mass. 53, 26 N. E. Rep. 229; White v. Medford, 163 Mass. 164, 39 N. E. Rep. 997; Caldwell v. Gale, 11 Mich. 77; Culver v. Chicago etc. R. R. Co., 38 Mo. App. 130; George v. Wabash Western R. R. Co., 40 Mo. App. 433; Schuylkill Nav. Co. v. McDonough, 33 Pa. St. 73; Green v. Taylor etc. R. R. Co., 79 Tex. 604, 15 S. W. Rep. 685; Broussard v. Sabine etc. R. R. Co., 80 Tex. 329, 16 S. W. Rep. 30.

mere error in the proceedings for condemnation.¹⁴ The proper course in such cases is to appeal.¹⁵ If the right to appeal has been lost by fraud or mistake, equity might interfere in a proper case.¹⁶ A bill to set aside an award on account of newly discovered evidence was dismissed, because the newly discovered evidence was merely cumulative, and because the bill was not filed until four years after the discovery.¹⁷ Plaintiff's land was taken for a street. He named three commissioners and the city three to assess the damages as provided by statute. The commissioners so named could not agree. Thereupon the plaintiff consented to the appointment of a certain person as umpire, upon condition that he should consult all of plaintiff's commissioners before deciding. The umpire, however, saw only one of plaintiff's commissioners, and then sided with those of the city. Plaintiff repudiated the award, but upon being told by the city solicitor that it would make no difference as to his claim for more damages he deeded to the city and took the award. Plaintiff then filed his bill for a reassessment of his damages, and it was sustained, the court holding that the award was bad and that the plaintiff was not estopped by his deed, because he executed it under a misapprehension of his legal rights.¹⁸ In another case the defendant appropriated the water of a stream upon which the plaintiff had a mill. Appraisers were appointed to assess the plaintiff's damages, who was then absent in Europe. The court directed notice to certain persons supposed to have charge of the premises, but no one appeared for the plaintiff. The appraisers were led to believe that the plaintiff had abandoned his mill and assessed his damages at a nominal sum. Upon his return the plaintiff brought suit against the company for damages and filed a bill to enjoin it from setting up the award as a defense. The injunction was granted on the ground that the appraisers proceeded on mistaken premises and erroneous

¹⁴ Hamblin v. County Comrs., 16 Gray 256; People v. Wasson, 64 N. Y. 167; McArthur v. McEachin, 64 N. C. 454.

¹⁵ Ibid.

¹⁶ People v. Wasson, 64 N. Y. 167.

¹⁷ Plymouth v. Russell Mills, 7 Allen 438.

¹⁸ Walker v. City Council, 1 Bailey Ch. (S. C.) 443.

information.¹⁹ Where by mistake, not the fault of either party, an owner thought a proposed highway would take only a few feet of his land and so made no opposition, and it actually took 15,000 feet, it was held he could have no relief in equity.²⁰

§ 653. **Compelling a railroad company to restore highway.**—Where a railroad occupies, crosses or otherwise interferes with a highway, it is usually made incumbent upon it by law to restore the highway to its former condition and usefulness, as nearly as practicable. This duty may be enforced by mandamus on behalf of the proper public authorities,²¹ or by indictment.²² In Massachusetts and Vermont it has been held that the duty cannot be enforced at the suit of a private party injured by its neglect,²³ but in Wisconsin a contrary doctrine is held.²⁴ In some jurisdictions it is held that a bill in equity may be maintained for the purpose of compelling the restoration of a highway,²⁵

¹⁹ *Wells v. Bridgeport Hydraulic Co.*, 30 Conn. 316; see, in this connection, *Shearer v. Commissioners*, 13 Kan. 145; *Reckner v. Warner*, 22 Ohio St. 275.

²⁰ *Lawrence v. Nahant*, 136 Mass. 477. And see *Armstrong v. Cincinnati*, 5 Ohio 138.

²¹ *Indianapolis etc. R. R. Co. v. Lawrenceburg*, 37 Ind. 489; *Ft. Dodge v. Minneapolis etc. R. R. Co.*, 87 Ia. 389, 54 N. W. Rep. 243; *State v. Minneapolis etc. R. R. Co.*, 39 Minn. 219, 39 N. W. Rep. 153; *State v. St. Paul etc. R. R. Co.*, 38 Minn. 246; *State v. St. Paul etc. R. R. Co.*, 35 Minn. 131; *State v. Chicago etc. R. R. Co.*, 29 Neb. 412, 45 N. W. Rep. 469; *Commonwealth v. New York etc. R. R. Co.*, 138 Pa. St. 58, 20 Atl. Rep. 951. And see *Edenville v. Chicago etc. R. R. Co.*, 77 Ia. 69, 41 N. W. Rep. 568.

²² *Pittsburgh, Va. & C. Ry. Co. v. Commonwealth*, 101 Pa. St. 192; *Louisville & Nashville R. R. Co. v. State*, 3 Head 523; *Commonwealth v. Pennsylvania R. R. Co.*, 117 Pa. St. 637, 12 Atl. Rep. 38; *State v. Monongahela Riv. R. R. Co.*, 37 W. Va. 108, 16 S. E. Rep. 519; *State v. Ohio Riv. R. R. Co.*, 38 W. Va. 242, 18 S. E. Rep. 582.

²³ *Brainard v. Connecticut River R. R. Co.*, 7 Cush. 506; *Vermont & Mass. R. R. Co. v. County Comrs.*, 10 Cush. 12; *Buck v. Connecticut etc. R. R. Co.*, 42 Vt. 370.

²⁴ *Young v. Chicago & Northwestern Ry. Co.*, 28 Wis. 171.

²⁵ *Greenup County v. Maysville etc. R. R. Co.*, 88 Ky. 659, 11 S. W. Rep. 774; *Moundsville v. Ohio Riv. R. R. Co.*, 37 W. Va. 92, 16 S. E. Rep. 514; *Oshkosh*

but in others the remedies at law are deemed adequate.²⁶ The duty is a continuing one, that is, it is a duty not only to restore the highway to its proper condition for public use, so far as consistent with the presence of the railroad, but to keep it in that condition.²⁷ Moreover the duty is measured by what the public use and safety require from time to time. A construction which was reasonable and proper at one time may become inadequate at another. In such case a reconstruction may be compelled to meet the new conditions. It is upon this principle that railroad companies may be compelled to abolish grade crossings and to bear the whole or any portion of the expense of so doing.²⁸

A railroad crossed a highway and within the limits of the right of way was a bridge over a stream. The railroad constructed its crossing and restored the highway without interfering with the bridge. It was held that the company could not be compelled to rebuild the bridge when it became un-

v. Milwaukee etc. R. R. Co., 74 Wis. 534, 43 N. W. Rep. 489.

²⁶ Concord Township's Appeal, 1 Walker's Pa. Supm. Ct. 195; Needham v. New York etc. R. R. Co., 152 Mass. 61, 25 N. E. Rep. 20. In the last case it is held that under some circumstances a bill may be maintained. And see Raritan v. Port Reading R. R. Co., 49 N. J. Eq. 11, 23 Atl. Rep. 127.

²⁷ State v. Minneapolis etc. R. R. Co., 39 Minn. 219, 39 N. W. Rep. 153; Wayzata v. Great Northern R. R. Co., 50 Minn. 438, 52 N. W. Rep. 913; Henry v. Wabash Western R. R. Co., 44 Mo. App. 100; Moundville v. Ohio Riv. R. R. Co., 37 W. Va. 92, 16 S. E. Rep. 514; Little Miami R. R. Co. v. Commissioners, 31 Ohio St. 338.

²⁸ State v. Minneapolis etc. R.

R. Co., 39 Minn. 219, 39 N. W. Rep. 153; State v. St. Paul etc. R. R. Co., 38 Minn. 246; State v. St. Paul etc. R. R. Co., 35 Minn. 131. In the first case two railroad companies, whose tracks were side by side, were compelled by mandamus to construct a bridge or viaduct over their tracks with approaches thereto, to lower their tracks in order to conform to the plan adopted and to condemn land for the abutments. Each company was commanded to construct the part over its own tracks and the approach on its side. It was held proper to provide in the order for the particular plan and manner of construction. This last point was also held in Ft. Dodge v. Minneapolis etc. R. R. Co., 87 Ia. 389, 54 N. W. Rep. 243. And see generally § 156e.

safe, that the duty of the company extended only to the construction necessary to get over its road.²⁹

The duty to restore a highway may be enforced against a lessee³⁰ or receiver in possession of the railroad.³¹

§ 653a. **Remedy for failure to construct or maintain private crossings.**—The right to a private crossing, where a right of way for a railroad or other purpose is taken through a farm or tract of land, has been considered in a prior section.³² The right is usually held to depend upon the statutory provisions applicable to the case. Where the statute provided a remedy by an action for damages it was held to be exclusive.³³ If no remedy is provided by statute, any appropriate remedy is available. An action in equity to compel the construction of a suitable crossing has been maintained in many instances.³⁴ In others the remedy by mandamus is held to be adequate and to preclude a resort to equity.³⁵ Where the duty is to construct suitable crossings and the company constructs crossings which are not suitable, the construction of new and suitable ones can be compelled.³⁶ Where a railroad company was proceeding to build a grade crossing over a twelve foot fill with steep approaches, the construction of an under crossing was compelled.³⁷ For failure to build a crossing or for interfering

²⁹ *Ohio etc. R. R. Co. v. Bridgeport*, 63 Ill. App. 224.

³⁰ *Commonwealth v. Pennsylvania R. R. Co.*, 117 Pa. St. 637, 12 Atl. Rep. 38.

³¹ *Ft. Dodge v. Minneapolis etc. R. R. Co.*, 87 Ia. 389, 54 N. W. Rep. 243.

³² *Ante*, § 588a.

³³ *Dominick v. Delaware etc. R. R. Co.*, 180 Pa. St. 468, 36 Atl. Rep. 866. But see *State v. Mason City etc. R. R. Co.*, 85 Ia. 516, 52 N. W. Rep. 490.

³⁴ *Jones v. Seligman*, 81 N. Y. 190; *Buffalo Stone & C. Co. v. Delaware etc. R. R. Co.*, 130 N. Y. 152, 29 N. E. Rep. 121; *Beards-*

ley v. Lehigh Valley R. R. Co., 142 N. Y. 173, 36 N. E. Rep. 877, affirming S. C., 65 Hun 502, 20 N. Y. Supp. 458; *Peckham v. Dutchess County R. R. Co.*, 145 N. Y. 385, 40 N. E. Rep. 15. And see *State v. Mason City etc. R. R. Co.*, 85 Ia. 516, 52 N. W. Rep. 490.

³⁵ *Illinois Central R. R. Co. v. Willenborg*, 117 Ill. 203. And see *Buffalo Stone & C. Co. v. Delaware etc. R. R. Co.*, 130 N. Y. 152, 29 N. E. Rep. 121.

³⁶ *Jones v. Seligman*, 81 N. Y. 190. See *State v. Burlington etc. R. R. Co.*, 99 Ia. 565, 68 N. W. Rep. 819.

³⁷ *Beardsley v. Lehigh Valley*

with or destroying a crossing an action for damages will lie.³⁸ The duty of constructing crossings may be enforced against receivers, mortgage trustees or lessees in possession of and operating a railroad.³⁹ If an owner accepts a new crossing in lieu of an old one, he cannot compel the restoration of the old one.⁴⁰ The owner may be restrained from constructing or using a crossing to which he has no right,⁴¹ or which would endanger the safe operation of the road.⁴²

§ 653b. **The question of one action or successive actions.**⁴³—Where a suit is brought for damages to property by the construction, use or operation of a work for public use, the question arises whether all damages, past, present and prospective, must be recovered in a single suit, or whether the damages must be limited to those sustained prior to the commencement of the suit, leaving future damages to be redressed by future suits, as such damages occur. If there can be but one suit and one recovery it necessarily follows; first, that the measure of damages is the diminution in the value of the property by reason of the permanent continuance of the construction or use which causes the damage; second, that when the action accrues, it accrues once for all

R. R. Co., 142 N. Y. 173, 36 N. E. Rep. 877; affirming S. C., 65 Hun 502, 20 N. Y. Supp. 458.

³⁸ *Port v. Huntingdon etc. R. R. Co.*, 168 Pa. St. 19, 31 Atl. Rep. 950; *Clarke v. Ohio Riv. R. R. Co.*, 39 W. Va. 732, 20 S. E. Rep. 696; *Wells v. Northern R. R. Co.*, 14 Ontario 594; *Stillwell v. St. Louis etc. R. R. Co.*, 39 Mo. App. 221; *Dubbs v. Philadelphia etc. R. R. Co.*, 148 Pa. St. 66, 23 Atl. Rep. 883; *Lake Erie etc. R. R. Co. v. Lee*, 14 Ind. App. 328, 41 N. E. Rep. 1058.

³⁹ *Jones v. Seligman*, 81 N. Y. 190; *Buffalo Stone & C. Co. v. Delaware etc. R. R. Co.*, 130 N. Y. 152, 29 N. E. Rep. 121; *Peckham v. Dutchess County R. R.*

Co., 145 N. Y. 385, 40 N. E. Rep. 215.

⁴⁰ *Boston etc. R. R. Co. v. Doherty*, 154 Mass. 314, 28 N. E. Rep. 277. And see *Fitzpatrick v. Boston etc. R. R. Co.* 84 Me. 33, 24 Atl. Rep. 432.

⁴¹ *New York etc. R. R. Co. v. Comstock*, 60 Conn. 200, 22 Atl. Rep. 511.

⁴² *Chalcraft v. Louisville etc. R. R. Co.*, 113 Ill. 86.

⁴³ Instructive articles pertaining to the subject of this section will be found in 26 Am. Law. Reg., pp. 281 and 345. See also ante, §§ 492-495, and note to *Wells v. New Haven etc. Co.*, 1 Am. R. R. & Corp. Rep. 708.

to recover the total damage measured as above, and that the right to recover any damages will be barred by the elapse of the statutory period from time of such accrual; third, that one recovery will be a bar to any future suit arising out of such construction or use, whether the recovery was in fact for permanent damages or not; fourth, that the right of action will be in the owner at the time the action accrued and will not pass by a conveyance of the property thereafter made, and that the grantee in such conveyance will take subject to the right to continue the construction or use which causes the damage.⁴⁴ On the other hand if there may be successive actions then, first, the measure of damages is the injury sustained up to the commencement of the suit, and within the statutory period, estimated on the basis that the construction or use then and there ceases; second, a suit may be brought at any time within the period

⁴⁴ The following are cases favoring this view: *Highland Ave. etc. R. R. Co. v. Matthews*, 99 Ala. 24, 10 So. Rep. 267; *Little Rock etc. R. R. Co. v. Chapman*, 39 Ark. 463; *Eachus v. Los Angeles Consol. Elec. R. R. Co.*, 103 Cal. 614, 37 Pac. Rep. 750; *District of Columbia v. Hutchinson*, 1 App. Cas. D. C. 403; *Jacksonville etc. R. R. Co. v. Lockwood*, 33 Fla. 573, 15 S. E. Rep. 327; *Atkinson v. Atlanta*, 81 Ga. 625, 7 S. E. Rep. 692; *Smith v. Floyd County*, 85 Ga. 422, 11 S. E. Rep. 850; *Chicago etc. R. R. Co. v. Maher*, 91 Ill. 312; *Chicago etc. R. R. Co. v. Loeb*, 118 Ill. 203; *Chicago etc. R. R. Co. v. McAuley*, 121 Ill. 160; *Kankakee etc. R. R. Co. v. Horan*, 30 Ill. App. 552, affirmed in 131 Ill. 288, 23 N. E. Rep. 621; *Springer v. Chicago*, 135 Ill. 552, 26 N. E. Rep. 514, 4 Am. R. R. & Corp. Rep. 52; *Kankakee etc. R. R. Co. v. Horan*, 22 Ill. App. 145; *Chicago*

etc. R. R. Co. v. Henneberry, 28 Ill. App. 110; *Pickneyville v. Hutchings*, 63 Ill. App. 137; *Pickneyville v. Rhine*, 63 Ill. App. 139; *North Vernon v. Voeghler*, 103 Ind. 314; *LaFayette v. Nagle*, 113 Ind. 425; *Sherlock v. Louisville etc. R. R. Co.*, 115 Ind. 22, 17 N. E. Rep. 171; *Porter v. Midland R. R. Co.*, 125 Ind. 476, 25 N. E. Rep. 556, 3 Am. R. R. & Corp. Rep. 357; *Louisville etc. R. R. Co. v. Sparks*, 12 Ind. App. 410, 40 N. E. Rep. 546; *Powers v. Council Bluffs*, 45 Ia. 652; *Cadle v. Muscatine Western R. R. Co.*, 44 Ia. 11; *Stodghill v. Chicago etc. R. R. Co.*, 53 Ia. 341; *Pratt v. Des Moines etc. R. R. Co.*, 72 Ia. 249; *Kansas Pac. R. R. Co. v. Muhlman*, 17 Kan. 224; *Leavenworth etc. R. R. Co. v. Curtan*, 51 Kan. 432, 33 Pac. Rep. 297; *Atchison etc. R. R. Co. v. Davidson*, 52 Kan. 739, 35 Pac. Rep. 787; *Elizabethtown etc. R. R. Co. v. Combs*, 10 Bush. 382;

required to create a prescriptive right and a recovery had of such damages as have accrued within the statutory period; third, successive actions may be brought as often as damages are sustained or injury done and a recovery had of all damages sustained subsequent to the prior suit; fourth, one recovery will be no bar to a suit for damages subsequently accruing; fifth, when a conveyance is made the right to recover damages accruing up to the time of the conveyance will be in the grantor and the right to recover subsequent damages in the grantee.⁴⁵

Jeffersonville etc. R. R. Co. v. Esterle, 13 Bush. 667; Strickley v. Chesapeake etc. R. R. Co., 93 Ky. 323, 20 S.W. Rep. 261; Maysville etc. R. R. Co. v. Ingram (Ky.) 30 S. W. Rep. 8; Karst v. St. Paul etc. R. R. Co., 22 Minn. 118; Baldwin v. Chicago etc. R. R. Co., 35 Minn. 354; Markowitz v. Kansas City, 125 Mo. 485, 28 S. W. Rep. 642; Bird v. Hannibal etc. R. R. Co., 30 Mo. App. 365; Martin v. Chicago etc. R. R. Co., 47 Mo. App. 452; Wallace v. Kansas City etc. R. R. Co., 47 Mo. App. 491; Troy v. Cheshire R. R. Co., 23 N. H. 83; White v. Northwestern N. C. R. R. Co., 113 N. C. 610, 18 S. E. Rep. 330, 9 Am. R. R. & Corp. Rep. 103; Cass v. Pennsylvania Co., 159 Pa. St. 273, 28 Atl. Rep. 161; North Chester v. Eckfeldt, 1 Monaghan (Pa. Supm.) 732; Kershaw v. Philadelphia, 20 Phil. 318; Gentry v. Richmond etc. R. R. Co., 38 S. C. 284, 16 S. E. Rep. 893; Harman v. Louisville etc. R. R. Co., 87 Tenn. 614, 11 S. W. Rep. 703; Rosenthal v. Taylor etc. R. R. Co., 79 Tex. 325, 15 S. W. Rep. 268; Kaufman v. Tacoma etc. R. R. Co., 11 Wash. 632, 40 Pac. Rep. 137; Stewart v. Ohio Riv. R. R.

Co., 38 W. Va. 438, 18 S. E. Rep. 604; Huntsville v. Ewing, 116 Ala. 576, 22 So. Rep. 984; St. Louis etc. R. R. Co. v. Morris, 35 Ark. 622; Doane v. Lake Street El. R. R. Co., 165 Ill. 510, 46 N. E. Rep. 471; Hyde Park T. H. Light Co. v. Porter, 167 Ill. 276, 47 N. E. Rep. 206; Chicago v. Altgeld, 33 Ill. App. 23; Lake Erie etc. R. R. Co. v. Purcell, 75 Ill. App. 573; Stein v. Lafayette, 6 Ind. App. 414, 33 N. E. Rep. 912; Fowler v. Des Moines etc. R. R. Co. (Ia.), 60 N. W. Rep. 116; Autensieth v. St. Louis etc. R. R. Co., 36 Mo. App. 254; Conkling v. Zerga, 72 Hun 134, 25 N. Y. Supp. 558; Ridley v. Seaboard etc. R. R. Co., 118 N. C. 996, 24 S. E. Rep. 730; Nichols v. Norfolk etc. R. R. Co., 120 N. C. 495; Beach v. Wilmington etc. R. R. Co., 120 N. C. 498; Bauman v. New Castle, 12 Pa. Co. Ct. 22; O'Brien v. Penn. Schuylkill Val. R. R. Co., 4 Mont. Co. L. R. 57; Paris v. Aldred, 17 Tex. Civ. App. 125, 43 S. W. Rep. 62.

⁴⁵ St. Louis etc. R. R. Co. v. Yarrowrough, 56 Ark. 612, 20 S. W. Rep. 515; St. Louis etc. R. R. Co. v. Lyman, 57 Ark. 512, 22 S. W. Rep. 170; Hopkins v. West-

The cases are very conflicting and incapable of reconciliation. This will be apparent from the statement of cases which follows:

1. *Interference with the flow of streams.*—A railroad company collected the water of eight natural streams and

ern Pac. R. R. Co., 50 Cal. 190; Ford v. Santa Cruz R. R. Co., 59 Cal. 290; Savannah etc. Canal Co. v. Bourquin, 51 Ga. 378; Davis v. East Tenn. etc. R. R. Co., 87 Ga. 605, 13 S. E. Rep. 567; Ohio etc. R. R. Co. v. Thillman, 143 Ill. 127, 32 N. E. Rep. 529; Allen v. Michel, 38 Ill. App. 313; Frith v. Dubuque, 45 Ia. 406; Drake v. Chicago etc. R. R. Co., 63 Ia. 302; Miller v. Keokuk etc. R. R. Co., 63 Ia. 680; Loughran v. Des Moines, 72 Ia. 382; Shively v. Cedar Rapids etc. R. R. Co., 74 Ia. 169, 37 N. W. Rep. 133; Sullens v. Chicago etc. R. R. Co., 74 Ia. 659; Randolph v. Bloomfield, 77 Ia. 50, 41 N. W. Rep. 562; Ferguson v. Formenich Mfg. Co., 77 Ia. 576, 42 N. W. Rep. 448; Hunt v. Iowa Cent. R. R. Co., 86 Ia. 15, 52 N. W. Rep. 668; Willitts v. Chicago etc. R. R. Co., 88 Ia. 281, 55 N. W. Rep. 313; Cumberland etc. Canal Co. v. Hitchings, 65 Me. 140; Attwood v. Bangor, 83 Me. 582, 22 Atl. Rep. 466; Hitchins v. Frostburg, 68 Md. 100, 11 Atl. Rep. 826; Frostburg v. Hitchins, 70 Md. 56, 16 Atl. Rep. 380; Frostburg v. Duffy, 70 Md. 47, 16 Atl. Rep. 642; Lake Roland El. R. R. Co. v. Webster, 81 Md. 529, 32 Atl. Rep. 186; Wells v. New Haven etc. Co., 151 Mass. 46, 23 N. E. Rep. 724, 1 Am. R. R. & Corp. Rep. 708; Harrington v. Railroad Co., 17 Minn. 215; Adams v. Hastings

etc. R. R. Co., 18 Minn. 260; Brakken v. Minneapolis etc. R. R. Co., 29 Minn. 41, 31 Minn. 45; Brakken v. Minneapolis etc. R. R. Co., 32 Minn. 425; Byrne v. Minneapolis etc. R. R. Co., 38 Minn. 212, 36 N. W. Rep. 339; Van Hoozier v. Hannibal etc. R. R. Co., 70 Mo. 145; Dickson v. Chicago etc. R. R. Co., 71 Mo. 575; Benson v. Chicago etc. R. R. Co., 78 Mo. 504; Smith v. Kansas City etc. R. R. Co., 98 Mo. 20, 11 S. W. Rep. 259; McKee v. St. Louis etc. R. R. Co., 49 Mo. App. 174; Bielman v. Chicago etc. R. R. Co., 50 Mo. App. 152; Carson v. Springfield, 53 Mo. App. 289; Omaha etc. R. R. Co. v. Standen, 22 Neb. 343; Delaware etc. R. R. Co. v. Lee, 22 N. J. L. 243; Hatfield v. Central R. R. Co., 33 N. J. L. 251; McFarlan v. Morris Canal & B. Co., 44 N. J. L. 471; Uline v. New York Cent. etc. R. R. Co., 101 N. Y. 98; Reed v. State, 108 N. Y. 407, 15 N. E. Rep. 735; Pond v. Metropolitan El. R. R. Co., 112 N. Y. 186, 19 N. E. Rep. 487; Hussner v. Brooklyn City R. R. Co., 114 N. Y. 433, 21 N. E. Rep. 1002; Ottenot v. New York etc. R. R. Co., 119 N. Y. 603, 23 N. E. Rep. 169; Tallman v. Met. El. R. R. Co., 121 N. Y. 119, 23 N. E. Rep. 1134, 2 Am. R. R. & Corp. Rep. 325; Williams v. Brooklyn El. R. R. Co., 126 N. Y. 96, 26 N. E. Rep. 1048; Galway v. Met. El. R.

discharged it through a culvert upon the plaintiff's land. By statute an action for such damages was barred in six years. Suit was brought more than six years after the work was done. It was held that the structure was a continuing nuisance and that the damages sustained within six years could

R. Co., 128 N. Y. 132, 28 N. E. Rep. 479, 5 Am. R. R. & Corp. Rep. 391; *Ode v. Manhattan R. Co.*, 56 Hun 199, 9 N. Y. Supp. 338; *Rumsey v. New York etc. R. R. Co.*, 63 Hun 200, 17 N. Y. Supp. 672; *Syracuse Solar Salt Co. v. Rome etc. R. R. Co.*, 67 Hun 153, 22 N. Y. Supp. 321; *Spilman v. Roanoke Nav. Co.*, 74 N. C. 675; *Emry v. Raleigh etc. R. R. Co.*, 102 N. C. 209, 9 S. E. Rep. 139; *Adams v. Durham etc. R. R. Co.*, 110 N. C. 325, 14 S. E. Rep. 857; *Valley R. R. Co. v. Franz*, 43 Ohio St. 623; *Eshleman v. Martic*, 152 Pa. St. 68; 25 Atl. Rep. 178; *Harris v. Philadelphia*, 155 Pa. St. 76, 26 Atl. Rep. 874; *Nashville v. Comer*, 88 Tenn. 415, 12 S. W. Rep. 1027; *Gulf etc. R. R. Co. v. Helsley*, 62 Tex. 593; *Gulf etc. R. R. Co. v. Tait*, 63 Tex. 223; *Austin etc. R. R. Co. v. Anderson*, 79 Tex. 427, 15 S. W. Rep. 484; *Baugh v. Texas etc. R. R. Co.*, 80 Tex. 56, 15 S. W. Rep. 587; *Clark v. Dyer*, 81 Tex. 339, 16 S. W. Rep. 1061; *Gulf etc. R. R. Co. v. Hepner*, 83 Tex. 136, 18 S. W. Rep. 441; *Gulf etc. R. R. Co. v. Frederickson*, (Tex.) 19 S. W. Rep. 124; *Gulf etc. R. R. Co. v. Haskell*, 4 Tex. Civ. App. 550, 23 S. W. Rep. 546; *Rogers v. Coal River Boom Co.*, 39 W. Va. 272, 19 S. E. Rep. 401; *Ford v. Railroad Co.*, 14 Wis. 609; *Carl v. Sheboygan etc. R. R.*

Co., 46 Wis. 625; *Winchester v. Stevens Point*, 58 Wis. 350; *Holmes v. Wilson*, 10 A. & E. 503, 37 E. C. L. R. 273; *Whitehouse v. Fellows*, 100 E. C. L. R. 765; *Troy v. Coleman*, 58 Ala. 570; *Cleveland etc. R. R. Co. v. Patterson*, 67 Ill. App. 351; *Chicago-Virden Coal Co. v. Wilson*, 67 Ill. App. 443; *Valparaiso City Water Co. v. Dickover*, 17 Ind. App. 233; *Hoffman v. Flint etc. R. R. Co.*, 114 Mich. 316, 72 N. W. Rep. 167; *Jungblum v. Minneapolis etc. R. R. Co.*, 70 Minn. 153, 72 N. W. Rep. 971; *Schoenh v. Kansas City*, 65 Mo. App. 134; *Chicago etc. R. R. Co. v. Emmert*, 53 Neb. 237, 73 N. W. Rep. 540; *Southard v. Brooklyn*, 1 App. Div. 175, 37 N. Y. Supp. 136; *Comesky v. Postal Tel. Cable Co.*, 41 App. Div. N. Y. 245; *Kenyon v. New York Cent. etc. R. R. Co.*, 29 App. Div. N. Y. 80; *Cincinnati etc. R. R. Co. v. Campbell*, 51 Ohio St. 328, 37 N. E. Rep. 366; *Penn. S. V. R. R. Co. v. Ziemer*, 124 Pa. St. 560, 17 Atl. Rep. 187; *Hartman v. Pittsburgh Inclined Plane Co.*, 11 Pa. Supr. Ct. 438; *Atlantic etc. R. R. Co. v. Peake*, 87 Va. 130, 12 S. E. Rep. 348; *Henry v. Ohio Riv. R. R. Co.*, 40 W. Va. 234, 21 S. E. Rep. 863.

See also the following cases in connection with this and the preceding note: *Ohio etc. R. R. Co. v. Wachter*, 123 Ill. 440; *Chi-*

be recovered.⁴⁶ In another case a railroad was located across an ox-bow in a river and, to avoid bridges, the company connected the two arms of the bow by a new channel on its own land. The water flowing in the new channel entered the old channel at an angle, ran across the old channel and at once commenced to wear away the plaintiff's land. It was held to be a continuing trespass and that an action was not barred in the statutory period of four years.⁴⁷ Other cases are to the same effect.⁴⁸ Where a city constructed a ditch past the plaintiff's premises which emptied into a county ditch with a fall of three feet, causing an erosion, which eventually reached the plaintiff's land and in time cut a channel fifty feet wide and twelve feet deep along his land, it was held that an action accrued to recover entire damages the moment the erosion reached the plaintiff and that any recovery was barred in five years.⁴⁹ The weight of authority is that where the flow of a stream is obstructed or interfered with by a dam or bridge or other means, causing a flooding of lands above or below, successive actions may be brought and damages recovered in such

cago etc. R. R. Co. v. Schaffer, 26 Ill. App. 280, 124 Ill. 112; Ohio etc. R. R. Co. v. Neutzel, 43 Ill. App. 108; Baker v. Leku, 48 Ill. App. 353; Centralia v. Wright, 58 Ill. App. 51; Seymour v. Cummins, 119 Ind. 148, 21 N. E. Rep. 549; Peden v. Chicago etc. R. R. Co., 73 Ia. 328, 35 N. W. Rep. 424; Chicago etc. R. R. Co. v. Union Inv. Co., 51 Kan. 600, 33 Pac. Rep. 378; Ottawa etc. R. R. Co. v. Peterson, 51 Kan. 604, 33 Pac. Rep. 606; Scott v. Nevada, 56 Mo. App. 189; Porter v. Met. El. R. R. Co., 120 N. Y. 284, 24 N. E. Rep. 454; Moore v. New York El. R. R. Co., 130 N. Y. 523, 29 N. E. Rep. 997; O'Brien v. Pennsylvania S. V. R. R. Co., 119 Pa. St. 184, 13 Atl. Rep. 74; Thomas v. Junction City Irr. Co.,

80 Tex. 550, 16 S. W. Rep. 324; New York El. R. R. Co. v. Fifth Nat. Bank, 135 U. S. 432, 10 S. C. 743.

⁴⁶ Wells v. New Haven etc. Co., 151 Mass. 46, 23 N. E. Rep. 724, 1 Am. R. R. & Corp. Rep. 708. This overrules Fowle v. New Haven etc. Co., 107 Mass. 352, and 112 Mass. 334, in so far as it holds a contrary doctrine.

⁴⁷ Valley R. R. Co. v. Franz, 43 Ohio St. 623. But see Lake Erie etc. R. R. Co. v. Purcell, 75 Ill. App. 573.

⁴⁸ Dickson v. Chicago etc. R. R. Co., 71 Mo. 575; Van Hoozier v. Hannibal etc. R. R. Co., 70 Mo. 145; Rogers v. Coal Riv. Boom Co., 39 W. Va. 272, 19 S. E. Rep. 401.

⁴⁹ Powers v. Council Bluffs, 45

to the commencement of the suit.⁵⁰ Some cases hold that if the works are properly constructed, an action accrues at once to recover entire damages, but if the damages arise from improper construction successive actions may be brought.⁵¹

2. *Diverting or polluting the waters of a stream.*—Where a railroad company diverted a stream of water from the plaintiff's land, it was held that permanent damages must be recovered and a second suit was held barred by a former recovery.⁵² In suits for the pollution of a stream with sewerage, it was held that the recovery should be limited to damages up to the commencement of the suit.⁵³

Ia. 652; see also *Huntsville v. Ewing*, 116 Ala. 576, 22 So. Rep. 984.

⁵⁰ *St. Louis etc. R. R. Co. v. Lyman*, 57 Ark. 512, 22 S. W. Rep. 170; *Miller v. Keokuk etc. R. R. Co.*, 63 Ia. 680; *Sullens v. Chicago etc. R. R. Co.*, 74 Ia. 659; *Byrne v. Minnesota etc. R. R. Co.*, 38 Minn. 212, 36 N. W. Rep. 339; *McKee v. St. Louis etc. R. R. Co.*, 49 Mo. App. 174; *Omaha etc. R. R. Co. v. Standen*, 22 Neb. 343; *Delaware & H. Canal Co. v. Lee*, 22 N. J. L. 243; *McFarlan v. Morris Canal & B. Co.*, 44 N. J. L. 471; *Emry v. Raleigh etc. R. R. Co.*, 102 N. C. 209, 9 S. E. Rep. 139; *Adams v. Durham etc. R. R. Co.*, 110 N. C. 325, 14 S. E. Rep. 857; *Gulf etc. R. R. Co. v. Hepner*, 83 Tex. 136, 18 S. W. Rep. 441; *Gulf etc. R. R. Co. v. Haskell*, 4 Tex. Civ. App. 550, 23 S. W. Rep. 546; *Chicago etc. R. R. Co. v. Emmert*, 53 Neb. 237, 73 N. W. Rep. 540; *Atlantic etc. R. R. Co. v. Peake*, 87 Va. 130, 12 S. E. Rep. 348.

Contra: *Kankakee etc. R. R. Co. v. Horan*, 30 Ill. App. 552;

affirmed 131 Ill. 288, 23 N. E. Rep. 621; *Pickneyville v. Hutchings*, 63 Ill. App. 137; *Pickneyville v. Rhine*, 63 Ill. App. 139; *Bird v. Hannibal etc. R. R. Co.*, 30 Mo. App. 365; *Ridley v. Seaboard etc. R. R. Co.*, 118 N. C. 996, 24 S. E. Rep. 730; and see *St. Louis etc. R. R. Co. v. Morris*, 35 Ark. 622.

⁵¹ *Ohio etc. R. R. Co. v. Wachter*, 123 Ill. 440; *Chicago etc. R. R. Co. v. Schaffer*, 26 Ill. App. 280; *Ohio etc. R. R. Co. v. Thillman*, 43 Ill. App. 78; *Ohio etc. R. R. Co. v. Neutzel*, 43 Ill. App. 108; *Centralia v. Wright*, 58 Ill. App. 51. And see *Ohio etc. R. R. Co. v. Thillman*, 143 Ill. 127, 32 N. E. Rep. 529; *Kankakee etc. R. R. Co. v. Horan*, 30 Ill. App. 552, affirmed 131 Ill. 288, 23 N. E. Rep. 621; *Pickneyville v. Hutchings*, 63 Ill. App. 137; *Pickneyville v. Rhine*, 63 Ill. App. 139.

⁵² *Stodghill v. Chicago etc. R. R. Co.*, 53 Ia. 341.

⁵³ *Loughran v. Des Moines*, 72 Ia. 382; *Randolf v. Boomfield*, 77 Ia. 50, 41 N. W. Rep. 562; *Schoen v. Kansas City*, 65 Mo. App. 134;

3. *Interfering with the flow of surface water.*—The rights of adjacent proprietors respecting surface water have been considered in a former section.⁵⁴ Most of the suits arise out of the construction of railroads, and are usually grounded upon an alleged negligent or improper construction. In such cases the correct rule would seem to be in favor of successive actions with damages limited to the commencement of the suit.⁵⁵ But some cases favor a single action and the recovery of permanent damages.⁵⁶

and see *Ferguson v. Formenich Mfg. Co.*, 77 Ia. 576, 42 N. W. Rep. 448. But the parties may treat the suit as one for permanent damages. *Scott v. Nevada*, 56 Mo. App. 189. In *Paris v. Allred*, 17 Tex. Civ. App. 125, 43 S. W. Rep. 62, it was held that permanent damages should be recovered.

⁵⁴ Ante, § 88.

⁵⁵ *St. Louis etc. R. R. Co. v. Biggs*, 52 Ark. 240, 12 S. W. Rep. 331; *St. Louis etc. R. R. Co. v. Yarborough*, 56 Ark. 612, 20 S. W. Rep. 515; *Drake v. Chicago etc. R. R. Co.*, 63 Ia. 302; *Hunt v. Iowa Central R. R. Co.*, 86 Ia. 15, 52 N. W. Rep. 668; *Willets v. Chicago etc. R. R. Co.*, 88 Ia. 281, 55 N. W. Rep. 313; *Benson v. Chicago etc. R. R. Co.*, 78 Mo. 504; *Gulf etc. R. R. Co. v. Helsley*, 62 Tex. 593; *Gulf etc. R. R. Co. v. Tait*, 63 Tex. 223; *Austin etc. R. R. Co. v. Anderson*, 79 Tex. 427, 15 S. W. Rep. 484; *Clark v. Dyer*, 81 Tex. 339, 16 S. W. Rep. 1061; *Gulf etc. R. R. Co. v. Frederickson*, (Tex.) 19 S. W. Rep. 124; *Troy v. Coleman*, 58 Ala. 570; *Jungblum v. Minneapolis etc. R. R. Co.*, 70 Minn. 153, 72 N. W. Rep. 971.

So in the case of highways,

Allen v. Michel, 38 Ill. App. 313; *Whitehouse v. Fellows*, 100 E. C. L. R. 765. In *St. Louis etc. R. R. Co. v. Biggs*, 52 Ark. 240, 12 S. W. Rep. 331, the court lays down this rule: "Whenever the nuisance is of permanent character, and its construction and continuance are necessarily an injury, the damage is original, and may be at once fully compensated. In such case the statute of limitations begins to run upon the construction of the nuisance. But where such structure is permanent in its character, and its construction and continuance are not necessarily injurious, but may or may not be so, the injury to be compensated in a suit is only the damage which has happened, and there may be as many successive recoveries as there are successive injuries. In such case the statute of limitations begins to run from the happening of the injury complained of."

⁵⁶ *Little Rock etc. R. R. Co. v. Chapman*, 39 Ark. 463; *Kankakee etc. R. R. Co. v. Horan*, 22 Ill. App. 145; *Chicago etc. R. R. Co. v. Henneberry*, 28 Ill. App. 110; *Louisville etc. R. R. Co. v. Sparks*, 12 Ind. App. 410, 40 N.

4. *Overflow or percolation from a reservoir or canal.*—Where a reservoir was constructed to serve as a feeder for a canal and the water percolated through the soil and injured the plaintiff's land, it was held that the injury was continuing and that successive actions might be brought.⁵⁷ The same ruling was made where land was injured by overflow, leakage and percolation from a canal.⁵⁸

5. *Change of grade causing surface water to flow upon the plaintiff's premises.*—Where a street is graded or otherwise improved so as to cast surface water upon the abutting property, the weight of authority is that there may be successive actions,⁵⁹ but the contrary is vigorously maintained in some cases.⁶⁰

6. *Change of grade or viaduct in street.*—Where the constitution or statute gives a right to recover for damages caused by a change of grade, the authorities uniformly hold that there can be but one suit and that all damages past and prospective must be recovered therein.⁶¹

E. Rep. 546; *Gentry v. Richmond* etc. R. R. Co., 38 S. C. 284, 16 S. E. Rep. 893; *Nichols v. Norfolk* etc. R. R. Co., 120 N. C. 495; *Beach v. Wilmington* etc. R. R. Co., 120 N. C. 498. In *Peden v. Chicago* etc. R. R. Co., 73 Ia. 328, 35 N. W. Rep. 424, it was held to be a question for the jury whether the structure causing the damage was permanent.

⁵⁷ *Reed v. State*, 108 N. Y. 407, 15 N. E. Rep. 735; to same effect, *Southard v. Brooklyn*, 1 App. Div. 175, 37 N. Y. Supp. 136.

⁵⁸ *Savannah etc. Canal Co. v. Bourquim*, 51 Ga. 378; *Spilman v. Roanoke Nāv. Co.*, 74 N. C. 675.

And see *Attwood v. Bangor*, 83 Me. 582, 22 Atl. Rep. 466; *Harris v. Philadelphia*, 155 Pa. St. 76, 26 Atl. Rep. 874; *Nashville v. Comar*, 88 Tenn. 415, 12 S. W. Rep. 1027.

⁵⁹ *Uline v. New York Central* etc. R. R. Co., 101 N. Y. 98; *Hitchins v. Frostburg*, 68 Md. 100, 11 Atl. Rep. 826; *Hitchins v. Frostburg*, 70 Md. 56, 16 Atl. Rep. 380; *Frostburg v. Duffy*, 70 Md. 47, 16 Atl. Rep. 642; *Carson v. Springfield*, 53 Mo. App. 289; *Eshleman v. Martic*, 152 Pa. St. 68, 25 Atl. Rep. 178; *Winchester v. Stevens Point*, 58 Wis. 350; *Adams v. Hastings* etc. R. R. Co., 18 Minn. 260.

⁶⁰ *North Vernon v. Voegler*, 103 Ind. 314; *Atkinson v. Atlanta*, 81 Ga. 625, 7 S. E. Rep. 692.

⁶¹ *Eachus v. Los Angeles Consol. Elec. St. R. R. Co.*, 103 Cal. 614, 37 Pac. Rep. 750; *Smith v. Floyd County*, 85 Ga. 422, 11 S. E. Rep. 850; *Springer v. Chicago*, 135 Ill. 552, 26 N. E. Rep. 514, 4 Am. R. R. & Corp. Rep. 52; *La Fayette v. Nagle*, 113 Ind. 425; *Hempstead v. Des Moines*, 63 Ia.

7. *Railroads in streets.*—The right to recover for damages to abutting property by reason of the construction and operation of a railroad in the street in front of it, is made to depend upon many different circumstances in the different States. It may depend upon the ownership of the fee of the street, or upon the nature and purpose of the road or manner of its construction, or upon statutory or constitutional provisions. The cases are conflicting and we cite them without any attempt to reconcile or explain them.⁶²

36; Markowitz v. Kansas City, 125 Mo. 485, 28 S. W. Rep. 642; Martin v. Chicago etc. R. R. Co., 47 Mo. App. 452; Wallace v. Kansas City etc. R. R. Co., 47 Mo. App. 491; Cass v. Pennsylvania R. R. Co., 159 Pa. St. 273, 28 Atl. Rep. 161; North Chester v. Eckfeldt, 1 Monaghan, (Pa. Supm.) 732; Kershaw v. Philadelphia, 20 Phil. 318; Chicago v. Altgeld, 33 Ill. App. 23; Stein v. Lafayette, 6 Ind. App. 414, 33 N. E. Rep. 912.

⁶² Cases favoring one action and permanent damages. Highland Ave. etc. R. R. Co. v. Matthews, 99 Ala. 24, 10 So. Rep. 267; Jacksonville etc. R. R. Co. v. Lockwood, 33 Fla. 573, 15 So. Rep. 327; Chicago etc. R. R. Co. v. Loeb, 118 Ill. 203; Porter v. Midland R. R. Co., 125 Ind. 476, 25 N. E. Rep. 556, 3 Am. R. R. & Corp. Rep. 357; Cadle v. Muscatine Western R. R. Co., 44 Ia. 11; Pratt v. Des Moines etc. R. R. Co., 72 Ia. 249; Leavenworth etc. R. R. Co. v. Curtain, 51 Kan. 432, 33 Pac. Rep. 297; Atchison etc. R. R. Co. v. Davidson, 52 Kan. 739, 35 Pac. Rep. 787; Elizabethtown etc. R. R. Co. v. Combs, 10 Bush. 382; Jeffersonville etc. R. R. Co. v.

Esterte, 13 Bush. 667; Strickley v. Chesapeake etc. R. R. Co., 93 Ky. 323, 20 S. W. Rep. 261; Maysville etc. R. R. Co. v. Ingram, (Ky.) 30 S. W. Rep. 8; Karst v. St. Paul etc. R. R. Co., 22 Minn. 118; Baldwin v. Chicago etc. R. R. Co., 35 Minn. 354; White v. Northwestern N. C. R. R. Co., 113 N. C. 610, 18 S. E. Rep. 330, 9 Am. R. R. & Corp. Rep. 103; Harman v. Louisville etc. R. R. Co., 87 Tenn. 614, 11 S. W. Rep. 703; Rosenthal v. Taylor etc. R. R. Co., 79 Tex. 325, 15 S. W. Rep. 268; Kaufman v. Tacoma etc. R. R. Co., 11 Wash. 632, 40 Pac. Rep. 137; Stewart v. Ohio Riv. R. R. Co., 38 W. Va. 438, 18 S. E. Rep. 604; Doane v. Lake St. El. R. R. Co., 165 Ill. 510, 46 N. E. Rep. 520; Fowler v. Des Moines etc. R. R. Co., (Ia.) 60 N. W. Rep. 116; Thompson v. Citizens Traction Co., 181 Pa. St. 131.

Cases favoring successive actions: Hopkins v. Western Pac. R. R. Co., 50 Cal. 190; Ford v. Santa Cruz R. R. Co., 59 Cal. 290; Davis v. East Tenn. etc. R. R. Co., 87 Ga. 605, 13 S. E. Rep. 567; Frith v. Dubuque, 45 Ia. 406; Lake Roland El. R. R. Co. v. Webster, 81 Md. 529, 32

8. *Where there is an actual occupation of the plaintiff's land.*—Plaintiff owned a lot on the Chicago river, his title extending to the middle of the stream. The defendant railroad company built a draw bridge across the river, the center pier and platform of which were partly on the plaintiff's land. The plaintiff acquired the property after the construction of the bridge and brought suit to recover as for a continuing trespass. But the court held that an action accrued to the plaintiff's grantor to recover permanent damages, that this right did not pass by the deed and that plaintiff could recover nothing.⁶³ A railroad company built its road upon a highway and appropriated a bridge and fenced up part of the way. It was held that the town could recover entire damages in one action.⁶⁴ There are other cases of similar import.⁶⁵ But where a turnpike company built its buttresses upon the plaintiff's land it was held

Atl. Rep. 186; Harrington v. Railroad Co., 17 Minn. 215; Adams v. Hastings etc. R. R. Co., 18 Minn. 260; Smith v. Kansas City etc. R. R. Co., 98 Mo. 20, 11 S. W. Rep. 259; Hatfield v. Central R. R. Co., 33 N. J. L. 251; Pond v. Met. El. R. R. Co., 112 N. Y. 186, 19 N. E. Rep. 487; Hussner v. Brooklyn City R. R. Co., 114 N. Y. 433, 21 N. E. Rep. 1002; Ottenot v. New York etc. R. R. Co., 119 N. Y. 603, 23 N. E. Rep. 169; Tallman v. Met. El. R. R. Co., 121 N. Y. 119, 23 N. E. Rep. 1134, 2 Am. R. R. & Corp. Rep. 325; Williams v. Brooklyn El. R. R. Co., 126 N. Y. 96, 26 N. E. Rep. 1048; Galway v. Met. El. R. R. Co., 128 N. Y. 132, 28 N. E. Rep. 479, 5 Am. R. R. & Corp. Rep. 391; Ode v. Manhattan R. R. Co., 56 Hun 199, 9 N. Y. Supp. 338; Rumsey v. New York etc. R. R. Co.,

63 Hun 200, 17 N. Y. Supp. 672; Syracuse Solar Salt Co. v. Rome etc. R. R. Co., 67 Hun 153, 22 N. Y. Supp. 321; Ford v. Railroad Co., 14 Wis. 609; Carl v. Sheboygan etc. R. R. Co., 46 Wis. 625; Hoffman v. Flint etc. R. R. Co., 114 Mich. 316, 72 N. W. Rep. 167; Kenyon v. New York Cent. etc. R. R. Co., 29 App. Div. N. Y. 80; Cincinnati etc. R. R. Co. v. Campbell, 51 Ohio St. 328, 37 N. E. Rep. 366; Henry v. Ohio Riv. R. R. Co., 40 W. Va. 234, 21 S. E. Rep. 863.

⁶³ Chicago etc. R. R. Co. v. Maher, 91 Ill. 312.

⁶⁴ Troy v. Cheshire R. R. Co., 23 N. H. 83.

⁶⁵ Kansas Pac. R. R. Co. v. Muhlman, 17 Kan. 224; District of Columbia v. Hutchinson, 1 App. Cas. D. C. 403; Sherlock v. Louisville etc. R. R. Co., 115 Ind. 22, 17 N. E. Rep. 171.

that successive actions might be brought.⁶⁶ So where a city caused a canal to be filled up.⁶⁷ And this would seem to be the correct rule, else land could be effectively appropriated to public use without complying with the statute and without prepayment of compensation.

9. *Miscellaneous cases*.—Where a plaintiff complained of a nuisance created by stock yards maintained by a railroad company, it was held that damages could only be recovered to the commencement of the suit, as the company might abate the nuisance.⁶⁸ Where a railroad was built across a cul de sac so as to cut off plaintiff's outlet, it was held plaintiff might bring successive actions until the highway was restored.⁶⁹ Where the right of recovery depends wholly upon a constitutional provision giving compensation for property damaged or injured by public works there can be but one recovery, since the suit is necessarily one for just compensation once for all, for injury to the land.⁷⁰

However the authorities disagree as to whether the plaintiff may or must recover entire damages in one suit, there is no question but what the parties may treat the suit as one for permanent damages and in such case a recovery

⁶⁶ Holmes v. Wilson, 10 A. & E. 503, 37 E. C. L. R. 273.

⁶⁷ Cumberland etc. Canal Co. v. Hitchings, 65 Me. 140.

⁶⁸ Shively v. Cedar Rapids etc. R. R. Co., 74 Ia. 169, 37 N. W. Rep. 133; Bielman v. Chicago etc. R. R. Co., 50 Mo. App. 152. To same effect, Baugh v. Texas etc. R. R. Co., 80 Tex. 56, 15 S. W. Rep. 587. Compare City of Seymour v. Cummins, 119 Ind. 148, 21 N. E. Rep. 549; Cleveland etc. R. R. Co. v. Patterson, 67 Ill. App. 351; Chicago-Virden Coal Co. v. Wilson, 67 Ill. App. 443. But see Hyde Park etc. Light Co. v. Porter, 167 Ill. 276, 47 N. E. Rep. 206.

⁶⁹ Brakken v. Minneapolis etc.

R. R. Co., 29 Minn. 41, 31 Minn. 45; Brakken v. Minneapolis etc. R. R. Co., 32 Minn. 425. And see Autensieth v. St. Louis etc. R. R. Co., 36 Mo. App. 254; Conkling v. Zerga, 72 Hun 134, 25 N. Y. Supp. 558.

⁷⁰ O'Brien v. Pennsylvania S. V. R. R. Co., 119 Pa. St. 184, 13 Atl. Rep. 74; Eachus v. Los Angeles Consol. Elec. R. R. Co., 103 Cal. 614, 37 Pac. Rep. 750; Atkinson v. Atlanta, 81 Ga. 625, 7 S. E. Rep. 692; Smith v. Floyd County, 85 Ga. 422, 11 S. E. Rep. 850; Springer v. Chicago, 135 Ill. 552, 26 N. E. Rep. 514, 4 Am. R. R. & Corp. Rep. 52; Markowitz v. Kansas City, 125 Mo. 485, 28 S. W. Rep. 642; Martin

will bar any subsequent suit growing out of the same wrong.⁷¹

§ 653c. Who entitled to sue in case of transfer of title after construction or use of works causing the damage.—The answer to this question depends upon whether there must be a recovery of all damages in one suit or whether successive actions may be brought.⁷² In the former case the right to recover entire damages is in the owner at the time the action accrues and a subsequent grantee can recover nothing.⁷³ In the latter case the grantor may recover such damages as have been sustained up to the time of the conveyance, and the grantee may recover damages thereafter accruing, including the fee damages, or the just compensation for the right to permanently maintain the works causing the damage.⁷⁴ The grantor may assign his claim for

v. Chicago etc. R. R. Co., 47 Mo. App. 452; Wallace v. Kansas City etc. R. R. Co., 47 Mo. App. 491; Cass v. Pennsylvania Co., 159 Pa. St. 273, 28 Atl. Rep. 161.

⁷¹ District of Columbia v. Hutchinson, 1 App. Cas. D. C. 403; Ohio etc. R. R. Co. v. Wachter, 123 Ill. 440; Baker v. Leka, 48 Ill. App. 353; Chicago etc. R. R. Co. v. Loeb, 118 Ill. 203; Central Branch U. P. R. R. Co. v. Andrews, 26 Kan. 702; Leavenworth etc. R. R. Co. v. Curtan, 51 Kan. 432, 33 Pac. Rep. 297; Jeffersonville etc. R. R. Co. v. Esterle, 13 Bush. 667; Scott v. Nevada, 56 Mo. App. 189; Porter v. Met. El. R. R. Co., 120 N. Y. 284, 24 N. E. Rep. 454; White v. Northwestern N. C. R. R. Co., 113 N. C. 610, 18 S. E. Rep. 330, 9 Am. R. R. & Corp. Rep. 103; Harman v. Louisville etc. R. R. Co., 87 Tenn. 614, 11 S. W. Rep. 703; Rosenthal v. Taylor etc. R. R. Co., 79 Tex. 325, 15 S. W. Rep. 268.

And see Chicago etc. R. R. Co., v. Maher, 91 Ill. 312; New York El. R. R. Co. v. Fifth Baptist Church, 135 U. S. 432, 10 S. C. Rep. 743.

⁷² For the authorities on this question see last section.

⁷³ Chicago etc. R. R. Co. v. Maher, 91 Ill. 312; Chicago etc. R. R. Co. v. Loeb, 118 Ill. 203; Seymour v. Cummins, 119 Ind. 148, 21 N. E. Rep. 549; Evans v. Savannah etc. R. R. Co., 90 Ala. 54, 7 So. Rep. 758; Northern Pac. R. R. Co. v. Murray, 87 Fed. Rep. 648; Maffert v. Quine, 93 Fed. Rep. 347.

⁷⁴ Griswold v. Met. El. R. R. Co., 122 N. Y. 640, 25 N. E. Rep. 331; Pappenheim v. Met. El. R. R. Co., 128 N. Y. 436, 28 N. E. Rep. 518, 5 Am. R. R. & Corp. Rep. 378; Kernochan v. New York El. R. R. Co., 128 N. Y. 559, 29 N. E. Rep. 65, 5 Am. R. R. & Corp. Rep. 407; Mitchell v. Met. El. R. R. Co., 134 N. Y. 11, 31 N. E. Rep. 260; Van Allen v.

past damages to the grantee, in which case the latter can recover both past and fee damages.⁷⁵ The effect of a reservation by the grantor of the right to recover prospective or permanent damages is considered in some cases cited in the margin.⁷⁶

§ 653d. **Effect of estates for life or years on the right to damages.** —Any person having an interest in property may recover for any damage to his interest.⁷⁷ A tenant may recover for injury to his crops or to his leasehold.⁷⁸ In the New York elevated railroad cases it is held that where there is an outstanding estate for life or years at the time the road is built, the damages to rental value belong to the

New York El. R. R. Co., 144 N. Y. 174, 38 N. E. Rep. 997; Pegram v. New York El. R. R. Co., 147 N. Y. 135, 41 N. E. Rep. 424; Foote v. Met. El. R. R. Co., 147 N. Y. 367, 42 N. E. Rep. 181; Foote v. Manhattan R. R. Co., 58 Hun 478, 12 N. Y. Supp. 516; Sperb v. Met. El. R. R. Co., 61 Hun 539, 16 N. Y. Supp. 392; Domschke v. Met. El. R. R. Co., 74 Hun 442, 26 N. Y. Supp. 810; Shepard v. Met. El. R. R. Co., 82 Hun 527, 31 N. Y. Supp. 537; Watson v. Met. El. R. R. Co. 57 N. Y. Supr. Ct. 364, 8 N. Y. Supp. 533; Pegram v. New York El. R. R. Co., 59 N. Y. Supr. Ct. 570, 14 N. Y. Supp. 769; Birch v. Met. El. R. R. Co., 15 Daly 453, 8 N. Y. Supp. 325; Pegram v. New York El. R. R. Co., 8 Misc. 425, 28 N. Y. Supp. 592; Cameron v. New York El. R. R. Co., 23 Misc. N. Y. 590; Chandler v. New York El. R. R. Co., 34 App. Div. N. Y. 305; Cameron v. New York El. R. R. Co., 38 App. Div. N. Y. 16; Farrell v. Manhattan El. R. R. Co., 43 App. Div. N. Y. 143.

⁷⁵ Birch v. Met. El. R. R. Co., 15 Daly 453, 8 N. Y. Supp. 325.

⁷⁶ Pegram v. New York El. R. R. Co., 147 N. Y. 135, 41 N. E. Rep. 424, affirming S. C. 8 Misc. 425, 28 N. Y. Supp. 592; Foote v. Metropolitan El. R. R. Co., 147 N. Y. 367, 42 N. E. Rep. 181; Foote v. Manhattan R. R. Co., 58 Hun 478, 12 N. Y. Supp. 516; Sperb v. Met. El. R. R. Co., 61 Hun 539, 16 N. Y. Supp. 392; Shepard v. Met. El. R. R. Co., 82 Hun 527, 31 N. Y. Supp. 537; Oehler v. New York El. R. R. Co., 4 App. Div. 152, 38 N. Y. Supp. 1047.

⁷⁷ Cartersville v. Lyon, 69 Ga. 577; Omaha etc. R. R. Co. v. Brown, 29 Neb. 492, 46 N. W. Rep. 39; Nebraska City v. Northcutt, 45 Neb. 456, 63 N. W. Rep. 807; Salsbury v. Western N. C. R. R. Co., 91 N. C. 490, 98 N. C. 465; Gorrell v. Toledo etc. R. R. Co., 4 Ohio C. C. 398.

⁷⁸ Georgia etc. R. R. Co. v. Berry, 78 Ga. 744; Bentley v. Atlanta, 92 Ga. 623, 18 S. C. Rep. 1013; Texas Pac. R. R. Co. v. Saunders, (Tex.) 18 S. W. Rep.

owner of such estate,⁷⁹ but the existence of such an estate does not prevent the owner of the fee or reversion from recovering the permanent or fee damages in a suit to enjoin the operation of the road.⁸⁰ Where a lease is made after the building of the road, it is presumed to be subject to the right to operate the road, and the right to recover damages to rental value will be in the lessor, notwithstanding the lease.⁸¹ Where a lease made before the building of the road is renewed after its construction pursuant to the terms of the original lease, it is regarded as one continuous term as respects the right to damages to rental value and the lessee may recover therefor both for the term of the old and new lease.⁸² But if the new lease is not strictly a renewal then the former rule applies.⁸³ A lease for a term of years, with an agreement to convey the fee to the lessee six months before the expiration of the term, was held not to divest the lessor of the right to sue for both past and prospective damages.⁸⁴

§ 653e. **What constitutes special damage.**—The question of what constitutes special damage is one that frequently arises in cases growing out of the exercise of the eminent domain power. Without going into the question at length,

792; *Baltimore etc. R. R. Co. v. Hackett*, 87 Md. 224.

⁷⁹ *Welsh v. New York El. R. R. Co.*, 16 Daly 515, 12 N. Y. Supp. 545; *Paret v. New York El. R. R. Co.*, 60 N. Y. Supr. 441; *Odell v. Met. El. R. R. Co.*, 3 Misc. 335, 22 N. Y. Supp. 737.

⁸⁰ *Mortimer v. Manhattan R. R. Co.*, 129 N. Y. 81, 29 N. E. Rep. 5; *Minton v. New York El. R. R. Co.*, 130 N. Y. 332, 29 N. E. Rep. 319; *Thompson v. Manhattan R. R. Co.*, 130 N. Y. 360, 29 N. E. Rep. 264; *S. C.* 16 Daly 64; *Macey v. Met. El. R. R. Co.*, 59 Hun 365, 12 N. Y. Supp. 804; *S. C.* affirmed 128 N. Y. 624; and see *Post v. Manhattan R. R. Co.*, 125 N. Y. 697, 26 N. E. Rep. 14.

⁸¹ *Kernochan v. New York El. R. R. Co.*, 128 N. Y. 559, 29 N. E. Rep. 65, 5 Am. R. R. & Corp. Rep. 407; *Hine v. New York El. R. R. Co.*, 128 N. Y. 571, 29 N. E. Rep. 69; *Hamilton v. Manhattan R. R. Co.*, 58 N. Y. Supr. 17, 9 N. Y. Supp. 313; *Rannow v. Hazard*, 61 N. Y. Supr. 211; *Mortimer v. Manhattan R. R. Co.*, 57 N. Y. Supr. 509, 8 N. Y. Supp. 536.

⁸² *Kearney v. Met. El. R. R. Co.*, 129 N. Y. 76, 29 N. E. Rep. 70.

⁸³ See *Crimmins v. Met. El. R. R. Co.*, 87 Hun 187, 33 N. Y. Supp. 984, 35 N. Y. Supp. 412.

⁸⁴ *Hine v. New York El. R. R.*

we think that wherever private property is depreciated in value by reason of a public nuisance, or by reason of an act which, but for the statutory authority would be a public nuisance, the owner of the property sustains a special and peculiar damage different from that sustained by the public in general, and, consequently may have his private action to recover for such damage.⁸⁵ Thus in a case where part of a street was vacated and plaintiff and others were left fronting on a cul de sac, whereby their property was depreciated though their immediate access to the street was not impaired, the court says: "But the owners of properties which have depreciated in value by reason of the closing of the street have sustained an injury to their property rights which is peculiar to themselves and which is different in kind from the injury sustained by those who use the street for travel only. The injury is not of the same kind, differing in degree only; it is an additional injury, caused by the impairment of an entirely distinct right, the special right of ingress and egress."⁸⁶

§ 653f. **Certiorari to set aside ordinance.**—In New Jersey certiorari is a common remedy to question the validity of an ordinance granting rights or franchises in streets⁸⁷ or providing for the extension, grading or improvement of

Co., 8 Misc. 18, 28 N. Y. Supp. 66.

⁸⁵ Aldrich v. Minneapolis, 52 Minn. 164, 53 N. W. Rep. 1072; In re Nelson Street, 182 Pa. St. 397; Thomas v. Inter-County Street Ry. Co., 167 Pa. St. 120; Hargo v. Hodgden, 89 Cal. 623, 26 Pac. Rep. 1106; Miller v. Schenck, 78 Ia. 372, 43 N. W. Rep. 225; Pennsylvania Co.'s Appeal, 115 Pa. St. 529; Wylie v. Elwood, 134 Ill. 281; Met. W. S. El. R. R. Co. v. Stickney, 150 Ill. 362; Chicago v. Burky, 158 Ill. 109; Sheedy v. Union Press Brick Works, 25 Mo. App. 527; Flynn v. Taylor, 127 N. Y. 596, 28 N. E. Rep.

418; Beekman v. Third Ave. R. R. Co., 13 App. Div. 279, 43 N. Y. Supp. 174. Compare Symons v. San Francisco, 115 Cal. 555, 42 Pac. Rep. 913, 47 Pac. Rep. 453; Cherry v. Rock Hill, 48 S. C. 553; Ante, § 227 and especially cases cited in notes 32 and 33; also §§ 235 and 235a.

⁸⁶ In re Nelson Street, 182 Pa. St. 397, 402.

⁸⁷ People's Gas Light Co. v. Jersey City Gas Light Co., 46 N. J. Eq. 297; State v. Trenton, 54 N. J. L. 92, 23 Atl. Rep. 281; State v. Newark, 54 N. J. L. 102, 23 Atl. Rep. 284; State v. Jersey City, 57 N. J. L. 293, 30

streets.⁸⁸ An ordinance declaring shade trees a nuisance and ordering their removal, was held void on certiorari.⁸⁹

§ 654. **Other remedies.** — A wrongful interference with private property or injury done thereto under color of the eminent domain power may in general be redressed by the same remedies as though such interference or injury was without such color. An action on the case will lie wherever the nature of the injury makes that the appropriate remedy.⁹⁰ So of the action of forcible entry and detainer.⁹¹ It has been held, however, that a statute imposing a penalty for wrongfully cutting timber on the land of another, of treble the value of the timber, does not apply to a company wrongfully entering under the power of eminent domain.⁹² Where a railroad company wrongfully occupied a portion of the plaintiff's land, it was held that he could maintain an action for use and occupation.⁹³ Where employes of a telegraph company cut limbs from trees in the highway, which belonged to the abutting owners, without having made compensation for the right so to do, it was held that they were indictable under a statute which imposed a penalty upon any who wrongfully injured or destroyed trees, shrubs, etc., growing upon land not their own.⁹⁴ The grant-

Atl. Rep. 531; *State v. Cape May*, 58 N. J. L. 565, 34 Atl. Rep. 397; *State v. Bayonne*, 59 N. J. L. 101, 34 Atl. Rep. 1080.

⁸⁸ *State v. Orange*, 54 N. J. L. 111, 22 Atl. Rep. 1004; *Read v. Camden*, 54 N. J. L. 347, 24 Atl. Rep. 549, reversing S. C. 53 N. J. L. 322, 21 Atl. Rep. 565; *State v. Long Branch Comrs.*, 54 N. J. L. 484, 24 Atl. Rep. 368; *New York etc. R. R. Co. v. Paterson*, 61 N. J. L. 408, 39 Atl. Rep. 680. Contra: *Wulzen v. Board of Supervisors*, 101 Cal. 15, 55 Pac. Rep. 353.

⁸⁹ *State v. Vineland*, 56 N. J. L. 474, 28 Atl. Rep. 1039.

⁹⁰ *Fiske v. Framingham Mfg. Co.*, 12 Pick. 68; *Baird v. Hunter*, 12 Pick. 556; *Hill v. Sayles*, 12 Met. 142; *Hill v. Sayles*, 4 Cush. 549; *Morris Canal etc. Co. v. Seward*, 23 N. J. L. 219; *Louisville & Nashville R. R. Co. v. Faulkner*, 2 Head 65; *Bingham v. Doane*, 9 Ohio 165.

⁹¹ *Mitchell v. Illinois etc. Co.*, 68 Ill. 286; *Wolf v. Coffey*, 4 J. J. Marsh. 41.

⁹² *Bethlehem South Gas & Water Co. v. Yoder*, 112 Pa. St. 136.

⁹³ *Galveston Wharf Co. v. Gulf etc. R. R. Co.*, 72 Tex. 454, 10 S. W. Rep. 537.

⁹⁴ *Dailey v. State*, 51 Ohio St.

ing by a city of the right to use its streets for a railroad or other like use, does not render the city liable for damages to private property resulting from such use.⁹⁵

348, 37 N. E. Rep. 710, 10 Am. 431; Terry v. Richmond, 94 R. R. & Corp. Rep. 687. Va. 537; Hatch v. Tacoma etc.

⁹⁵ Sorensen v. Greeley, 10 Col. R. R. Co., 6 Wash. 1, 32 Pac. 369; Green v. Portland, 32 Me. Rep. 1063.

CHAPTER XXIX.

DISCONTINUANCE AND ABANDONMENT OF PROCEEDINGS.

§ 655. The right to discontinue proceedings before completion.—We have already had more than one occasion to observe that the proceedings for condemnation are entirely under the control of the legislature. It may provide that a party, having once instituted proceedings to condemn property, shall be bound to go on and complete the proceedings and take the property. It may regulate and limit the right to discontinue, and annex such terms and conditions to the exercise of the right as it sees fit.¹ In considering the right to discontinue in any case, regard should first be had to the statute applicable to the case. In the absence of express statutory provisions it is generally held that, where a party has instituted proceedings to condemn property, it may discontinue those proceedings at any time before confirmation of the report of commissioners, or, in case of jury trials, at any time before the case is given to the jury.² In New York leave to discontinue has been granted in numerous cases before the final confirmation of the report of the

¹ See *In re Board of Street Opening*, 133 N. Y. 436, 31 N. E. Rep. 316; *In re Board of Street Opening*, 82 Hun 580, 31 N. Y. Supp. 732; *State Park Commissioners v. Henry*, 38 Minn. 266, 36 N. W. Rep. 874.

² *Joliet & Chicago R. R. Co. v. Barrows*, 24 Ill. 562; *Chicago, St. Louis & W. R. R. Co. v. Gates*, 120 Ill. 86; *Elkhart v. Simonton*, 71 Ind. 7; *Pittsburgh, Ft. Wayne & Chicago R. R. Co. v. Swinney*, 97 Ind. 586; *Burlington & Missouri R. R. Co. v. Sater*, 1 Ia. 421; *Hunting v. Curtis*, 10 Ia.

152; *Hastings v. B. & M. R. R. Co.* 38 Ia. 316; *Corbin v. Cedar Rapids etc. R. R. Co.* 66 Ia. 73; *Application for Widening Roffignac St.*, 4 Rob. La. 357; *Hullin v. Second Municipality of New Orleans*, 11 Rob. La. 97; *Graff v. Baltimore*, 10 Md. 544; *North Missouri R. R. Co. v. Lackland*, 25 Mo. 515; *Same v. Reynal*, 25 Mo. 534; *St. Joseph v. Hamilton*, 43 Mo. 282; *Whyte v. City of Kansas*, 22 Mo. App. 409; *Clarke v. Manchester*, 56 N. H. 502; *Matter of Water Comrs. of Jersey City*, 31 N. J. L. 72; *Dayton &*

commissioners.³ An order confirming a report, except in two particulars, and referring it back for correction in those respects is not a final order so as to prevent a discontinuance.⁴ It is held in the same State, however, that the right to discontinue is not absolute, but the application is addressed to the discretion of the court, which may refuse the application altogether or impose equitable terms, such as the costs and expenses of the adverse party, as a condition of granting the application.⁵ In one case the application to

Western R. R. Co. v. Marshall, 11 Ohio St. 497; Schuylkill etc. Navigation Co. v. Decker, 2 Watts 343; Stevens v. Duck River Navigation Co., 1 Sneed 237; Chesapeake & Ohio R. R. Co. v. Bradford, 6 W. Va. 220; see also Pillsbury v. Springfield, 16 N. H. 565.

Reynolds v. Louisiana etc. R. R. Co., 59 Ark. 171, 26 S. W. Rep. 1039; Simpson v. Kansas City, 111 Mo. 237, 20 S. W. Rep. 38; Appeal of Allegheny, 165 Pa. St. 367, 30 Atl. Rep. 983; Waynesborough School District, 1 Pa. Co. Ct. 422; Bate v. Philadelphia etc. R. R. Co., 1 Mont. Co. L. R. 47; Andrus v. Bay Creek Ry. Co., 60 N. J. L. 10; Milwaukee etc. R. R. Co. v. Stolze, 101 Wis. 91. Compare Fischer v. Catawissa R. R. Co., 175 Pa. St. 554, 34 Atl. Rep. 860; Brady v. Atlantic City, 53 N. J. Eq. 440, 32 Atl. Rep. 271.

³ Corporation of New York in Matter of Doyer Street, 18 Johns. 506; People v. Brooklyn, 1 Wend. 318; Matter of Canal Street, 11 Wend. 154; Matter of Anthony St., 20 Wend. 618; Martin v. Mayor etc. of Brooklyn, 1 Hill 545; Matter of Commissioners of Washington Park, 56 N. Y. 144;

S. C. 2 N. Y. Supr. Ct. 637; Matter of Military Parade Ground, 60 N. Y. 319; Matter of Waverly Water Works, 85 N. Y. 478, reversing 16 Hun 57; Matter of Department of Public Works, 2 Hun 374; Matter of Syracuse etc. R. R. Co., 4 Hun 311; Matter of North 13th St., 5 Hun 175; Matter of Munson, 29 Hun 325; Matter of Wells Ave. Sewer, 46 Hun 534; People ex rel. v. Commissioners, 1 N. Y. Supm. Ct. 193; Matter of New York, West Shore & Buffalo Ry. Co., 1 How. Pr. N. S. 190; Hudson River R. R. Co. v. Outwater, 3 Sandf. 689; Corporation of New York v. Mapes, 6 Johns. Ch. 46; Washington Park v. Barnes, 2 N. Y. Supm. Ct. 637; In re Board of Street Opening, 133 N. Y. 436, 31 N. E. Rep. 316; In re Board of Street Opening, 82 Hun 580, 31 N. Y. Supp. 732.

⁴ Matter of Anthony St., 20 Wend. 618.

⁵ Matter of Waverly Water Works, 85 N. Y. 478; Matter of Wells Ave. Sewer, 46 Hun 534; Matter of New York, West Shore & Buffalo Ry. Co., 1 How. Pr. N. S. 190; Hudson River R. R. Co. v. Outwater, 3 Sandf. 689. And such is the rule in Pennsylvania,

discontinue was denied.⁶ In some cases it is held that it is too late to discontinue after the report of commissioners has been filed and the time to object has elapsed.⁷ Where a city charter did not provide for any confirmation of the report, but either party might appeal within ten days after the report was filed, it was held that after the ten days had elapsed the rights of the parties were fixed.⁸

In a case in Indiana, proceedings were instituted to condemn land for widening a street. Damages were assessed and the owner appealed. Pending the appeal the city took possession and opened the street. On appeal the damages were greatly increased. The statute provided that "if, upon appeal, the report of the commissioners as to the benefits or damages be greatly diminished or increased, the city may, upon payment of all costs, discontinue such proceedings." After verdict and before judgment the city paid all the costs and moved to discontinue, which was allowed by the trial court and sustained by the Supreme Court.⁹ The same doc-

Moravian Seminary v. Bethlehem, 153 Pa. St. 583, 26 Atl. Rep. 237; and in Wisconsin, Milwaukee etc. R. R. Co. v. Stolze, 101 Wis. 91. The same view is intimated in Matter of Water Commissioners of Jersey City, 31 N. J. L. 72. See also Clarke v. Manchester, 56 N. H. 502; Stevens v. Duck River Navigation Co., 1 Sneed 237.

⁶ Beekman Street, 20 Johns. 269. See also Crouner v. Watertown & Rome R. R. Co., 9 How. Pr. 457.

⁷ Crume v. Wilson, 104 Ind. 583; Pollard v. Moore, 51 N. H. 188.

⁸ People ex rel. etc. v. Common Council of Syracuse, 78 N. Y. 56.

⁹ Brokaw v. Terre Haute, 97 Ind. 451. The court say: "Although the appellee, in the ex-

ercise of the power granted to it by the first provisions of the statute above cited, widened and opened the street during the pendency of the appeal, it was not, in our opinion, precluded thereby from subsequently abandoning the same, and discontinuing the proceedings which were still pending, upon ascertaining that the amount of damages awarded to the appellant, on his appeal, greatly exceeded the sum that was assessed in his favor by the city commissioners. The results that legally flowed from the action of the appellee in discontinuing the proceedings were the abandonment by the appellee of the real estate of the appellant which had been condemned for the street, and the restoration to him of its possession, and rendering the appellee liable, in an

trine is held in Mississippi,¹⁰ but in Minnesota it has been held that, where possession has been taken of the property, the party condemning cannot abandon proceedings without also giving up possession.¹¹ In Connecticut and Missouri it has been held that where possession has been taken and the works constructed the condemnor cannot discontinue the proceedings.¹²

§ 656. **The right to abandon after the proceedings are completed.**—The weight of authority undoubtedly is that, in the absence of statutory provisions on the question, the effect of proceedings for condemnation is simply to fix the price at which the party condemning can take the property sought, and that even after confirmation or judgment the purpose of taking the property may be abandoned without incurring any liability to pay the damages awarded.¹³ *Beas-*

action brought for that purpose, for any damages that the appellant may have sustained which were the direct and proximate result of the proceedings and the acts of the appellee under them." p. 453.

¹⁰ *Louisville etc. R. R. Co. v. Ryan*, 64 Miss. 399.

¹¹ *Witt v. St. Paul & Northern Pacific R. R. Co.*, 35 Minn. 404; *Wilcox v. Same*, 35 Minn. 439. And see *Curtis v. Portland*, 60 Me. 55.

¹² *Shannahan v. Waterburg*, 63 Conn. 420, 28 Atl. Rep. 611; *Nevada etc. R. R. Co. v. De Lissa*, 103 Mo. 125, 15 S. W. Rep. 366.

¹³ *Hendrick v. Johnson*, 5 Porter 208; *Hendricks v. Same*, 6 Porter 472; *Bensley v. Mountain Lake Water Co.*, 13 Cal. 306; *Denver & New Orleans R. R. Co. v. Lamborn*, 8 Col. 380; *S. C. affirmed* 9 Col. 119; *Carson v. Hartford*, 48 Conn. 68; *Stevens v. Danbury*, 53 Conn. 9; *County of Sangamon v. Brown*, 13 Ill. 207;

St. Louis etc. Ry. Co. v. Teters, 68 Ill. 144; *Peoria & Rock Island Ry. Co. v. Rice*, 75 Ill. 329; *Chicago v. Barbican*, 80 Ill. 482; *Chicago v. Shepard*, 8 Ill. App. 602; *People v. Hyde Park*, 117 Ill. 462; *Hayes v. Board of Comrs.*, 59 Ind. 552; *Wilkinson v. Bixler*, 88 Ind. 574; *Gear v. Dubuque & Sioux City R. R. Co.*, 20 Ia. 523; *Nelson v. Goodykoontz*, 47 Ia. 32; *St. Louis, Lawrence & Denver R. R. Co. v. Wilder*, 17 Kan. 239; *City of Kansas v. Kansas Pacific Ry. Co.* 18 Kan. 331; *Cave's Executor v. Colmes*, 3 A. K. Marsh. 36; *Graff v. Baltimore*, 10 Md. 544; *State v. Graves*, 19 Md. 351; *Merrick v. Baltimore*, 43 Md. 219; *Mayor etc. of Baltimore v. Musgrave*, 48 Md. 272; *Black v. Mayor etc. of Baltimore*, 50 Md. 235; *Hunt v. Whitney*, 4 Met. 603; *State ex rel. v. Board of Park Comrs.*, 33 Minn. 524; *Williams v. New Orleans, Mobile & Texas R. R. Co.*, 60 Miss. 689; *St. Joseph v. Hamilton*, 43 Mo. 282;

ley, Chief Justice of the Court of Errors and Appeals of New Jersey, referring to the principle of a previous decision, says: "That principle in substance was this: that whenever land is sought to be taken for a public purpose, the public authorities, in the absence of any statutory provision to the contrary, have a reasonable time given them, after the ascertainment of the expense of the scheme, to decide whether to accept or refuse the land at the price fixed. On every account that rule commends itself to my judgment. With respect to the land-owner, the procedure is fair and just: it calls for a reasonable valuation of his land, and if the public reject it at such estimation, he suffers, in general, no detriment; and if, in any exceptional case, any injury is done to him, he is entitled to reparation. On the other side, the rule in question is a necessity, in view of the rational conduct of public affairs: the question whether a projected improvement is wise or unwise, expedient or inexpedient, cannot be answered by any one who is ignorant of the expense that it involves, and therefore to require public

State v. Hug, 44 Mo. 116; Mabon v. Halsted, 39 N. J. L. 640; O'Neill v. Freeholders of Hudson, 41 N. J. L. 161; State v. Cincinnati & Indiana R. R. Co., 17 Ohio St. 103; Hampton v. Commonwealth, 19 Pa. St. 329; Schuylkill etc. Navigation Co. v. Decker, 2 Watts 343; Stacey v. Vermont Central R. R. Co., 27 Vt. 39; Chesapeake & Ohio R. R. Co. v. Bradford, 6 W. Va. 220; Evans v. James, 4 Wis. 408; State ex rel. v. Mills, 29 Wis. 322; Baltimore & Susquehanna R. R. Co. v. Nesbit, 10 How. 395; Garrison v. New York 21 Wall. 196.

Alabama M. R. R. Co. v. Newton, 94 Ala. 443, 10 So. Rep. 89; Callaghan v. Dunn, 78 Cal. 366, 20 Pac. Rep. 737; United States v. Cooper, 9 Mackey D. C. 104; United States v. Cooper, 21 Supm.

Ct. D. C. 605; Rice v. Chicago, 57 Ill. App. 558; Price v. Engeling, 58 Ill. App. 547; Manion v. Louisville etc. R. R. Co., 90 Ky. 491, 14 S. W. Rep. 532; Wichita etc. R. R. Co. v. Kuhn, 38 Kan. 104, 16 Pac. Rep. 75; State Park Commissioners v. Henry, 38 Minn. 266, 36 N. W. Rep. 874; State v. City Council, 40 Minn. 483, 42 N. W. Rep. 355; Mobile etc. R. R. Co. v. Postal Tel. Cable Co., 120 Ala. 21; Chicago v. Hayward, 176 Ill. 130, 52 N. E. Rep. 26; Cutler v. Sours, 80 Ill. App. 618; Seavey v. Seattle, 17 Wash. 361. Contra: Furbish v. County Comrs., 93 Me. 117.

The rule stated in the text is quoted and approved in Manion v. Louisville etc. R. R. Co., 90 Ky. 491, 14 S. W. Rep. 532.

agents, in handling these matters, to disregard this plain dictate of common sense, would be altogether absurd. A man of prudence relinquishes a project when he finds the cost is likely to exceed, in a large measure, its benefits; it would seem intolerably unreasonable to require the agent of the public to pursue the opposite course. In construing any statute authorizing one of these undertakings, every reasonable intendment should be against reading it in a sense that would put the public in this false position. The legal effect of such acts should be held to be that they compel the land-owner to offer the public the required land at the ascertained price, and that, when such price has been finally ascertained, the public has a reasonable time within which to make an election either to accept or reject the offer."¹⁴ Similar reasoning will be found in the other cases cited. But while the condemnor may abandon the purpose of taking the property it cannot avoid the effect of the award or judgment if it desires to acquire the same.¹⁵ It has been held that the right to abandon is not affected by the fact that the petitioner has taken possession, pending proceedings, under a statute which provided that it might do so upon depositing a sum to be ascertained by the judge of the court in which the proceedings are pending.¹⁶ The case of

¹⁴ *O'Neill v. Freeholders of Hudson*, 41 N. J. L. 161, 172, 173.

¹⁵ Where after the entry of a judgment of condemnation, the court, at a subsequent term, on motion of the petitioner, dismissed the proceedings, the order of dismissal was held to be a nullity. *Chicago etc. R. R. Co. v. Chicago*, 148 Ill. 479, 36 N. E. Rep. 72; and see *Evanston v. Clark*, 77 Ill. App. 234.

¹⁶ *Denver, New Orleans R. R. Co. v. Lamborn*, 8 Col. 380; *S. C. affirmed* 9 Col. 119; *Chicago v. Hayward*, 176 Ill. 130, 52 N. E. Rep. 26; see also *Cave's Ex-*

ecutor v. Colmes, 3 A. K. Marsh. 36; and *Brokaw v. Terre Haute*, 97 Ind. 451. The following cases seem opposed to the view: *Shannahan v. Waterbury*, 63 Conn. 420, 28 Atl. Rep. 611; *Nevada etc. R. R. Co. v. De Lissa*, 103 Mo. 125, 15 S. W. Rep. 366; *Wood v. Trustees*, 164 Pa. St. 159, 30 Atl. Rep. 237. In *St. Louis etc. Ry. Co. v. Teters*, 68 Ill. 144, it was held that, where the railroad company was in possession, it was proper to render an absolute judgment for the damages. In *Corwith v. Hyde Park*, 14 Ill. App. 635, it was held that the judgment became absolute after

*Chicago v. Barbian*¹⁷ arose upon the following facts: The city of Chicago instituted proceedings to condemn property for widening State street. Damages were assessed and judgment rendered therefor in favor of the property-owners. A supplemental proceeding was then instituted for the purpose of raising the amount of the damages by a special assessment upon the property benefited. Commissioners were appointed, who made the assessment and returned it into court. Before confirmation of the assessment the city council repealed the ordinance under which the proceedings were had and abandoned the improvement. A motion was made to discontinue the whole proceeding and was granted by the court. Barbian being one of those to whom damages had been awarded, then commenced a proceeding by mandamus to compel the city to levy a tax and pay his judgment. The Supreme Court of the State denied the mandamus and sustained the right of the city to abandon at any time before actual payment. *Chicago v. Shepard*¹⁸ goes still further in its facts and holds that the city can abandon the improvement after the assessment of benefits has been confirmed and a large portion of it collected.

In Nebraska the statute in regard to condemnation by railroad companies provides that, if the property cannot be obtained by grant, either party may apply to the probate judge of the county for the appointment of freeholders who shall assess the damages and report in writing to the probate judge and that the probate judge shall certify the report and deliver it to the county clerk, who is required to record and index the same. The company may deposit the amount of the award with the probate judge and enter on

possession taken. *Harness v. Chesapeake & Ohio Canal Co.*, 1 Md. Ch. 248; *Blake v. Dubuque*, 13 Ia. 66; *Carr v. Boone*, 108 Ind. 241; *First Nat. Bank v. West River R. R. Co.*, 46 Vt. 633, 49 Vt. 167; *Callahan v. Dunn*, 78 Cal. 366, 20 Pac. Rep. 737.

In the following cases it is held that if the condemnor takes pos-

session of the property after judgment, the right to the damages will become absolute in the owner: *Chicago v. Hayward*, 60 Ill. App. 582; *Rice v. Chicago*, 57 Ill. App. 558; *Price v. Engeling*, 58 Ill. App. 547.

¹⁷ 80 Ill. 482.

¹⁸ 8 Ill. App. 602.

the property. Either party may appeal to the district court, and the decision and finding of the district court are required to be transmitted to the county clerk and recorded in like manner as the award of freeholders. Under this statute it has been held that it was proper for the district court on appeal to render an absolute judgment against the company and issue execution thereon, and that the company could not after judgment abandon the location and avoid the payment of the damages.¹⁹ The statute was silent as to the judgment to be rendered and did not undertake to declare when rights should become vested. The court in giving their decision say: "The statute gives a railroad company almost unlimited powers in regard to what real estate it requires for its use, and, unless it is clear that this power is abused, a court would have no right to interfere. But the company must act in good faith. It cannot be permitted to condemn real estate for its use, and, after the condemnation is complete, the certificate filed with the county clerk, and the amount of the award deposited with the county judge, an appeal taken to the district court and judgment rendered against it on such appeal, be permitted to abandon the proceedings. The power of eminent domain is placed in its hands to enable it to take such real estate as it may require, at its fair value. This, if the case is appealed to the district court, is to be ascertained by the verdict of a jury, based upon the evidence. Where, as in this case, the entire property is taken, the power of the lot-owner to sell or mortgage the premises is entirely taken away while the proceedings are pending. The necessities of such owner may be very great, and the property condemned his entire estate, yet when the public good requires it he must submit to the delay in obtaining compensation for his property. But the court will not permit a railroad company to use the sovereign power of the State—that of eminent domain—as a means to enable it to obtain property at its own price, or failing to do so refuse to take it. If this could be done, the rights of property-owners along a line of railway would

¹⁹ *Drath v. Burlington etc. R. R. Co.*, 15 Neb. 367.

indeed be insecure. But such is not the law. When a company has condemned real estate, and on appeal a judgment has been rendered against it, which remains in full force, it must like other litigants pay the judgment, and the judgment creditor is entitled to all the remedies given by law to enforce the same. It follows that the order of the district court denying the right to issue execution is reversed, and the cause is remanded to that court with leave to the plaintiff to issue execution on her judgment as in other cases."

The act of 1813 in reference to the opening and enlarging of streets in the city of New York provided for an assessment of damages by commissioners appointed by the Supreme Court, who were to make report to the court. The court had power to confirm or set aside the report, and if it set it aside it could refer the question to the same or new commissioners. When, however, a report was finally confirmed, it was declared to be final and conclusive upon the parties, and the corporation was by virtue thereof declared to be seized in fee of the land. We have already referred to numerous decisions under this statute in which it has been held that, until the final confirmation of the report, the city may discontinue the proceedings.²⁰ In the same cases it is declared or implied that after confirmation the city cannot abandon. The rights of the parties are fixed, subject only to the contingency of the confirmation being set aside for irregularity, mistake or fraud.²¹ In other cases rights have been held to vest upon confirmation, though title did not vest until payment made.²² Following in the line of these decisions it has been recently decided by the court of appeals that there can be no abandonment after confirmation, although the statute fairly left the question

²⁰ Ante, § 655; see also Gillespie v. Thomas, 15 Wend. 464.

²¹ Matter of Widening Broadway, 61 Barb. 483; 42 How. Pr. 220; 49 N. Y. 150; Garrison v. New York, 21 Wall. 196; People

v. Common Council 20 How. Pr. 491.

²² People v. Brooklyn 1 Wend. 318; Martin v. Mayor etc. of Brooklyn, 1 Hill 545; Hawkins v. Trustees of Rochester, 1 Wend. 53.

open to be decided upon general principles.²³ In giving their decision the court say: "The company, when the report of the commissioners is made, is apprised of the sum which it will be required to pay for the lands embraced in the report, and if the valuation is, in the judgment of the company, excessive, or, if, for any reason, it is regarded for the interest of the corporation not to proceed further, it may decline to do so; but, if the company elect to go on and apply for and procure a confirmation of the report, the relation of vendor and vendee is then established between the parties and the company is bound to pay the awards, or such sum as may be awarded on a second appraisal, if, on appeal by either party, as provided for in the eighteenth section, a new appraisal shall be directed. The statute does not, in express terms, impose upon the company the duty to pay the awards after confirmation of the report of the commissioners. But the court 'shall,' the statute declares, 'direct to whom the money is to be paid,' etc. It assumes that the awards are to be paid by the company to the persons, or in the manner designated in the order of the court, and the duty of the company to pay them is, we think, clearly implied. The provisions of the eighteenth section, that if, on a second appeal, the awards are increased, the difference 'shall be a lien on the land appraised,' and, if diminished, 'the difference shall be refunded to the company,' tend to support the conclusion that the confirmation of the first report determines the rights of both parties, subject only to the right of review, as to the amount of the appraisal. * * * * The confirmation of the report of the commissioners of appraisal in proceedings to acquire lands by a railroad company under the general railroad act, within the principle established in the street cases referred to, creates reciprocal rights between the company and the land-owners, and puts it beyond the power of the company thereafter to abandon the proceedings. The order of confirmation operates as a judgment binding both parties." In a subsequent case arising under the charter of Syracuse, which did not provide for any

²³ *Matter of Rhinebeck etc. R. Co.* S. C. 8 Hun 34, R. Co., 67 N. Y. 242, 247, 249;

confirmation of the report of commissioners, but gave either party a right to appeal within ten days of the filing of the report, it was held that the lapse of the ten days, no appeal being taken, had the same effect as a confirmation, and that it was then too late for the corporation to abandon the improvement.²⁴ "The statute declares," says the court, "that, if no appeal is taken, the common council shall direct the same commissioners who made the award to assess the amount awarded for damages upon property benefited, and upon the city at large, as they shall deem just. The counsel for the city contended that some affirmative act on the part of the city was necessary to bind it, but there is nothing in the statute favoring this view. The omission to appeal from the award until the expiration of the time allowed for that purpose, rendered the award as final and conclusive as the formal confirmation provided in other statutes. During that period the common council, if they thought the awards too high, or for any reason that public interest rendered it inexpedient to proceed with the improvement, might have discontinued the proceedings. By allowing this period to elapse, they must be deemed to have acquiesced in the report, and the award must be regarded as a finality, and in the nature of a judgment which the property-owner has a vested right to have assessed and collected according to the terms of the statute. The rule sanctioned in the Washington Park case, and here indicated, while I regard it as right and just, is quite as liberal in favor of the public, and as rigorous against property-owners as can be justified consistently with the rights of the latter. It enables the municipal authorities to determine whether public interest will be subserved by consummating the improvement after the expense has been ascertained, while the rights of the property-owner are uncertain until the award becomes final."

These cases from New York and Nebraska are, we believe, the only ones which are contrary to the doctrine stated at the beginning of the section.²⁵

²⁴ *People ex rel. v. Common Council*, 78 N. Y. 56.

²⁵ In *Higgins v. Chicago*, 18 Ill. 276, it was held, following

Some cases which seemingly conflict with that doctrine, but which depend upon peculiar statutes, will now be noticed. Where a statute provided that upon confirmation the damages should be paid on demand, it was held there could be no abandonment after confirmation.²⁶ Where the statute provided that the city might dismiss its petition for condemnation, as to all or any part of the property involved, at any time before final judgment in the proceedings, it was held that if it failed to dismiss before judgment it could not abandon afterwards.²⁷ In *Wilkerson v. Buchanan County*²⁸ an act for establishing a road provided that the commissioners should take a grant from the owners which should vest the easement in the public, and prescribed a mode for assessing the damages. After a grant had been obtained from the plaintiff and his damages assessed, but before the road was opened, the legislature repealed the act. It was held that the plaintiff was entitled to a mandamus to compel payment of the damages awarded him. The repeal of the act under which the proceedings were had after the right to damages has been vested does not divest the right,²⁹ nor is it in the power of the legislature to do so.³⁰ The railroad law of Pennsylvania provides that upon confirming

the New York cases, that the confirmation by a city council of an assessment of damages and benefits fixed the rights of the parties, and that mandamus would lie to compel the collection of the assessment and payment of the damages. But see *Chicago v. Barbican*, 80 Ill. 482. *Mitchell v. Great Western R. R. Co.*, 35 U. C. Q. B. 148, holds that there can be no abandonment after the award. So also *Furbish v. County Comrs.*, 93 Me. 117. Where a city council accepted the report of commissioners to assess damages for land taken for a proposed street and ordered the appropriation of the land as proposed, it was

held that it could not afterwards abandon the taking so as to avoid payment of the award. *Terre Haute v. Blake*, 9 Ind. App. 403, 36 N. E. Rep. 932.

²⁶ *Stafford v. Mayor etc. of Albany*, 7 Johns. 541; *Same v. Same*, 6 Johns. 1. A similar decision under a somewhat similar statute was made in *La Fayette v. Shultz*, 44 Ind. 97.

²⁷ *Duncan v. Mayor of Louisville*, 8 Bush 98.

²⁸ 12 Mo. 328.

²⁹ *People v. Supervisors of Westchester*, 4 Barb. 64.

³⁰ After the plaintiff's damages had been assessed and the railroad partly constructed over his land, an act was passed that,

the report of reviewers the court shall enter judgment for the amount of the damages, and if the same is not paid in thirty days that execution may issue thereon as in other cases of debt.³¹ This contemplates an absolute judgment, and it has properly been held that payment cannot be avoided after judgment by abandoning the location.³² The courts of Pennsylvania have gone further and held that the right to damages vests upon the location of a railroad, and that the right cannot be defeated by a change of location before confirmation.³³ Where, in case of street improvements, the statute contains an imperative command that the city shall pay the damages awarded, the award becomes a debt immediately upon confirmation, for which the city is absolutely liable.³⁴

In some of the New England States it is held that it is competent for the legislature to vest title in the first instance and adjust the compensation afterwards. Consequently, when such proceedings have been had as perfect the right of the public to the use of land for a highway, the owner's right to damages is vested and a subsequent discontinuance of the way before the property is entered upon does not divest the right,³⁵ and the payment of damages may be enforced, irrespective of the actual occupation of the

where the route was abandoned before the damages were paid, the owner should only recover his actual damages. The location over plaintiff's land was abandoned. It was held that his right to the damages was complete before the passage of the act and was not affected by it. *Smart v. Portsmouth & Concord R. R. Co.*, 20 N. H. 233. Consult, in this connection, *Daley v. St. Paul*, 7 Minn. 390, and *Garri-son v. New York*, 21 Wall. 196.

³¹ 2 Brightley's *Purdon's Digest*, p. 1425.

³² *Neal v. Pittsburgh & Con-nellsville R. R. Co.*, 31 Pa. St. 19; S. C. 2 Grant's Cases 137.

³³ *Beale v. Pennsylvania R. R. Co.*, 86 Pa. St. 509.

³⁴ *Philadelphia v. Dickson*, 38 Pa. St. 247; *In re Sedgeley Ave.*, 88 Pa. St. 509; *In re Lex or Mica St.*, 12 Phila. 622; *Myers v. South Bethlehem*, 149 Pa. St. 85, 24 Atl. Rep. 280.

³⁵ *Harrington v. County Comrs.*, 22 Pick. 263; see also *Hallock v. County of Franklin*, 2 Met. 558. After these decisions the legislature in 1842 enacted that the damages should not be demandable until the property was entered upon, in case of ways laid out by county commissioners. In 1847 the provisions of the act of 1842 were extended

property.³⁶ Where the statute regulates the right to abandon, the question becomes one of merely statutory construction. Where the statute provided that a railroad company must within ten days from the return of the assessment elect to abandon, it was held that an abandonment could not be made after the ten days had elapsed.³⁷ A statute contained a provision that "the board of park commissioners shall have the right, at any time during the pendency of any proceedings for the improvements authorized in this act, or at any time within thirty days after the final order of the court on any appeal from such proceedings, to abandon all such proceedings whenever it shall deem it for the interest of the city to do so." In proceedings under the act there were numerous appeals, and it was held that the proceedings were several as to each owner and that the election as to the property involved in each appeal must be made within thirty days after the determination of that appeal and that one owner could not be kept waiting for the determination of other appeals than his own.³⁸

§ 657. What constitutes an abandonment.—In most of

to the ways laid out by selectmen. *Harding v. Medway*, 10 Met. 465; *Bishop v. Medway*, 12 Met. 125. See *Corey v. Wrentham*, 164 Mass. 18, 41 N. E. Rep. 101. In *Shaw v. City of Charlestown*, 3 Allen 538 these statutes were held not to apply to ways laid out by city councils. But see *New Bedford v. County Commissioners*, 9 Gray 346. There has been a similar course of decision and legislation in New Hampshire. *Hampton v. Coffin*, 4 N. H. 517; *Willey v. Effing*, 16 N. H. 58; *Clough v. Unity*, 18 N. H. 75; *Clark v. Hampstead*, 19 N. H. 365. And see *Westbrooke v. North*, 1 Me. 179; *Millett v. County Comrs.*, 80 Me. 427, 15 Atl. Rep. 24. Such statutes apply only to an actual discontinu-

ance and not to a mere failure to take possession. *Kent v. Wallingford*, 42 Vt. 651.

³⁶ *Welles v. Cowles*, 4 Conn. 182; *Kimball v. Rockland*, 71 Me. 137; *Moore v. Boston*, 8 Cush. 274; *Loring v. Boston*, 12 Gray 209; *Edmonds v. Boston*, 108 Mass. 535; *Briggs v. Cape Cod Ship Canal Co.*, 137 Mass. 71; *Attorney General v. Turpin*, 3 Hen. & Munf. 548.

³⁷ *Gray v. St. Louis & San Francisco Ry. Co.*, 81 Mo. 126.

³⁸ *State ex rel. etc. v. Board of Park Comrs. of Minneapolis*, 33 Minn. 524. For other cases under particular statutes see *Kirtland v. Meriden*, 39 Conn. 107; *Derby v. Gage*, 60 Mich. 1; *Ryan v. Hoffmann* 26 Ohio St. 109.

the cases which have arisen, the intention to abandon has been manifested by affirmative acts. But this intention may be manifested in other ways. Where a statute required the final order establishing a highway to be filed with the town clerk within ten days from its date, a failure to do so was held to constitute an abandonment of the proceedings.³⁹ Where a motion to accept an award was made and lost in a county board, it was held to amount to a vote to abandon.⁴⁰ The failure to pay the damages within a reasonable time after their final determination will itself constitute an abandonment of any right to take the property under the proceedings had.⁴¹ What will constitute a reasonable time must, of course, depend upon circumstances. Four years has been held to be an unreasonable delay, constituting an abandonment, and in the same case it is said that after one year, no offer to pay having been made, the assessment would become *functus officio*.⁴² The delay of the condemnor to prosecute an appeal taken by the owner cannot be construed as an abandonment of the proceedings.⁴³

§ 658. **The owner's right to recover for damages occasioned by proceedings which have been abandoned.**—We have already referred to cases holding that, upon the discontinuance of proceedings before judgment, the court had authority to impose equitable terms, such as the payment to the owner of his costs and expenses in the case.⁴⁴ This however is opposed to the current of authority, which is that the right to discontinue is absolute and cannot be fettered with conditions by the court. Legal costs may, of course, be

³⁹ *Breese v. Poole*, 16 Ill. App. 551.

⁴⁰ *Mabon v. Halsted*, 39 N. J. L. 640; *O'Neill v. Freeholders of Hudson*, 41 N. J. L. 161. In the first case it was also held that the election, once made, was final, and that a subsequent resolution to pay the award and take the land did not affect the rights of either party.

⁴¹ *Bensley v. Mountain Lake*

Water Co., 13 Cal. 306; *Chicago v. Barbican*, 80 Ill. 482; *State ex rel. v. Cincinnati & Indiana R. Co.*, 17 Ohio St. 103.

⁴² *Bensley v. Mountain Lake Water Co.*, 13 Cal. 306.

⁴³ *Bradley v. Northern Pac. R. Co.*, 38 Minn. 234, 36 N. W. Rep. 345.

⁴⁴ *Ante*, § 655; also *Clarke v. Manchester*, 56 N. H. 502; *Master of Water Commissioners of*

imposed. In various suits in which the right to abandon has been in question, it has been intimated by the court that a suit would lie on the part of the owner to recover his costs and expenses and perhaps other damages to which the proceedings have subjected him.⁴⁵ If, pending proceedings, possession has been taken of the property sought to be condemned, the abandonment of such proceedings renders such possession wrongful from the beginning, and a suit will lie for any damages occasioned by the entry and possession.⁴⁶ But the gravamen of such a claim is not the institution and abandonment of the proceedings, but the trespass committed. A number of suits, however, have been brought to recover damages which have been occasioned by the institution and prosecution of proceedings that were afterwards abandoned. As these are not numerous and the question is an important one, it may be well to notice them briefly.

In *Carson v. City of Hartford*⁴⁷ the facts were as follows: The common council on May 24, 1874, passed an ordinance for opening a certain street. An assessment of damages and benefits was made by the board of street commissioners and filed with the city clerk on September 2, 1874. Various appeals were taken to the court of common pleas which were not determined until 1877. In August, 1877, the street commissioners made a report to the council showing the amount of damages and benefits as finally adjusted, and for reasons given recommended that the improvement be abandoned. This was done by resolution passed October 27, 1877.

Jersey City, 31 N. J. L. 72; *Matter of Waverly Water Works*, 85 N. Y. 478; *Hudson River R. R. Co. v. Outwater*, 3 Sandf. 689; *Stevens v. Duck River Navigation Co.*, 1 Sneed 237; *Denver etc. R. R. Co. v. Lamborn*, 9 Col. 119; *Moravian Seminary v. Bethlehem*, 153 Pa. St. 583, 26 Atl. Rep. 237.

⁴⁵ *Gear v. Dubuque & Sioux City R. R. Co.*, 20 Ia. 523; *Graff*

v. Mayor etc. of Baltimore, 10 Md. 544; *State v. Graves*, 19 Md. 351; *North Missouri R. R. Co. v. Lackland*, 25 Mo. 515; *Same v. Reynal*, 25 Mo. 534.

⁴⁶ *Pittsburgh, Fort Wayne & Chicago Ry. Co. v. Swinney*, 97 Ind. 586; *Hullin v. Second Municipality of New Orleans*, 11 Rob. La. 97; *Van Valkenburgh v. Milwaukee*, 43 Wis. 574.

⁴⁷ 48 Conn. 68.

Carson brought his action on the case against the city for damages. A demurrer was sustained to the declaration. The first count was abandoned. The third count was based on a statute as to the discontinuance of highways which the court declared was not applicable. As to the second and fourth counts, the court say:

“In the second count the allegations are—that in May, 1874, the council laid out a street over the plaintiff’s land, and appraised damages to him therefor to the amount of \$8,200; that he had made preparations for the erection of a building upon his lot; that the council discontinued the street in October, 1877; that at the first-named date the land was worth \$12,000; that by the action of the council he was deprived of the use of, and was prevented from selling it, for the period of three years; and that during that time it greatly depreciated in value—to his damage the sum of \$15,000.

“Although the allegation is that more than three years intervened between the first and final acts of the council, no blame for the delay is imputed. As we have said that no way was laid out, the count must stand upon the proposition that if the council considers, for any period however brief, the matter of laying out a way, and a provisional award of damages is made to the owner of land if it shall be taken, and he is delayed thereby in the sale, or omits to make profit by the use of it, the city is responsible in damages.

“But, the council considered only—did not take. By considering, no new relation between the city and the land came into being; for at all times the land of the plaintiff and of every other owner is exposed to the right of the public to take it for public use. By considering, the taking became more probable than before; but it remained only a possibility; his exclusive possession was not interrupted; the power to sell was not taken from him; his use was made less profitable only by his apprehension lest a possibility might ripen into a certainty. Presumably the award of damages included the loss resulting from his breach of contract, as well as the value of the land; doubtless the award would prevent a sale for more than the valuation; but the prevention

of a sale for more than a fair price constitutes no invasion of the rights of property for which the law furnishes any redress. Moreover, as with notice to the plaintiff of each act of the council there went notice that it was considering merely, and had not determined, if he has suffered loss by non-use it must be charged to his mistake in forecasting its action.

* * * * *

“In the fourth count the allegations are that the defendants are an incorporated city, vested with powers granted and subject to duties imposed by their charter and laws of the State; that in May, 1874, the plaintiff was the owner therein of a piece of land valuable only for building, and which could yield no revenue except for rents of buildings thereon; that previous to that date he had entered into a contract for the completing of an unfinished building thereon; that on that date the defendants, intending to injure and prejudice him, did, in violation of their legal duties, pass a vote proposing to lay out a highway which should include most of his land; did deceitfully advise him that the vote was a valid lay-out; did by their lawful agents forbid him from completing the building which he had commenced; did unlawfully endeavor to and did intimidate him and prevent him from completing it; did further deceitfully and in violation of their duties advise and notify him and all other citizens that the vote was a lawful lay-out, by making an assessment of benefits conferred and an appraisal of damages inflicted thereby, as if there had been a lawful lay-out; did appear by attorney upon the trial of appeals from said assessments; did wrongfully and unnecessarily prolong the proceedings upon said vote until October 24, 1877, and did upon the last-named day rescind the vote; that during the period between these dates he was prevented from building on the land; was deprived of rents therefrom which he otherwise would have received, was put to great expense for witnesses and counsel upon the trial of said appeals, was prevented during said period from selling the land by reason of the cloud upon his title and right to sell resulting from the unlawful acts of the defendants, and that at the

first date the land could have been sold for \$10,000; and at the last could not be sold for more than \$4,000; all of which he avers is to his damage to the sum of \$10,000.

"But the vote of the council, the assessment by the commissioners, and the appearance in court by the attorney, were acts within legal permission. No one of them, nor all combined, constituted a declaration to the plaintiff that a street had been laid out, nor a promise that it would be. They contained no false statement as to the past; none at all as to the future. The 'deception' was self-imposed by his erroneous inference of the future from the past. The 'intimidation' had this extent, that he was made fearful lest he should not so read the future as to make the greatest profit from his land; but this is not the fear for which the law gives damages. And the allegation that the city 'did wrongfully and unnecessarily prolong the proceedings,' is too vague and general to support a judgment. It points neither to an act, nor to an omission to act, for the purpose of delay, and is without suggestion as to whether the obstruction was for a day or a year. Moreover, it calls upon us to say that, of legal necessity, the intervention of three and one-half years between the first and last votes would of itself and under all circumstances subject the city to damages. This we cannot do. *But, while preserving to the council the privilege of considering after knowledge, we do not say that it cannot abuse this privilege; nor that as a consequence of such abuse the city may not be compelled to indemnify land-owners who have suffered loss by inexcusable delay.*"⁴⁸

In *Mallard v. La Fayette*⁴⁹ the council on February 16, 1848, passed a resolution to take certain property. Commissioners were appointed who made a report on May 4, 1848, and on May 15, before confirmation, the city discontinued the proceedings. The plaintiffs sued for damages, claiming that while the proceedings were pending they

⁴⁸ The same doctrine is approved in *Stevens v. Danbury*, 53 Conn. 9, which was a suit to recover the award after the

proceedings had been abandoned.

⁴⁹ 5 La. An. 112.

could not dispose of their property, that it had depreciated in value, and that the city should make good the depreciation. The court held that there was no cause of action. In another case in the same State, proceedings were twice undertaken to open a certain street, and twice abandoned. The plaintiff was warned not to continue the erection of buildings which he had begun, and refrained from doing so. He claimed for loss of rents and other damages. A recovery was sustained, but the grounds of recovery are not very satisfactorily stated.⁵⁰ The court say: "These suits against private rights should therefore be commenced only in case of indispensable necessity, and when the corporations are in a situation to afford immediate and ample indemnity. They should be prosecuted in strict conformity to law and to a speedy termination. The fact of great delay and abandonment of the suit is *prima facie* evidence that they were unnecessary; and, until fully justified by proof, must subject the corporation to indemnify those who are injured by them. The municipal history of this and other cities shows that these suits are a great burden to the corporations, encourage jobs and speculations, besides often causing great injury to individuals; and we are not disposed to reverse a judgment which may tend to discourage them, unless it be manifestly erroneous. We cannot conceive any reasonable excuse for the municipality to commence such a proceeding twice, and finally abandon it, after keeping the suffering proprietor in suspense for more than eighteen months, and have no hesitation in pronouncing that it is legal and equitable that they should pay the actual damages suffered."

A series of decisions in Maryland has settled the law of that State to be that the owner of property may recover for damages caused by any unreasonable delay either to prosecute or abandon proceedings.⁵¹

⁵⁰ *McLaughlin v. Municipality* No. 2, 5 La. An. 504.

⁵¹ In *Norris v. Mayor etc. of Baltimore*, 44 Md. 598, the matter is quite fully discussed,

though it was a proceeding by *mandamus* to recover interest on an award. The particular relief sought was denied, but the court intimated that redress

In *Mayor etc. of Baltimore v. Musgrove* the city passed an ordinance for the improvement of Jones Falls, and appointed a board of commissioners to take charge of the whole matter of condemning the necessary property and

might be had in another form of action. The court say: "But while we are of the opinion the appellants cannot recover this amount as interest, it by no means follows they are without remedy in the premises, or that they cannot recover an equivalent sum in an action for damages. It has not been decided that the property owner is without remedy in such a case, and must pocket his loss. On the contrary, this court, while sustaining the right of the city to abandon the improvement, and repeal the ordinance authorizing it, has very explicitly decided, that where the owner has suffered loss by the acts or delay of the corporation, the city may be made liable, and he may have his redress in another form of proceeding for any loss or damage he may have sustained by the conduct of the city authorities in the premises. *Graff v. Mayor & C. C. of Balt.*, 10 Md. 544. Looking to the ordinances, which prescribe the mode of making these improvements, as to the right of the city to abandon the work, we find there must be some unavoidable delays for which the city cannot be made liable, and if loss results to the property-owners therefrom, they are without remedy. Thus the election to abandon cannot be fairly made until all assessments and damages are finally settled,

thereby placing before the city council a definite ascertainment of the whole cost of the work; nor can the work of opening a street from one point to another be properly commenced until the city has acquired the right to take all the property through which it may pass. In doing this some of the owners may be satisfied with the valuation made by the commissioners, while others may exercise the right of appeal and have the amount ascertained by a jury. For delay thus authorized by law and necessarily preventing an immediate certain ascertainment of the entire cost, it would be unjust to hold the city responsible. It must also be observed in this connection that, before an ordinance authorizing an improvement of this character can be passed, application for it must be made, and notice of such application given. 2 Code, (Public Local Laws), Art. 4, Secs. 837, 838. These applications are usually made and the action of the city authorities in most cases invoked by parties interested in property to be taken or enhanced in value by the proposed improvement. In view of these considerations we are of opinion the city is not responsible for any loss occasioned by delays of this character. But, when the assessments have been finally settled, the city can then

carrying out the improvement. These commissioners notified Musgrove that his tannery would be taken and that he should close out his business as soon as he could, as they wanted possession at the earliest moment. He accordingly

fairly exercise its election to abandon the enterprise or pay the assessments and proceed with the work. For losses to owners occasioned by delay, subsequently occurring, through failure of the city authorities thus to abandon or pay, it is, we think, just and right the city should be held liable, and this is what we understand to be the effect of the decision in Graff's case. It is obviously unjust for the city to hold condemnation over property for years, neither paying the assessment nor abandoning the improvement. The effect of so doing is in most cases to inflict loss and injury upon the owner, and it would be a reproach to the law if he was denied a remedy therefor. It was therefore a just and proper decision that gave him his action in such a case. As to what the measure of damages should be, no general rule applicable to all cases can be laid down. But, where the property, as in this case, consists of a vacant and unimproved lot, from which the owner derived neither rents nor profits, it is not difficult to fix a just standard. The inquisition in contemplation of law establishes what was the actual market value of the property to be taken at the time of the condemnation. *Tide Water Canal Co. v. Archer*, 9 G. & J. 479; *Moale v. Mayor & C. C. of Balt.*, 5 Md. 314.

This alone is what the jury are authorized to assess as damages in such cases, and the jury in this particular case was instructed to that effect. After this inquisition, thus fixing the then actual market value of the property, the condemnation hung over it, and the assessment was not paid for more than ten months thereafter. The practical effect of this condemnation was to deprive the owners of all beneficial use of the property. They could not thereafter improve it, except at the risk of having their improvements taken by the city without compensation, at any time it might choose to proceed with the work of opening the street. They could not avail themselves of its enhanced value in the market by a sale of it, because no one would buy it at an advance so long as the city held the right to take it at the valuation fixed by the inquisition. Under such circumstances, the true measure of damages for the injury and loss occasioned by the delay in payment, is interest upon the market value of the property as ascertained by the inquisition, for the time the delay was without justifiable excuse. If it be then assumed (facts, however, which the record does not clearly disclose), that on the 22d of January, 1874, all assessments for damages for this improve-

closed out his business in course of the next six months, after which his place remained idle for a year, when, concluding the improvement would not go on, he resumed business. Various appeals were taken on the question of damages, and before they were all finally determined the improvement was formally abandoned. Musgrove sued for damages. The right to abandon was reaffirmed, and the court found that there had been no unreasonable delay on the part of the city in doing so. As to the notice, the court held that the commissioners had no authority to give it and consequently that the plaintiff had no right to rely upon it. The gist of the case is that no recovery can be had for abandonment merely, but only for unreasonable delay to abandon.⁵²

Black v. Mayor etc. of Baltimore,⁵³ was a suit for damages based on unreasonable delay in the prosecution and abandonment of proceedings to open a street. The ordinance was passed on June 10, 1871. Proceedings were instituted which lay along until May, 1875, without anything being done, when the ordinance was repealed and the improvement abandoned. The points decided on the first appeal are thus stated in the opinion of the court on the second appeal:

"First. Where a property-owner has suffered actual damage by the culpable or unreasonable delay of the city authorities in prosecuting a work of this kind, or in determining to abandon it, he is entitled to be indemnified for his loss, whether the delay complained of occurs before or

ment had been finally settled, and no appeal to this court from any of them had been taken, or if taken had been abandoned, and all assessments for benefits had in like manner been settled and adjusted, we have no doubt that, in an action to be brought by the appellants against the city for loss and injury to them, the standard of damages should be interest on the sum ascertained by the inquisition until the same

was paid. But they are not entitled to a mandamus to enforce its payment until in such an action the jury have ascertained the amount of their verdict, and a judgment thereon has been rendered against the city. For these reasons the order dismissing the petition for a mandamus must be affirmed."

⁵² 48 Md. 272.

⁵³ 50 Md. 235, and 56 Md. 333.

after the assessment of damages and benefits has been completed.

"Second. The question whether such a culpable or unreasonable delay has occurred, or in other words the question of negligence on the part of the defendant, is one for the jury to decide, under the instructions of the court.

"Third. Where an ordinance for condemning and opening a street has been passed, and remains unexecuted, or but partially carried into effect, and the property-owner acquiesces in the delay, he cannot maintain an action for damages caused thereby. In order to entitle him to maintain an action against the city for alleged negligence in such case, he must prove that some action has been taken on his part, whereby the city has been put in default; such as a remonstrance, or application made to the proper city authorities to go on with the work or to repeal the ordinance. In the absence of some action of this kind on the part of the property-holder, the city authorities would be justified in concluding that no person is suffering loss or damage by the delay, and negligence cannot be imputed to the city.

"Fourth. As to the measure of damages, the rule was declared that the plaintiffs can only recover for such special damages as they actually suffer from the fault and negligence of the defendant."

On the second trial of the case the plaintiff proved repeated remonstrances and applications to the commissioners who were charged with the duty of executing the ordinance, also to the city solicitor and to individual members of the council. This was held sufficient to rebut the presumption of acquiescence in the delay. The question whether the delay was unreasonable and negligent was left to the jury and a verdict and judgment for the plaintiff were sustained.

But it has been held in the same State that the mere passage of an ordinance designating the property to be taken and authorizing its condemnation in case it cannot be acquired by agreement, without any attempt to execute the ordinance by instituting proceedings, does not give rise to a cause of action, though the owner may suffer loss by rea-

son of the uncertainty hanging over his property or by the delay in acquiring it.⁵⁴

In *Bergman v. St. Paul, Stillwater & Taylor's Falls R. R. Co.*,⁵⁵ the plaintiff brought suit to recover for his loss of time, attorneys' fees and expenses in defending a condemnation proceeding instituted by the defendant and afterwards abandoned. A judgment sustaining a demurrer to the complaint was affirmed by the Supreme Court, which says:

"If the plaintiff is entitled to recover, it must be by virtue of some contract, express or implied, or of some positive rule of law conferring upon him a right of action, or upon the ground that defendant has been guilty of tort. Certainly there is no contract here, nor is there any positive rule of law upon which the plaintiff can base a right of action. Neither is there anything in the complaint tending to show any tortious or malicious conduct on the part of the defendant. On the contrary, defendant's proceedings are expressly admitted to have been duly and regularly taken, as provided by law, and there is nothing whatever to raise a suspicion that defendant's motives or purposes in instituting, conducting or dismissing the proceedings, were not entirely proper. In other words, the complaint does not set up a cause of action in tort, nor assume to do so."

In *Leisse et al. v. St. Louis & Iron Mountain R. R. Co.*⁵⁶ it appeared that the defendant company, on July 23, 1872, commenced proceedings to condemn the land of plaintiffs for a branch railroad. An award of commissioners was made and set aside by the court, and thereupon the company, on December 19, 1873, dismissed the proceeding. Plaintiffs then brought suit for damages occasioned by the proceedings, claiming "that, prior to the institution of the proceedings, the railroad company had given out that it proposed to, and would, locate its road over and across the lot of Leisse and Lange; that, in consequence of this an-

⁵⁴ *Shaufelter v. Baltimore*, 80 Md. 483, 31 Atl. Rep. 439. In this case the time between the passage of the ordinance and the commencement of the suit was

about eleven months.

⁵⁵ 21 Minn. 533.

⁵⁶ 2 Mo. App. 105, 5 Mo. App. 585, 72 Mo. 561.

nouncement, they were unable 'for years to lease, improve, or in any manner use and employ' their land; that they were themselves compelled to lease and rent other property; that, during the pendency of this suit, the said land was virtually condemned, idle, useless, subject to the payment of taxes by Leisse and Lange, and to the loss of interest on the money therein invested; that, by said proceedings, it was rendered unsalable; that the appellants were put to much trouble, expense and annoyance by said proceedings; were obliged to fee counsel for about eighteen months, at great cost, and for all this they claimed \$10,000 damages." A demurrer to the complaint was sustained; the defendant stood by its demurrer and judgment was entered for the plaintiffs which was reversed on the ground that a joint action would not lie, the plaintiffs being tenants in common.⁵⁷ On the second trial the plaintiff Leisse obtained a judgment which was affirmed by the Court of Appeals and the Supreme Court.⁵⁸ The opinion of the Court of Appeals as to liability was approved by the Supreme Court. The case seems to go upon the ground that the railroad company by dismissing the proceeding virtually admitted that the taking was not necessary, and, therefore, that the proceedings were not in good faith.⁵⁹

⁵⁷ 2 Mo. App. 105.

⁵⁸ 5 Mo. App. 585; 72 Mo. 561.

⁵⁹ The court say: "It seems wholly inadmissible that the railroad company should be at liberty to declare that a particular piece of property, or a particular series of lots or tracts of land, will be taken as necessary for the location, change or modification of its line of road; to arrest wholly, by this declaration, any improvement and beneficial occupation of the lots in question: to ruin their market value temporarily at least, perhaps permanently, except with reference to the projected use (all

other uses being rendered impossible), and, after an interval more or less protracted, to abandon the proposed line; to say, with all gravity that the alleged necessity was a loose form of expression, signifying, at most, that it might be convenient to have the property if the price was sufficiently depressed, but that it was not of so pressing a nature as to prevent the present discontinuance of proceedings to acquire land, the tendency of the price of real estate being downward, and the natural operation of such discontinuance being to depress its value

In the subsequent case of *Whyte v. City of Kansas*,⁶⁰ in the Court of Appeals, the city passed an ordinance to widen Main street, which would take four feet of the plaintiff's property. At the time the ordinance was passed plaintiff had commenced the erection of a building on the old line of the street. Having learned of the passage of the ordinance he changed his foundations to correspond with the proposed new line and completed the erection of his building. Nothing more was ever done concerning the improvement. It was held that the facts gave the plaintiff no cause of action.⁶¹ A recent decision in Missouri puts the right to recover damages, in such cases upon substantially the same basis as the Maryland cases. It is held that there can be no recovery on the ground that the proceedings were needlessly instituted or on the mere fact of abandonment, but that there may be a recovery on account of keeping the proceedings pending for an unnecessary and unreasonable length of time. Nine years was held to be *prima facie* unreasonable and sufficient to render the defendant liable unless it could show that the delay was unavoidable.⁶²

in the particular locality; and that for all this the land-owner should be without recourse on the corporation. * * * We, therefore, think the actual losses inflicted on the land-owner, by the institution and maintenance of the proceedings to condemn his land, are revocable when those proceedings are discontinued; and that in the estimate of these losses will be included any loss of rent occasioned by the pending of the proceedings, and the threat of subjecting the property to the use of the road. So long as this threat continues, it is an injury and hindrance to the owner. If the railroad company intends condemning the land at all, it should proceed without delay. If it has

abandoned the design, it should say so in an unequivocal manner, and at once."

⁶⁰ 22 Mo. App. 409.

⁶¹ This is to the same effect as *Shauffer v. Baltimore*, 80 Md. 483, 31 Atl. Rep. 439.

⁶² *Simpson v. Kansas City*, 111 Mo. 237, 20 S. W. Rep. 38. So also *St. Louis R. R. Co. v. Southern R. R. Co.*, 138 Mo. 591, 39 S. W. Rep. 471. *Gibbons v. Missouri Pac. R. R. Co.*, 40 Mo. App. 146 and *Lohse v. Missouri Pac. R. R. Co.*, 44 Mo. App. 645 appear to support a recovery of damages on the mere ground of abandonment. In the former case the proceedings were pending less than a year, in the latter about two years.

In *Martin v. Mayor etc. of Brooklyn*⁶³ proceedings were instituted to take land for a street. The commissioners made their report, but the trustees refused to present it for confirmation, and so virtually abandoned the improvement. The plaintiff brought suit for damages occasioned by the proceedings. In giving their decision, the court say: "But he complains that a cloud has been brought over his title, that he has been prevented from raising money on his land, and incurred other disadvantages by the delay. Truly, as the plaintiff's counsel said, the action is one of the first impression, at least in this respect. He avers, that on the faith of the proceedings being consummated, he had pulled down his rope-walks and stone building on the land, and built in another place; that he has erected three new buildings in reference to one of the contemplated streets; and that the opening of the streets would have benefited his other lands, etc. The speculative disadvantage arising from such proceedings being kept pending for a long time may be considerable; but we cannot recognize them as the subject of an action against the officers commissioned to prosecute such proceedings, or the corporation which they represent. In the nature of things such officers must exercise a discretion on the question whether the public shall be finally committed; and courts must hold such consequences as are here complained of to be *damnum absque injuria*. A contrary rule would be ruinous to all those who engage as commissioners in carrying through this sort of improvement. It is said, the trustees should have at least decided one way or the other, within a reasonable time. Such is, no doubt, the duty of every officer who is required by law to decide. But can an action be brought by a party for unreasonable delay, when the officer has a discretion to decide one way or the other? and that, too, in respect to a public improvement, the complainant having no individual right to demand that the officer shall decide one way or the other? I think not."

In *Van Valkenburg v. Milwaukee*⁶⁴ the suit was in part for acts done on the plaintiff's lots under proceedings which

⁶³ 1 Hill 545.

⁶⁴ 43 Wis. 574.

had been abandoned, and in part for loss of rents occasioned by the pendency of the proceedings. The court say: "We think this action may be maintained to recover such damages to him (the plaintiff) as were the direct and proximate result of the condemnation proceedings and the acts of the city under them." In afterwards commenting on this case the Supreme Court interpret it as holding that a recovery may be had for damages arising from the interference with the possession only.⁶⁵ In the case last cited proceedings were commenced on April 26, 1875, to open a street over the plaintiff's property, which were abandoned on November 8, 1875. On July 16, 1877, new proceedings were commenced for the same purpose and abandoned on February 23, 1878. The plaintiff claimed for loss of rents and depreciation of her property. The court holds that no action will lie on the ground merely that proceedings have been instituted and abandoned, and intimates that none will lie for mere delay in prosecuting the proceedings.⁶⁶

⁶⁵ Feiten v. Milwaukee, 47 Wis. 494, 499.

⁶⁶ The complaint to which a demurrer was sustained was as follows: "The complaint is in trespass on the case. Plaintiff is the owner of a certain lot in the twelfth ward of the city, and on the lot there are valuable improvements, among which is a large two-story frame building used for business and dwelling purposes. On April 26, 1875, the city concluded that that part of said premises on which the house is situated became necessary for opening a street. Upon its application, a jury was appointed May 3, 1875, to determine as to the necessity. The jury promptly reported that it was necessary, but the city necessarily delayed further action in the premises until October 4, 1875, when it confirmed the re-

port of the jury, and directed its board of public works to make an assessment of benefits and damages. On November 8, 1875, the condemnation proceedings, by resolution of the common council, were rescinded and abandoned. The plaintiff complains that, in consequence of the proceedings so instituted, it became and was generally understood that the part of the lot on which the building is situated would be taken for the purpose of a street, and that by reason thereof she proved unable to let the premises at a fair rent during the time while such proceedings were pending, and for a considerable period thereafter, to her damage of one thousand dollars. For a second cause of action, the plaintiff complains that on July 16, 1877, condemnation proceedings were again insti-

§ 659. **Statutes giving a right to recover for damages occasioned by proceedings.**—Many statutes of this sort exist at the present time, but they are of such recent date that but few cases have arisen under them. Where a statute provides that the owner of land shall be indemnified for the trouble and expense to which he has been put and the damages to his property which have been occasioned by proceedings which have been discontinued or abandoned, the indemnity must be sought in a separate suit, and cannot be had in the condemnation proceeding.⁶⁷ Under a statute giving indemnity for “trouble and expense” occasioned to the owner by proceedings, no recovery can be had for “disquietude, vexation and annoyance” to which he has been subjected, or for uncertainty as to whether the improvement would be made. “The word ‘trouble’ in the statute refers to trouble

tuted. Notice was given, a jury appointed, a report made, the report of the jury confirmed, and an assessment of benefits and damages ordered. In the course of these proceedings, on February 14, 1878, the board of public works, pursuant to a resolution of the council, caused notice to be given in the official papers that the building would be sold at public auction; and on February 23, 1878, the said board, pursuant to said notice, entered the plaintiff's land, and did then and there sell the building, which was of the value of 2,500. About two months thereafter the city again abandoned and discontinued these condemnation proceedings, in the course of which the plaintiff's building was sold as aforesaid. The plaintiff complains that in consequence of these proceedings many persons were deterred and prevented from renting the premises; that her property has

become depreciated in value; and that she has been greatly injured in her rents, revenues and profits, and in the value of her real estate, to the amount of three thousand dollars.” *Feiten v. City of Milwaukee*, 47 Wis. 494-495. In *Ardrus v. Bay Creek Ry. Co.*, 60 N. J. L. 10, it was held that a suit would not lie to recover for counsel fees and expenses incurred in defending proceedings, which were discontinued just before the commissioners were ready to report. A city passed certain ordinances which provided for the purchase or condemnation of a specified tract of land for a court house. The ordinances were never carried into execution. It was held that an owner of property proposed to be taken could not recover for any damages caused by such preliminary proceedings. *Shaufelter v. Baltimore*, 80 Md. 483, 31 Atl. Rep. 439.

⁶⁷ *Drury v. Boston*, 101 Mass.

from which some material or pecuniary injury results, involving labor and the expenditure of time, or occasioning inconvenience to the owner in the use and occupation of the land; all of which may be estimated in damages by a standard common to all cases.”⁶⁸ A statute requiring the petitioner in condemnation proceedings to pay costs and attorneys’ fees in case of dismissal was held not to be invalid as a grant of special privileges, no such recovery being allowed in ordinary suits.⁶⁹

§ 660. **Right to abandon under English statutes after notice to treat.**—The interests of the individual are as a rule much more fully protected, as against the exercise of the eminent domain power, by the laws of England than by the constitutions and laws of the United States. Upon the giving of notice to treat, the rights of the parties are at once fixed. “The notice gives the proprietor a right to insist upon the company taking that which they have given notice of their intention to take. It constitutes a sort of inchoate contract; at all events, the situation of vendor and purchaser is created, for which, however, the sum to be paid, which is a material part of ordinary contracts, remains to be ascertained. The right may be enforced in a court of equity when the price is fixed, and an action may be brought in a court of law upon an award or verdict.”⁷⁰

§ 661. **New proceedings for the same purpose as former proceedings which have been abandoned.**—Proceedings

439; *Minneapolis & Northwestern R. R. Co. v. Woodworth*, 32 Minn. 453.

⁶⁸ *Whitney v. Lynn*, 122 Mass. 338, 343.

⁶⁹ *Sanitary District v. Bernstein*, 175 Ill. 215.

⁷⁰ *Lloyd’s Compensation*, p. 45, and see, generally, *Same*, chap. iii; *Queen v. Birmingham & Oxford Junction Ry. Co.*, 6 Ry. Cas. 628; 4 Eng. L. & Eq. 276; *Walker v. Eastern Counties Ry. Co.*,

6 Harr. 594; *Salisbury v. Great Northern Ry. Co.*, 17 A. & E. N. S. 840, 79 E. C. L. R. 840; *Blount v. Great Southern etc. R. R. Co.*, 2 Irish Ch. 40; *Edinburgh etc. R. R. Co. v. Leven*, 1 McQueen 284. The rule was held not to apply to commissioners acting on behalf of the public whose means were limited. *Queen v. Commissioners of Woods & Forests*, 15 A. & E. N. S. 761, 69 E. C. L. R. 761.

which have been discontinued before completion⁷¹ or which have proved ineffectual because defective⁷² are no bar to new proceedings for the same purpose. But, where proceedings were duly had to lay out a highway, and an order was made establishing the way upon the payment of the damages awarded, it was held to assume the character of a binding adjudication, and new proceedings to lay out the same way resulting in an order establishing the way upon the payment of a less sum as damages were quashed on certiorari.⁷³ So it has been held that the prior proceedings may be set up as a defense to the new, by way of a motion to dismiss founded upon such prior proceedings.⁷⁴ In *Rogers v. City of St. Charles*⁷⁵ it appeared that the city in 1867 took proceedings to widen a certain street. The proceedings were admitted to have been regular, and Rogers was awarded \$1,000 for property of his which would be taken by the improvement. The city did not take the property, and after the lapse of a year Rogers instituted a mandamus proceeding to compel the city to pay the damages. The city claimed to have abandoned the improvement and the right to do so was sustained by the Supreme Court.⁷⁶ Rogers then erected a building upon his lot. When this was about completed the city commenced new proceedings for the same purpose, resulting in an award of only \$450 to the plaintiff. Under these proceedings the city took possession of the lot, and Rogers sued for the value of the lot. The city relied upon the new proceedings and a tender of the \$450. The court found that the new proceedings were void for not showing any previous attempt to agree with the owner. A judgment in favor of the city was

⁷¹ *Corbin v. Cedar Rapids, Iowa Falls & Northwestern Ry. Co.*, 66 Ia. 73.

⁷² *Lehigh Valley R. R. Co. v. Dover & Rockaway R. R. Co.*, 43 N. J. L. 528.

⁷³ *Hupert v. Anderson*, 35 Ia. 578.

⁷⁴ *Illinois Cent. R. R. Co. v. Champaign*, 163 Ill. 524, 45 N. E.

Rep. 120. And see *Chicago etc. R. R. Co. v. Chicago*, 143 Ill. 643; *Chicago etc. R. R. Co. v. Chicago*, 148 Ill. 479; *McChesney v. Chicago*, 161 Ill. 110; *State v. City Council*, 40 Minn. 483, 42 N. W. Rep. 355.

⁷⁵ 3 Mo. App. 41.

⁷⁶ *State ex rel. Rogers v. Hug*, 44 Mo. 116,

reversed, with an intimation that the first award was binding upon the city.⁷⁷

A statute of Ohio provides as follows: "When a municipal corporation takes an appropriation of land for any purpose specified in this chapter, and fails to pay for or take possession of the same within six months after the assessment of compensation shall have been made, as hereinbefore provided, the right of the corporation to make such appropriation on the terms of the assessment so made, shall cease and determine; and any lands so appropriated shall be relieved from all incumbrance on account of the proceedings in such case, or the resolution of the council making the appropriation; and the judgment or order of the court, directing such assessment to be paid, shall cease to be of

⁷⁷ The court say: "But we are of opinion that this value is fixed by the first award; that this is binding upon the city, except in the event of the abandonment of the design of widening the street; and that it is not competent for the city, adhering to its original purpose to widen the street, to have recourse, tentatively, to a number of juries, to reject such findings as it does not think eligible, and to fasten upon and hold the citizen to the first one which places an estimate in its eyes sufficiently low upon the property upon which the condemnation is sought. Argument would be wasted upon the unreasonableness and thorough injustice of such a course of action. No illustration can make them plainer than the mere statement of the proposition. It is a matter of experience—and, if experience were wanting, the faintest sagacity would discern beforehand—that the projecting of an improvement

involving the opening or widening of a street, whatever may be its effects on adjacent property, is certain to depress the value of the ground which, in the event of the opening or widening, will become public. It is still more true that, so long as it remains uncertain whether a particular piece of land will be condemned for public use, all profitable private use of it is at least suspended. The resulting injury is proportioned to the time during which the uncertainty continues, and if to influences so disastrous upon the interests of the land-holder be added a power, on the part of the corporation exercising, by delegation, the right of eminent domain, to impanel as many juries as may seem expedient, and to reject every award which, in its own eyes, is not small enough, the owner of the property having, in the meantime, no voice or right of resistance against such oppression, a condition of things

any effect, except as to the costs adjudged against the corporation." The same statute appears to have been extended to railroad companies. In construing this statute it has been held that after the six months have elapsed new proceedings can be taken for the same purpose.⁷⁸

§ 662. When entry is to be made or possession taken in a specified time, what is sufficient.—Where a statute required that, when a highway was established it should be opened within five years or be deemed to be vacated, it was held that it must be opened for its entire length within the time limited.⁷⁹ A statute of Massachusetts provides that the laying out of a highway shall be void as against the owner of land taken unless possession is taken within two years from the time when the right to take possession first accrues, and that an entry for the purpose of constructing any part of the way shall be deemed a taking possession of all the lands included in the lay-out.⁸⁰ Of course, under this statute, an entry upon a part is a constructive entry upon the entire location.⁸¹ Acts done before the right of possession accrues may be considered as showing or explaining the character and purpose of acts done afterwards.⁸² But an entry for the purpose of construction and acts done before the right of possession accrues will not alone be sufficient. Something must be done after the right accrues and within the two years.⁸³ An entry and partial construction of the road within the two years by town officers, though without due authority from the town, was

would be presented which we believe to be unwarranted, by any constitutional government where spoliation is forbidden by the fundamental law."

⁷⁸ Trustees of Cincinnati Southern Ry. Co. v. Haas, 42 Ohio St. 239. To same effect: Alabama M. Ry. Co. v. Newton, 94 Ala. 443, 10 So. Rep. 89; and see Decker v. Washburn, 8 Ind. App. 673, 35 N. E. Rep. 1111.

⁷⁹ Green v. Green, 34 Ill. 320; Wragg v. Penn Township, 94 Ill. 11.

⁸⁰ Statutes of 1869, c. 303, § 1; Wilcox v. New Bedford, 140 Mass. 570, 571, note.

⁸¹ Poor v. Blake, 123 Mass. 543; Wheeler v. Fitchburg 150 Mass. 350, 23 N. E. Rep. 207.

⁸² Wilcox v. New Bedford, 140 Mass. 570.

⁸³ Ibid.

held sufficient when acquiesced in by the town at the time, and ratified after the two years had expired.⁸⁴

§ 663. **Improvements pending proceedings.**—Theoretically, the taking of property and paying of just compensation therefor should be concurrent, and the whole process should be begun and completed in a day. Practically, this is impossible. Improvements and new undertakings must be considered before they are decided upon. When the property to be taken has been designated, negotiations must be had with the owner for its purchase. If these fail, proceedings must be instituted, notice given and the damages ascertained. All these matters require time. From the time when the taking of particular property is first talked about until the damages are paid or the duty to take otherwise irrevocably fixed, the fate of the property is uncertain. The right of the owner to use and enjoy the property until it is actually taken is undoubted.⁸⁵ But his right to place improvements upon it and to recover the value of such improvements presents a question of more difficulty. Somewhere in course of the proceedings a point of time must be fixed upon with reference to which the damages shall be assessed and to which the title shall relate. We have heretofore given our reasons for selecting the filing of the petition as the point of time referred to in the absence of any statutory provision.⁸⁶ But, wherever that point of time is fixed, up to that point of time the owner may put improvements upon his property and recover their value, but after that point of time improvements will be made at the risk of being taken without compensation. This seems to us the plain conclusion from the reason of the matter. The authorities do not present any well-defined rule upon the subject.

In Pennsylvania it has been held that it was competent for the legislature to provide for the making of a map of proposed blocks and streets in a city, and that from the time such map was completed the owners would be precluded from improving the land embraced in the lines of such pro-

⁸⁴ *Gilkey v. Watertown*, 141 Mass. 317.

⁸⁵ *Stewart v. County*, 2 Pa. St. 340.

⁸⁶ *Ante*, § 477.

posed streets, or, if such improvements were made, their value could not be recovered, though the streets might not be actually opened and damages paid until years after the completion of the map.⁸⁷

In *City of Portland v. Lee Sam*⁸⁸ the city council on July 11, 1876, directed a survey and plat to be made for the widening of Second street. On August 5, an ordinance was passed for making the improvement. Viewers were appointed on August 21, who reported on August 31. The report was confirmed on September 19. On July 5, 1876, the owner of a lot to be taken made a contract for the erection of a building thereon. The building was commenced before August 21, and completed before September 19. The court held that the rights of the parties were not fixed until the report of reviewers was confirmed, that until then the owner had a right to go on with his improvements, that he was entitled to damages to his property as it was on September 19, and on appeal could recover them.⁸⁹

Where an owner made some improvements upon property after a railroad had been staked out over it, it was held he was entitled to damages thereto, unless they were made in grossly bad faith.⁹⁰ In another case it was held that the

⁸⁷ *Forbes Street*, 70 Pa. St. 125; *In re Sedgeley Ave.*, 88 Pa. St. 509; see also *Johnston v. Cal- lery*, 184 Pa. St. 146; ante, § 114.

⁸⁸ 7 Or. 397.

⁸⁹ The court say: "The common council were under no obligation to adopt the report made by the viewers or pay for the property proposed to be taken. It was entirely optional with them whether they would go on with the widening of the street or abandon it altogether, and it would be unjust to hold that it was the duty of the respondents to cease working on their building as soon as the viewers made their report or go on with the improvements at the peril of

losing all expenditures incurred by them while awaiting the uncertain action of the common council." Substantially the same conclusion was reached upon similar facts in *Matter of Wall Street*, 17 Barb. 617. See also *Matter of Appropriation*, 23 App. Div. N. Y. 7. In *Corporation of New York v. Mapes*, 6 Johns. Ch. 46, it was held that an injunction would not lie to prevent the improvement of property proposed to be taken for a street, but in the previous case it was intimated by one judge that an injunction with ample security would be a proper remedy.

⁹⁰ *Sherwood v. St. Paul & Chicago Ry. Co.*, 21 Minn. 122.

owner was not entitled to recover for the destruction of a partly-erected smelting furnace which was begun after notice that the land would be taken, although before proceedings instituted.⁹¹ Where a house was commenced in the line of a proposed highway, after surveyors were appointed to lay out the road, it was held that the house was an unlawful encroachment.⁹² In *Driver-v. Western Union R. R. Co.*,⁹³ it appeared that the plaintiffs bought lots seven, eight, nine and ten in January, 1870, for the purpose of erecting a planing-mill thereon, and immediately thereafter commenced the erection of a building. Upon being notified by the railroad company that it would want lot seven, plaintiffs moved their foundations so as not to occupy any part of that lot with their building. Proceedings were commenced to condemn lot seven in March, and on May 7 an award was made and deposited. The building was completed about May 1. The railroad caused a large depreciation to the mill, and the company claimed that, as the mill was built after notice that the railroad would take lot seven, and to a large extent after proceedings were commenced, the company was not liable for such depreciation. The court held otherwise, that the title did not vest until the award was made and deposited, that until then the company could have discontinued, and consequently until then the owner might improve his property as he liked.

⁹¹ *Schuylkill Navigation Co. v. Farr*, 4 W. & S. 362. "They would be entitled to little if any damage, being aware that, for all practical purposes, the intended erection must be destroyed, or its value greatly impaired, by the proposed alteration of a dam. It would be their own folly to proceed with their work when

put upon their guard by a notice that the company intended to improve the navigation in the manner stated, a right to which they were unquestionably entitled under their charter."

⁹² *State v. Waldron*, 17 N. J. L. 369.

⁹³ 32 Wis. 569.

CHAPTER XXX.

LIMITATIONS TO ACTIONS AND PROCEEDINGS.

§ 664. Where compensation need not be first made, the owner may be required to present his claim for damages within a time limited. Construction of statutes.—In those jurisdictions in which it is held that compensation need not precede or be concurrent with the taking, statutes limiting the time within which the owner may apply for damages and barring any claim not made within the time limited have, we believe, been uniformly sustained.¹ In the cases

¹ Harper v. Richardson, 22 Cal. 251; Lincoln v. Colusa Co., 28 Cal. 662; White Water Valley Canal Co. v. Ferris, 2 Ind. 331; Nelson v. Fleming, 56 Ind. 310; Goddard v. Boston, 20 Pick. 407; Monagle v. County Comrs., 8 Cush. 360; Russell v. New Bedford, 5 Gray 31; People ex rel. Green v. Michigan Southern R. R. Co., 3 Mich. 496; Smith v. McAdam, 3 Mich. 506; People v. Canal Appraisers, 9 Barb. 496; Rexford v. Knight, 11 N. Y. 308; Viers et al. Petition, Tappan, Ohio, 56; Reckner v. Warner, 22 Ohio St. 275; Anderson v. McKinney, 24 Ohio St. 467; Malone v. Toledo, 34 Ohio St. 541; Carolina Central R. R. Co. v. McCaskill, 94 N. C. 746; Waring v. Cherew & Darlington R. R. Co., 16 S. C. 416; Simms v. Memphis etc. R. R. Co., 12 Heisk. 621; Ruehl v. Voight, 28 Wis. 153; Janssen v. Lammers, 29 Wis. 88; Mark v. State, 97 N. Y. 572; Benedict v. State, 120 N. Y. 228, 24 N. E. Rep. 314; Yaw v. State,

127 N. Y. 190, 27 N. E. Rep. 829; Gudger v. Richmond etc. R. R. Co., 106 N. C. 481, 11 S. E. Rep. 515; Purifoy v. Richmond etc. R. R. Co., 108 N. C. 100, 12 S. E. Rep. 741; Lewiston Road, 8 Pa. St. 109; Tutt v. Port Royal etc. R. R. Co., 28 S. C. 388, 5 S. E. Rep. 831; East Tenn. R. R. Co. v. Telford's Exrs., 89 Tenn. 293, 14 S. W. Rep. 776, 3 Am. R. R. & Corp. Rep. 364; Dettor v. Grand Trunk R. R. Co., 15 U. C. Q. B. 595; Whitman v. Nantucket, 169 Mass. 147; Gately v. Old Colony R. R. Co., 171 Mass. 494, 51 N. E. Rep. 5; Whoriskey v. Old Colony R. R. Co., 173 Mass. 432; Bause v. Town of Clark, 69 Minn. 53; Hooe v. Chicago etc. R. R. Co., 98 Wis. 302.

In Pennsylvania the provision in the constitution of 1874 that "no act shall prescribe any limitations of time within which suits may be brought against corporations for injuries to persons or property, or for other causes different from those fixed

cited limitations of ten years,² five years,³ two years,⁴ and one year⁵ were sustained. A law providing that claims for damages by laying out a road not presented to the viewers should be barred, was upheld in Ohio.⁶ In the case cited the owner appeared before the viewers at the time appointed, for the purpose of presenting his claim for damages. One viewer being absent, the view was postponed for two days. The claimant then left town, and did not get back until after the view on account of a railroad accident, and his claim was not presented. The court held, however, that the claim was barred.⁷ A similar statute has been upheld in Kansas. Just as the owner was ready to start for the purpose of presenting his claim before the viewers his mother was taken suddenly and dangerously ill and soon after died. He re-

by general laws regulating actions against natural persons, and such acts now existing are avoided," was held to abrogate the limitation of one year in which to present a claim for damages in road cases. In *re Grape St.*, 103 Pa. St. 121. So it abrogates an act limiting the time within which suit must be brought against a railroad company to recover damages for right of way or for use and occupation of land appropriated. *Baltimore etc. Extension Co. v. Seippe*, 129 Pa. St. 425, 18 Atl. Rep. 568.

² *Ruehl v. Voight*, 28 Wis. 153; *Janssen v. Lammers*, 29 Wis. 88.

³ *Simms v. Memphis etc. R. R. Co.*, 21 Heisk. 621; *East Tennessee etc. R. R. Co. v. Telford's Exrs.*, 89 Tenn. 293, 14 S. W. Rep. 776, 3 Am. R. R. & Corp. Rep. 364.

⁴ *White Water Valley Canal Co. v. Ferris*, 2 Ind. 331; *Nelson v. Fleming*, 56 Ind. 310; *Carolina Cent. R. R. Co. v. McCaskill*,

94 N. C. 746; *Waring v. Cherew & Darlington R. R. Co.*, 16 S. C. 416; *Gudger v. Richmond etc. R. R. Co.*, 106 N. C. 481, 11 S. E. Rep. 515; *Purifoy v. Richmond etc. R. R. Co.*, 108 N. C. 100, 12 S. E. Rep. 741.

⁵ *Goddard v. Boston*, 20 Pick. 407; *Russell v. New Bedford*, 5 Gray 31; *People ex rel. Green v. Michigan Southern R. R. Co.*, 3 Mich. 496; *Smith v. McAdam*, 3 Mich. 506; *People v. Canal Appraisers*, 9 Barb. 496; *Rexford v. Knight*, 11 N. Y. 308; *Malone v. Toledo*, 34 Ohio St. 541; *Mark v. State*, 97 N. Y. 572; *Benedict v. State*, 120 N. Y. 278, 24 N. E. Rep. 314; *Yaw v. State*, 127 N. Y. 190, 27 N. E. Rep. 829; *Lewiston Road*, 8 Pa. St. 109; *Tutt v. Port Royal etc. R. R. Co.*, 28 S. C. 388, 5 S. E. Rep. 831.

⁶ *Reckner v. Warner*, 22 Ohio St. 275.

⁷ See also *Viers' Petition*, *Tappan, Ohio*, 56; and *Anderson v. McKinney*, 24 Ohio St. 467.

mained to attend her and so missed the opportunity to present his claim.⁸ In another case the bar of the statute was sustained though the owner had no actual notice of the meeting of viewers, and for that reason failed to present his claim.⁹ The cases referred to were bills for injunctions, which could only proceed upon the basis of the proceedings being void. Whether relief could not have been had in some of the cases referred to, on the ground of accident or mistake, presents another question.¹⁰ In Nebraska it has been held that, when the owner had no actual notice of proceedings to take his property until after the time given for filing claims had expired, he might sue for compensation within a reasonable time after actual notice of the actual appropriation of his property, and this though notice was given by publication in accordance with the statute and the proceedings were deemed valid.¹¹ In California a statute requiring the owner to sue the county within ten days after the laying out of a road was sustained by the Supreme Court.¹² Where a statute provided that claims for damages should be presented to the board of supervisors within thirty days from a given time, unless sufficient excuse for not doing so was shown by affidavit, it was held the board were not the final or exclusive judges of what was a sufficient excuse, but that their decision might be reviewed on

⁸ *Shearer v. Commissioners of Douglas Co.*, 13 Kan. 145.

⁹ *Cupp v. Commissioners of Seneca Co.*, 19 Ohio St. 173, 184. The court say: "The whole proceeding is substantially in rem. Jurisdiction over the person of the parties is not necessary. The act in question relates to and affects only the remedy, and not the rights of the parties, and is therefore within the general scope of the legislative power. The constitutional provision referred to does not take away that power. It defines and guar-

antees the right of the party to his land, or to a sure and adequate compensation therefor. The remedy—the proceeding by which that right is to be effected—is still left to legislative discretion. We fail, therefore, to see wherein the act in question violates the constitution."

¹⁰ *Ante*, § 652.

¹¹ *Pawnee County v. Storm*, 34 Neb. 735, 52 N. W. Rep. 696.

¹² *Harper v. Richardson*, 22 Cal. 251; *Lincoln v. Colusa Co.*, 28 Cal. 662; see also *Potter v. Ames*, 43 Cal. 75,

appeal.¹³ An application for damages for land taken for a railroad was required to be made to county commissioners within three years from the filing of the location. It was held that filing the application within three years with a clerk of the board who had no authority to receive it, when it was not acted upon until after the three years, was insufficient.¹⁴ Where plaintiff failed to make his claim for damages for land taken for a turnpike within a year, as required, and afterwards the legislature authorized a new company to complete the road, it was held that the claim was not revived.¹⁵ Where a remainder man filed his petition for damages within the time limited, it was held that it might be amended by joining the life tenant after the time had expired.¹⁶ A dam to improve navigation is not a mill dam and the limitation provided in the statute as to mill dams does not apply thereto.¹⁷ As a general rule statutes of limitations are strictly construed and they are not applied to cases which are not clearly within their purview.¹⁸

§ 665. **When the statutory remedy for just compensation accrues.**—Ordinarily the right to damages accrues when the right or title of the party condemning becomes complete. No general rule can be laid down for ascertaining this point of time. The statute sometimes declares that upon the performance of certain acts the title shall vest, and in other cases it is left more or less to inference. Where the right to apply for damages was limited to one year from the laying out of a highway, it was held in one case that the laying out was not complete until the report of the lay-out was filed in

¹³ Warner v. Doran, 30 Ia. 521.

¹⁴ Charles River Branch R. R. Co. v. County Comrs., 7 Gray 389.

¹⁵ Callison v. Hedrick, 15 Gratt. 244.

¹⁶ Woodbridge v. Cambridge, 114 Mass. 483.

¹⁷ Arimond v. Green Bay etc. Canal Co., 35 Wis. 41. But see Hardesty v. Ball, 43 Kan. 151, 22 Pac. Rep. 1095.

¹⁸ Cincinnati v. Sherike, 47 Ohio St. 217, 25 N. E. Rep. 169; Terre Haute & Indianapolis R. R. Co. v. Scott, 74 Ind. 29; Lawrence Railroad Co. v. Cobb, 35 Ohio St. 94; Commissioners v. Allen, 25 Kan. 616; Dargan v. Carolina Central R. R. Co., 113 N. C. 596, 18 S. E. Rep. 653; Delaney v. Metropolitan Board of Works, L. R. 2 C. P. 532

the town clerk's office,¹⁹ and in another case that the statute began to run from the adjudication of the mayor and aldermen that the improvement would be of common convenience and necessity, and directing that the street be laid out.²⁰ Where the time allowed is from the opening of the road, it begins to run from the actual physical opening and not from the time when the right to open is perfected.²¹ In case of damages by flowage, the statute begins to run when the dam is completed and put in operation,²² and not from the time when damage is first sustained.²³ Where a dam is built sufficient to raise water to a certain height which would injure plaintiff, but the dam is used at a less height so as not to injure him, the plaintiff is entitled to damages because it is optional with the miller to what height he will raise the water.²⁴ In a similar case in Pennsylvania, it was held the plaintiff's action did not arise until actual damage was done.²⁵ But, where the height of the flooding was to be fixed by commissioners, it was held that the statute began to run from the award of such commissioners.²⁶ Where water was taken from a stream to supply a canal, to the damage of plaintiff's mill, and was restored by reason of injury to the canal within the two years allowed for claiming damages, and after several years the canal was repaired and the water retaken, it was held that the claim was barred.²⁷ Authority was given a town to construct a dam and reservoir for storing water. Any one whose property was taken or damaged was required to apply for damages within three years after the construction of the dam. It

¹⁹ *Brookline v. County Comrs.*, 114 Mass. 548.

²⁰ *Loring v. Boston*, 12 Gray 209.

²¹ *Grugan v. Philadelphia*, 158 Pa. St. 337, 27 Atl. Rep. 1000.

²² *Heard v. Proprietors of the Middlesex Canal*, 5 Met. 81.

²³ *Call v. County Comrs.*, 2 Gray 232.

²⁴ *Town v. Faulkner*, 56 N. H. 255.

²⁵ *Union Canal Co. v. Keiser*, 19 Pa. St. 134. And see *Hardesty v. Ball*, 43 Kan. 151, 22 Pac. Rep. 1095.

²⁶ *Essex Co. v. County Comrs.*, 7 Gray 450.

²⁷ *Mill v. White Water Valley Canal Co.*, 4 Ind. 431. See also *Haskell v. County Comrs.*, 9 Gray 341.

was held that a petition for damages for percolation was barred after the three years, though the petitioner's land was not affected within the three years.²⁸ Where an act for taking water provided that application for damages should be made within three years "from the time when the water was first actually withdrawn or diverted," it was held that the statute began to run from the time of the first abstraction of water for the purposes contemplated, and not when it was first withdrawn in quantities injurious to the plaintiff.²⁹ Water withdrawn for the purpose of testing engines, by order of the engineer of the town, was held a withdrawal within the meaning of the act, and a claim filed more than three years after such withdrawal, but within three years from the first withdrawal to supply the town, was held barred.³⁰ Under the Massachusetts statutes the filing of the location of a railroad has been held to vest the right to compensation.³¹ In other jurisdictions it has been held that the right does not vest until the company takes possession.³² A city widened a street by providing that whenever a building was constructed, rebuilt or altered, it should be made to recede five feet. It was held that the right to compensation accrued when the owner altered or rebuilt in conformity to the ordinance.³³ A city was authorized to take a stream of water for a sewer. The city took a section of the stream, built the sewer on that section, and the waters of the stream ran through the sewer and then in the natural channel. It was held to be a taking of the entire stream and that the statute began to run as to those below the sewer.³⁴

²⁸ *Davis v. New Bedford*, 133 Mass. 549.

²⁹ *Ipswich Mills v. County Comrs.*, 108 Mass. 363.

³⁰ *Tileston v. Brookline*, 134 Mass. 438.

³¹ *Charlestown Branch R. R. Co. v. County Comrs.*, 7 Met. 78. To same effect, *Moore v. Boston*, 8 Cush. 274. And see *Yaw v.*

State, 127 N. Y. 190, 27 N. E. Rep. 829.

³² *Midland R. R. Co. v. Smith*, 125 Ind. 509, 25 N. E. Rep. 153; *Oregon etc. R. R. Co. v. Day*, 3 Wash. Ter. 252, 14 Pac. Rep. 588.

³³ *In re Chestnut St.*, 118 Pa. St. 593, 12 Atl. Rep. 585; *In re Widening Chestnut St.*, 18 Phila. 511.

³⁴ *Worcester Gas Light Co. v.*

§ 665a. When there is no special limitation of the statutory remedy. Application of the general statutes of limitations.—A statute of Indiana provided that actions for injuries to property or for the detention thereof should be brought within six years. Another statute provided that all actions not limited by any other statute should be brought within fifteen years. It was held that a statutory proceeding by the owner for the assessment of damages for land taken for a railroad right of way came under the latter and not the former statute.³⁵ Such a proceeding was held not to be an action of trespass nor an action on a liability created by statute within the Code of North Carolina, limiting such actions to three years.³⁶ Such proceedings will not be brought within the general statutes of limitations unless the intention is clear.³⁷

§ 665b. Limitation when compensation must be first made.—Where the constitution either expressly, or as interpreted by the courts, requires compensation to be first made for property taken for public use, a law which casts the initiative upon the owner and requires him to prosecute his claim for compensation within a time limited or be barred, is invalid.³⁸ Where under such a constitution property is appropriated to public use without complying therewith, the owner's right to compensation is not barred, except by adverse possession for the prescriptive period.³⁹

County Comrs., 138 Mass. 289.

³⁵ Shortle v. Louisville etc. R. Co., 130 Ind. 505, 30 N. E. Rep. 639; Shortle v. Terre Haute etc. R. R. Co., 131 Ind. 338, 30 N. E. Rep. 1084. To same effect: Clark v. Water Comrs., 148 N. Y. 1, 42 N. E. Rep. 414.

³⁶ Land v. Wilmington etc. R. Co., 107 N. C. 72, 12 S. E. Rep. 125; Utley v. Wilmington etc. R. R. Co., 119 N. C. 720. So in New York as to a liability created by statute. Clark v. Wa-

ter Comrs., 148 N. Y. 1, 42 N. E. Rep. 414.

³⁷ Keller v. Harrisburg etc. R. Co., 151 Pa. St. 67, 25 Atl. Rep. 84. But in Forster v. Cumberland Valley R. R. Co., 23 Pa. St. 371, it was held that the general statute of limitations applied to a special statutory proceeding for damages.

³⁸ Levee Commisisoners v. Dancy, 65 Miss. 335, 3 So. Rep. 568.

³⁹ Lehigh Valley R. R. Co. v. McFarlan, 43 N. J. L. 605; Mc-

§ 665c. **Limitations when property is appropriated without complying with the law.**—We have seen that where property is entered upon and appropriated to public use without complying with the law, the owner may waive the tort and sue for his just compensation.⁴⁰ The same rule applies where the entry is by consent and the question of compensation is left for future adjustment. In such cases the action for just compensation is not barred, except by adverse possession for the requisite period to establish a title by prescription.⁴¹ In Indiana in case of a tortious entry by a railroad company the owner's action is barred by statute in six years.⁴² In Michigan it has been held that where a railroad company wrongfully enters upon land and constructs and operates its railroad thereon, an action of trespass is barred in six years after the entry and that the use and operation of the road cannot be considered as a continuing trespass.⁴³ A statute provided that in case water commissioners took possession of land without having the same condemned, the owner might "then or at any time after" have proceedings to ascertain his compensation. It was held by the Supreme Court of New York that the words "then or at any time after" did not take the proceeding out of the statute of limitations which would otherwise apply.⁴⁴ On appeal this proposition does not appear to have been controverted, but the court of appeals held the proceeding was not barred by the general statute of limitations.⁴⁵

§ 665d. **Common law suits for damages to property.**—

Farlan v. Morris Canal & Banking Co., 44 N. J. L. 471. And see *Ross v. Grand Trunk R. R. Co.*, 10 Ont. 447.

⁴⁰ Ante, § 623.

⁴¹ *Lehigh Valley R. R. Co. v. McFarlan*, 43 N. J. L. 605; *McFarlan v. Morris Canal & Banking Co.*, 44 N. J. L. 471; *Hannum v. West Chester*, 63 Pa. St. 475; *In re Girard Ave.*, 18 Phil. 499; *Hays v. T. & P. R. R. Co.*, 62 Tex. 397. But see *Tucker v. Chicago etc. R. R. Co.*, 91 Wis.

576, 65 N. W. Rep. 515; *Hooe v. Chicago etc. R. R. Co.*, 98 Wis. 302.

⁴² *Harshberger v. Midland R. R. Co.*, 131 Ind. 177, 27 N. E. Rep. 352, 30 N. E. Rep. 1083; *Pickett v. Toledo etc. R. R. Co.*, 131 Ind. 562, 31 N. E. Rep. 200.

⁴³ *Wood v. Michigan Air Line R. R. Co.*, 90 Mich. 212, 51 N. W. Rep. 265.

⁴⁴ *In re Clark*, 74 Hun 294, 26 N. Y. Supp. 214.

⁴⁵ *Clark v. Water Commission-*

Whenever there is an unlawful entry upon property for the purpose of appropriating it to public use, or whenever it is injured by the construction or operation of public works, so as to afford the owner a cause of action, the owner may have redress by any of the appropriate common law remedies,⁴⁶ and the general statute of limitations will apply thereto.⁴⁷ As to whether the wrong may be regarded as continuing and so giving rise to successive causes of action, or whether it is to be regarded as single and entire to be redressed once for all in a single action, is a question elsewhere considered.⁴⁸

§ 666. **When an action accrues for consequential damages.**—The remedy for such damages is usually sought in a common law suit, and the general statute of limitations applies.⁴⁹ As a general rule the action accrues when the damage is sustained by the plaintiff, and not when the causes are first set in motion which ultimately produce the damage.⁵⁰ The question is more fully discussed in a former section.⁵¹

ers, 148 N. Y. 1, 42 N. E. Rep. 414.

⁴⁶ Ante, §§ 647-651, 654.

⁴⁷ This proposition is self evident. The following cases illustrate its correctness: *St. Louis etc. R. R. Co. v. Morris*, 35 Ark. 622; *Pratt v. Des Moines etc. R. R. Co.*, 72 Ia. 249; *Hunter v. Burlington etc. R. R. Co.*, 84 Ia. 605, 51 N. W. Rep. 64; *Kansas Pac. R. R. Co. v. Muhlman*, 17 Kan. 224; *Wells v. New Haven etc. Co.*, 151 Mass. 46, 23 N. E. Rep. 724, 1 Am. R. R. & Corp. Rep. 708; *Omaha etc. R. R. Co. v. Moschel*, 38 Neb. 281, 56 N. W. Rep. 875; *Delaware etc. Canal Co. v. Lee*, 22 N. J. L. 243; *Valley R. R. Co. v. Franz*, 43 Ohio St. 623.

⁴⁸ Ante, § 653b.

⁴⁹ *Houston & T. C. R. R. Co. v. Chaffin*, 60 Tex. 553.

⁵⁰ *Powers v. Council Bluffs*, 45 Ia. 652; *Miller v. Keokuk & Des Moines Ry. Co.*, 63 Ia. 680; *Omaha etc. R. R. Co. v. Standen*, 22 Neb. 343; *Valley Ry. Co. v. Franz*, 43 Ohio St. 623; *Roberts v. Reed*, 16 East 215; *Sherlock v. Louisville etc. R. R. Co.*, 115 Ind. 22, 17 N. E. Rep. 171; *Sullens v. Chicago etc. R. R. Co.*, 74 Ia. 659, 38 N. W. Rep. 545; *Hempstead v. Cargill*, 46 Minn. 141, 48 N. W. Rep. 558; *Emry v. Raleigh etc. R. R. Co.*, 102 N. C. 209, 9 S. E. Rep. 139; *New York Cent. etc. R. R. Co. v. State*, 37 App. Div. N. Y. 57; *Austin etc. R. R. Co. v. Anderson*, 79 Tex. 427, 15 S. W. Rep. 484; *Clark v. Dyer*, 81 Tex. 339, 16 S. W. Rep. 1061; *Bonner v. Wirth*, 5 Tex. Civ. App. 560, 24 S. W. Rep. 306; *King v. United States*, 59 Fed. Rep. 9. But see

An action to recover damages for a railroad in a street accrues when the street is actually occupied and not when the road is located or the right to use the street granted.⁵²

§ 667. **When action accrues for change of grade.**—As such damages can only be recovered in most of the States by virtue of some special statutory provision, the terms of the statute must be strictly complied with. It may definitely limit the time within which suit must be commenced or claim made,⁵³ as within one year after completion of the work,⁵⁴ or within twenty days after the publication of a certain notice.⁵⁵ In the former case the action does not accrue until the completion of the entire work, including the change of grade of the sidewalks;⁵⁶ and if, after the work is commenced but before its completion, property affected is transferred, the right to damages is in the grantee.⁵⁷ A statute provided that “when the city shall alter the recorded grade of any street or alley, the owner of any house or lot fronting thereon may, within one year thereafter, claim damages by reason of such alteration.” It was held to mean one year from making the physical change.⁵⁸ Where, however, the right to such damages is given in general language and no remedy or limitation is prescribed, the better rule is that the right to damages accrues when the change is actually

St. Louis etc. R. R. Co. v. Morris, 35 Ark. 622; Savannah etc. R. R. Co. v. Buford, 106 Ala. 303, 17 So. Rep. 395; St. Louis etc. R. R. Co. v. Anderson, 62 Ark. 360, 35 S. W. Rep. 791; New York etc. R. R. Co. v. Hamlet Hay Co., 149 Ind. 344; Drake v. Chicago etc. Ry. Co., 63 Ia. 302; ante, §§ 624, 625.

⁵¹ Ante, § 653b.

⁵² Pennsylvania S. V. R. R. Co. v. Ziemer, 124 Pa. St. 560, 17 Atl. Rep. 187; Tyler v. Texas etc. R. R. Co., 73 Tex. 95; Maltman v. Chicago etc. R. R. Co., 41 Ill. App. 229; Chicago & Eastern Ill.

R. R. Co. v. Loeb, 118 Ill. 203; Pratt v. Des Moines N. W. Ry. Co., 72 Ia. 249; Frankle v. Jackson, 30 Fed. Rep. 398; and see § 653b.

⁵³ Revere v. Boston, 14 Gray 218; Keith v. Brockton, 147 Mass. 618.

⁵⁴ Erskine v. Boston, 14 Gray 216.

⁵⁵ Matter of Beale Street, 39 Cal. 495.

⁵⁶ Baker v. Taunton, 119 Mass. 392.

⁵⁷ Page v. Boston, 106 Mass. 84.

⁵⁸ People v. Zoll, 97 N. Y. 203.

made.⁵⁹ Some courts, however, hold that the action accrues when the change is ordered by the common council.⁶⁰

§ 667a. **Miscellaneous.**—The duty of a railroad company to restore a highway which it has crossed, is a continuing duty and a suit to enforce such a duty is not affected by the statute of limitations.⁶¹ So it has been held that the statute of limitations did not apply to a mandamus proceeding to compel payment of an award.⁶² A statute gave a remedy for damages caused by railroads in streets and provided a limitation of six years. After a railroad had been built and an action had accrued for damages the road was transferred to a new company, which assumed and agreed to pay all claims against the first company. It was held that this gave rise to a new cause of action against the new company, which could be enforced any time within six years from the transfer.⁶³ An action to recover an award, which had been deposited, was held not to be an action to enforce a trust within a statute of limitations.⁶⁴

⁵⁹ *Hempstead v. Des Moines*, 63 Ia. 36; *Mulholland v. D. M. & W. R. R. Co.*, 60 Ia. 740; *Jennings v. Le Roy*, 63 Cal. 397; *Brown v. Lowell*, 8 Met. 172; *Tyson v. Milwaukee*, 50 Wis. 78; *Eachus v. Los Angeles Consol. Electric R. R. Co.*, 103 Cal. 614, 37 Pac. Rep. 750; *Atkinson v. Atlanta*, 81 Ga. 625, 7 S. E. Rep. 692; *Bloomington v. Pollock*, 141 Ill. 346, 31 N. E. Rep. 146; *Lafayette v. Nagle*, 113 Ind. 425; *Ogden v. Philadelphia*, 143 Pa. St. 430, 22 Atl. Rep. 694; *Jones v. Bangor*, 144 Pa. St. 638, 23 Atl. Rep. 252; *Cass v. Pennsylvania Co.*, 159 Pa. St. 273, 28 Atl. Rep. 161; *North Chester v. Eckfeldt*, 1 Monaghan (Pa. Supm. Ct.) 732; *In re Change of Grade*, 2 Pa. Dist. Ct. 179; *Kershaw v. Philadelphia*, 10 Pa. Co. Ct. 153; *Sargeant v. Tacoma*, 10 Wash. 212,

38 Pac. Rep. 1048; *Omaha v. Flood*, 57 Neb. 124, 77 N. W. Rep. 379.

⁶⁰ *McCarthy v. St. Paul*, 22 Minn. 527; *Matter of Change of Grade of 5th and 6th Streets*, 12 Phila. 587; *Campbell v. Philadelphia*, 108 Pa. St. 300; *Healey v. New Haven*, 49 Conn. 394.

⁶¹ *Windsor v. Del. & H. Canal Co.*, 92 Hun 127, 36 N. Y. Supp. 863. And see *State v. Kansas City etc. R. R. Co.*, 54 Ark. 608, 16 S. W. Rep. 657.

⁶² *Boyer's Petition*, 15 Pa. Co. Ct. 531.

⁶³ *Kuhl v. Chicago & N. W. Ry. Co.*, 101 Wis. 42. Compare *Missouri etc. R. R. Co. v. Graham*, 12 Tex. Civ. App. 54, 33 S. W. Rep. 576.

⁶⁴ *Stillwater etc. R. R. Co. v. Stillwater*, 66 Minn. 176, 68 N. W. Rep. 836.

INDEX.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

ABANDONMENT, (see Discontinuance.)

- of location, when it defeats claim for damages, 624.
- of mill site, what constitutes, 305.
- of proceedings, right of, before completion, 655.
 - right of, after completion, 656.
 - what constitutes, 657.
 - owner's right to recover damages in case of, 658.
 - statutes giving a right to recover in such cases, 659.
 - right to recover the award in case of, 612.
 - effect of, upon new proceedings for the same purpose, 661.
 - right of, under English statutes, 660.
- of public use, what amounts to, 597.
 - transfer by party condemning not, 594.
 - repeal of charter does not operate as, 594.
 - reversion in case of, 596.
 - right to improvements in case of, 598.

ABATEMENT,

- of dam unless damages paid, 619.

ABUTTING OWNERS UPON STREETS,

- who are abutting owners, 91d.
- rights of, generally, 91e-91l, 115b.
- right to light, air and access, 91e-91h.
- origin and basis of rights of light, air and access, 91f.
- to how much of the street such rights extend, 91h.
- other rights than those of light, air and access, 91i.
- right of prospect, 91i.
- rights of, as adjoining properties, 91j.
- distinctions in rights of, based on ownership of fee of street, 91l.
- right of, to recover for various uses of streets, 92-134. (See Change of Grade, Streets and Highways, Taking.)
- right to recover damages in case of vacations, 134, 134a.
- right to damages for change of grade, 92-109.
- right to compensation for railroads in streets, 111-125.
- rights under statutes giving compensation for change of grade, 206b-218i.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

ABUTTING OWNERS UPON STREETS—Continued.

- rights under statutes giving compensation for railroads in streets, 219.
- when estopped to claim damages for railroad in street, 120.
- remedies of, for unlawful use of street, 117b, 635-637. (See Remedies, Streets and Highways.)
- injunction to prevent certain uses of streets, 635-637. (See Injunction.)
- to prevent change of grade, 638.

ACCESS, (See Abutting Owners, Riparian Rights.)

- to highway, right of, 91e-91l.
 - impeding or preventing, whether a taking, 118.
 - interference with, by change of grade not a taking, 100a.
 - impeding by works not in front of property, whether a taking, 132b.
 - impeding by works not in front of property a damaging, 227.
- to public waters, right of, 79-83.
 - impeding or preventing is a taking, 81-84c.
 - cases holding the contrary, 85.

ACCIDENT,

- as ground for setting aside the report or verdict, 523.

ACCRETIONS, (See Riparian Rights.)

- right to, 79, 83.

ACQUIESCENCE, (See Estoppel, Waiver.)

- as a bar to an injunction, 634.

ACTION,

- whether condemnation proceeding is an action, 314.
- at common law, when proper, 607, 609.
- to recover value of land appropriated without proceedings, 623.
- form of, on award or judgment, 609.
- when it accrues for interfering with right of support, 151.
- when it accrues for consequential damages, 666. (See Limitations.)
- when for change of grade, 218e, 667. (See Change of Grade.)
- when for just compensation, 665.
- the question of one action or successive action for
 - interference with the flow of streams, 653b (1).
 - diverting or polluting the waters of a stream, 653b (2).
 - interfering with the flow of surface water, 653b (3)
 - overflow or percolation from a reservoir or canal, 653b (4).
 - change of grade, 653b (5 and 6).
 - railroads in streets, 653b (7).
 - when there is an actual occupation of plaintiff's land, 653b (8).
 - Miscellaneous cases, 653b (9).

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

ADDITIONAL DAMAGES,

right to recover, 564-577. (See Award or Judgment.)

ADJOINING PROPRIETORS, (See Taking.)

law of, applies to owners of property taken for public use, 585.
(See Rights in Property Condemned.)

ADJOURNMENTS,

by commissioners, etc, 418.
notice of, 384.

ADMINISTRATOR,

has no power to convey, 289.
as a party, 320. (See parties.)

ADMISSIONS, (See Evidence.)

when competent evidence, 439.

AD QUOD DAMNUM,

writ of, 402.

AGREEMENT, (See Attempt to Agree, Contracts.)

not to exercise eminent domain power null and void, 261a.

AIR,

right of abutting owners to, 91e-91l.
interference with by change of grade not a taking, 100a.
right to pure air, 152.
pollution of, a taking, 152.

ALABAMA,

constitutional provisions of, 15.

ALLEY, (See Streets and Highways.)

taking of for street not a taking of property of abutting owners,
141.

AMENDMENT,

of notice, 398.
of petition, 349, 357, 358, 361, 398.
of return to writ of certiorari, 547.
by adding or dismissing parties, 337, 349.
power of commissioners to amend their report, 423.
power of court to amend report of commissioners, 529.

ANSWER,

propriety of, 390.

APPEAL, (See Certiorari, Writ of Error.)

granting and regulating of, in control of legislature, 537.
may be given on conditions, 531.
legislature may provide for, after final termination of proceedings, 558.
when the proper remedy, 543, 557.
is only remedy for a failure to award damages, 627.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

APPEAL—Continued.

- when it lies, construction of particular statutes as to, 535.
 - when statute makes decision of inferior tribunal final and conclusive, 536.
 - who entitled to appeal, parties, 538.
 - estoppel to take or prosecute, 556.
 - party condemning cannot, from order to pay over money deposited, 616.
- practice in taking, 537.
 - when statute silent as to mode of taking, 537.
 - under particular statutes, 537.
 - the proper parties, 538.
 - the notice required, 539.
 - time of taking, 537, 555.
- practice in appellate court, 540.
 - consolidation of appeals, 537.
 - objections not available, 347.
- effect of, on parties and proceedings, 541, 631.
 - as a waiver of notice, 379.
- costs on, 559, 562.
- limitations as to time of taking, 555.
- possession pending, 580.
- to the Supreme Court, 550-553.
 - when it lies, 550.
 - construction of constitution as to right of, 536.
 - when decision of lower court made final and conclusive by statute, 536.
 - construction of statutes as to when it lies, 552.
 - what orders may be appealed from, 551.
 - practice in Supreme Court, 553.
- to Supreme Court of United States, when it lies, 558a.

APPEARANCE,

- when a waiver of notice, 379.

APPLICATION, (See Petition.)

APPORTIONMENT, (See Landlord and Tenant.)

- of rent, 483.
- of damages, 326, 483.

APPROPRIATION OF PROPERTY, (See Authority to Condemn, Eminent Domain, Taking.)

- what may be taken, 262-287.
 - all property subject to the power, 262.
 - land and all rights and easements appurtenant thereto, 262a.
 - property affected by contracts, settlements or otherwise, or held for particular uses, 265.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

APPROPRIATION OF PROPERTY—Continued.

- money, choses in action and all kinds of personal property, 263.
- public lands, 264.
- lands of Indian tribes, 264a.
- property held by grant from the State or condemning authority, 264.
- property of educational institutions, 265.
- corporate property and franchises, 274.
- exclusive rights and privileges, 275.
- churches, poor farms and miscellaneous cases, 272a.
- property already devoted to public uses, 266-276.
 - lands held for use of the general government, 264.
 - railroad property for highways, 266.
 - for another railroad, 267.
 - for railroad crossing, 268, 268a.
 - for canal, ditch, park or telegraph, 269.
 - taking tracks or joint use of same, 267a, 267d.
 - part of right of way, 267b.
 - land used for depots, yards, shops, etc., 267c.
 - toll bridges, ferries, turnpikes, canals and mills, 271.
 - parks, cemeteries, public school property, 272, 272a.
 - property of gas and water companies, 272.
 - tide waters, 273.
 - navigable streams, 273.
 - general principles in regard to taking such property, 276.
- what may be taken under particular statutes, 255-256e, 281, 285, 287.
- what estate or interest may be taken generally, 277.
 - under particular statutes, 278.
- how much may be taken generally, 279.
 - under particular statutes, 280.
 - all cannot be taken when only part can be used, 204.
- designating the property to be taken, 286, 307.
- priority of right to appropriate particular property, 305, 306.
- preliminaries essential to the right of appropriation, 301-310.
 - (See Attempt to Agree; Preliminaries.)
- statutes prohibiting the taking of improvements and enclosures, 281-284. (See Authority to Condemn.)
- order in which the appropriation must be made, 395.
- injunction to prevent the taking of property already devoted to public uses, 643. (See Injunction.)

ARBITRATION,

- to fix the just compensation, 429.

ARKANSAS,

- constitutional provisions of, 16.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

ARTIFICIAL STREAMS. (See Streams.)

ASSIGNEE,

of damages awarded, rights of, 630.

ASSESSMENT OF DAMAGES, (See Commissioners, Jury, Just Compensation, Practice, Taking.)

measure of damages when entire tract taken, 463.

when part of a tract is taken, 471a.

when property is damaged or injured, but no part taken, 503d, 625.

when part taken just compensation includes damages to the remainder, 464.

whether benefits may be considered in reduction of damages, 465-471. (See Benefits.)

special constitutional provisions as to benefits, 472.

statutory provisions as to benefits and measure of damages, 473.

benefits or damages to a different tract, 474.

what constitutes a different tract, 475.

what are special benefits, 476.

time with reference to which the damages should be estimated, 477.

general principles in estimating value, 478.

what is meant by "market value," 478.

whether value for particular uses may be considered, 479.

some particular elements of value, 479a.

speculative inquiries as to a possible use or improvement of the property improper, 480.

may show capabilities of the property and uses to which it is adapted, 478-480.

may not show an intended use, 480.

whether proper to consider how the work is to be constructed, 481.

damage from construction, use and operation, 480a.

damages from improper construction and use to be excluded, 482.

damages from trespass, 482a.

when there are different estates or interests, 483.

apportionment between landlord and tenant, 483.

damages to franchise connected with the property taken, 484.

when the title is subject to restrictions, conditions, etc., 485.

whether value of trees, crops, minerals, etc., is to be considered, 486.

injury to business, loss of profits, etc., 487.

damage to fixtures and personal property; cost of removal, 488.

when one railroad crosses another, 489.

when one railroad takes the use of another's tracks, 490.

when a telegraph is erected on a railroad right of way, 490a.

when a highway crosses a railroad, 491.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

ASSESSMENT OF DAMAGES—Continued.

- when a railroad is laid across or along a turnpike, 492.
- when a railroad is laid in a public street, 493, 493a.
- damages from noise, smoke, cinders, etc., 493.
- measure of damages for change of grade, 494.
- for viaducts, causeways, etc., in streets, 495.
- various elements of damages when part of tract taken, 496.
- danger from fire, 497.
- cost of fencing, 498.
- interest, 499.
- when property which is subject to a public easement of way is taken for a street, 500.
- when the fee of an existing street is taken, 500a.
- enhancement caused by the work or improvement, 501.
- the right or estate acquired for public use should be considered, 502.
- extent of the use may be considered, 503.
- damages which would be irremediable if no property taken, 503a.
- damages by retarding or preventing increase of value, 503b.
- whether the effect of the entire work or improvement is to be considered or merely that portion thereof which is on the property taken, 503c.
- when rights or easements are impaired or destroyed but no land taken, 503e.
- when the taking produces damage which is preventable or necessitates a change, reconstruction or substitution of works, 503f.
- miscellaneous items of damages held allowable, 503g.
- cost of improvements which may be assessed against the property not to be considered, 504.
- expense of proceedings cannot be included, 504.
- miscellaneous items of damage held not allowable, 504.
- reserving rights or easements or requiring things to be done in lieu of money, 505.
- measure of damages in mill cases, 506.
- whether damages by an unlawful entry may be included, 507.
- where entry is made and works constructed before obtaining title, 507.
- when the owner is estopped to claim damages, 508.
- principles which should govern as to prospective damages, 566.
- right to recover for improvements made pending proceedings, 663.
- mandamus to compel, 614.

ASSESSMENT,

- for taxation, not evidence of value, 448.
- of part not taken to pay damages awarded, 476a.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

ASSUMPSIT,

when it lies on an award or judgment, 609.

ATTEMPT TO AGREE, (See Contract.)

necessity of, 301.

how alleged in petition, 301, 304.

how proven, 301, 304.

what is a sufficient, 302.

what the record should show respecting, 301.

how excused or waived, 303.

an agreement precludes proceedings, 304a.

ATTORNEY,

whether fees of, may be taxed as costs, 562a.

ATTORNEY GENERAL,

may sue to prevent pollution of public stream, 86, note 76.

AUTHORITY TO CONDEMN, (See Appropriation of Property.)

must emanate from the legislature, 237.

must be expressly given, 240.

not implied from authority to construct works, 240.

must provide for compensation, 452.

and for notice, 368.

may be given by general or special act, 241.

and to individuals or corporations, foreign or domestic, 242.

a personal trust and not transferable, 243.

of corporation, not lost by lease of its property and franchises,
244.

conflict between different authorities having power over the same
territory for the same purpose, 250.

whether it can be exercised when no mode pointed out, 252.

must be strictly pursued, 253, 509.

and strictly construed, 254.

successive appropriations, 259.

construction of statutes conferring authority, 255-260.

as to location, 255-258.

as to power to condemn for branch or lateral railroads, 256a.

as to power of street railroads to condemn, 256b.

as to power to condemn for roads and streets, 256c.

as to taking materials for repair of roads and bridges, 256d.

miscellaneous cases, 256e.

as to change of location, 258.

as to meaning of words "to," "from," "at" or "near," 257.

and of words "land," "ground," etc., 285.

of statutes prohibiting the taking of dwellings, 281, 284.

of other buildings and structures, 282, 284.

of gardens, orchards, yards and other enclosures, 283, 284.

as to what may be taken under. (See Appropriation of Property.)

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

AWARD OR JUDGMENT, (See Practice, Proceedings.)

- action on, 609, 610.
- conflicting claims to, 627.
- interest on, 499.
- damages presumed to be included in, 564-575.
 - statement of the question, 564.
 - general doctrine of the decisions, 565.
 - the same criticised, 566.
 - damages by construction of the works, 567.
 - by works on land to which the assessment does not relate, 568.
 - damages to a distinct tract, 568a.
 - by interfering with the right of support, 569.
 - by bringing a street to grade, 570.
 - by interfering with streams, 571.
 - or with surface or subterranean waters, 572.
 - by blasting, trespass and the like, 573.
 - by improper construction or negligent use of works, 574.
 - by changes in the plan of construction, 575.
 - by an increased use of the property, 575.
- claims based upon mistake in making the assessment, 576.
- statutes giving a remedy for damages not foreseen or estimated, 577.
- whether it should be joint or several, 515.

BARRIERS. (See Natural Barriers.)

BENEFITS,

- whether to be considered in estimating the just compensation, 465-471.
- the decisions classified, 465.
 1. Cases holding that benefits cannot be considered at all, 466.
 2. Cases holding that special benefits only can be set off against damages to the remainder, but not against the value of the land taken, 467.
 3. Cases holding that benefits, both general and special, may be set off against damages to the remainder, but not against the value of the part taken, 468.
 4. Cases holding that special benefits only may be set off against both the value of the part taken and damages to the remainder, 469.
 5. Cases holding that benefits, both general and special, may be set off against both damages to the remainder and the value of the part taken, 470.
- conclusions on the subject, 471.
- special constitutional provisions respecting, 472.
- statutory provisions respecting, 473.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

BENEFITS—Continued.

- to a different tract may not be considered, 474.
- what is meant by a different tract, 475.
- special, what are, 476.
- opinion of witnesses as to amount of, 436.
- whether to be considered in suits for damages by change of grade, 494.
- in case of railroads in streets, 493a.
- whether part not taken can be assessed to pay damages awarded for the taking, 476a.

BETTERMENTS. (See Special Assessments.)

BLASTING,

- damage by, whether a taking, 146.
- not included in the award, 573.

BOND,

- giving of, when necessary before instituting proceedings, 310.
- as security for just compensation, 458.
 - giving of does not suspend other remedies, 609.
 - remedy on, 617.
- may be required in case of appeals, 537.
- refunding, when may be required of owner, 616.

BOOM,

- is a public use, 71, 177.
- right of riparian owner to construct, 71.
- damages by the operation of, whether remediable, 64, 67.
- is a nuisance if it interferes with navigation, 69.

BRANCH RAILROADS. (See Lateral Railroads.)

BRIDGES AND FERRIES, (See Franchise, Taking.)

- are a public use, 168.
- cannot be taken for highway without express authority, 271.
- competing, when a taking, 136-138.
 - when a damaging, 228.
- when right to maintain is exclusive, an interference is a taking, 137.
- what is such an interference, 138.
- exclusive right to maintain protected by injunction, 642.
- authority to railroad to use streets includes right to use bridge forming part of street, 116.
- authority to construct over navigable rivers, 67a.
- authority to bridge navigable streams not implied, 273.
 - how construed, 66, 85.
- damage by interfering with current a taking, 66, 67, 67a, 85.
- right to recover for damage by bridge approaches, 100b, 223a.
- ferry landing on highway an additional burden, 141.
- whether street railroad over toll bridge, a taking, 141.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

BUILDING LINES,

cannot be established without compensation, 144a.

BUILDINGS, (See Improvements.)

construction of statutes prohibiting the taking of, 282-284.

BURIAL GROUND. (See Cemetery.)

BUSINESS,

injury to, not a taking, 147.

and not to be considered in estimating damages, 487.

regulating business and contracts, whether a taking, 156b.

damages to, by change of grade, 109.

CABLE RAILROADS, (See Street Railroads.)

whether a legitimate street use, 115d.

CALIFORNIA,

Constitutional provisions of, 17.

CANAL,

for transportation, a public use, 169.

for mining or irrigation, whether a public use, 169, 184.

is not a proper use of a street, 133.

taking railroad property for, 269.

may not be taken longitudinally without express authority, 271.

transfer of property and franchises pertaining to, 594.

removing structures from in case of abandonment, 598.

exclusive right to maintain, protected by injunction, 642.

CASE,

action of, when the proper remedy, 452, 624, 654.

CAUSEWAYS,

in streets, liability for damages by, 100b, 223a.

CEMETERY,

a public use, if not exclusive, 176.

when may be taken for other public uses, 272.

petition for, should show that its privileges are open to the public, 353.

CERTIORARI,

its nature and office generally, 542.

when it lies and when the proper remedy, 543, 557.

when it lies to set aside ordinance, 653f.

application for the writ, 544.

notice of the application should be given, 544.

adverse party may show cause against, 544.

when granted and when refused, 545.

form and effect of the writ, 546.

return to the writ, 547.

proceedings on the return, 548.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

CERTIORARI—Continued.

- what are sufficient grounds for quashing the proceedings, 301, 549.
- estoppel to prosecute, 556.
- appeals to the Supreme Court in, 550.
- costs in, 562.

CESTUI QUE TRUST,

- not a necessary party, 321.
- bill by to obtain damages awarded, 627.

CHANGE OF GRADE, (See Streets and Highways, Taking.)

- early English cases as to, 92.
- leading American cases as to, 94, 95.
- damages by, whether a taking, 94-104.
 - Ohio doctrine, 98.
 - Kentucky doctrine, 99.
- interfering with access, light and air by change of grade, 100a.
- damages caused by a change of grade for some purpose, other than the improvement of the street, 100b.
- damages by extraordinary changes of grade, whether a taking, 100b.
- to form approach to bridge, viaduct or tunnel, whether a taking, 100b.
- in connection with railroad in street, whether a taking, 121a.
- damages by interfering with right of support, 101.
 - by encroachment of filling, 102.
 - by interfering with surface water, 103.
 - or with streams, 104.
- damage to business, 109.
 - to pipes of water company, 109.
- liability for, when made for purpose of forming a dike, 100b.
- liability of turnpike company for, 109.
- liability for, when unlawful, 105.
 - or when negligently done, 106.
- power to make, a continuing one, 107.
- power of city to make compensation for, 108.
- statutes giving compensation for, 206b-218i.
 - are liberally construed, 216, 218a.
 - what constitutes a change within purview of, 211, 217, 218a, 218c.
 - remedy under, 207, 208, 210, 213, 218d, 218e.
 - when the right accrues, 208, 209, 211, 214, 217, 218e.
 - measure of damages, 208, 209, 217, 494.
 - estoppel to claim damages under, 217, 218g.
 - whether statute applies to changes ordered before but made after act takes effect, 218f.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

CHANGE OF GRADE—Continued.

may recover for, under words "damaged" or "injured," in constitutions, 223, 224.

also for viaducts, tunnels, causeways, bridge approaches, etc., 223a.

when the right to compensation accrues, 667.

injunction to prevent change, 638.

whether one action or successive actions for damages by, 653b (5 and 6).

CHANGE OF USE, (See Taking.)

when a taking, 140, 141.

when unauthorized, 596.

CHARGES, (See Police Power.)

regulation of, whether a taking, 156c.

CHOSSES IN ACTION,

may be taken, 263.

CHURCHES,

property of may be taken for public use, 272a.

CINDERS,

injury by, whether a taking, 151a.

COLLATERAL ATTACK,

upon proceedings, 600-606.

general considerations, 600.

if jurisdiction exists, errors do not vitiate as a rule, 601.

exceptions to the rule, 603.

what is essential to jurisdiction, 602. (See Jurisdiction.)

what the record should show, 604.

parol evidence to aid or impeach the record, 605.

estoppel to question the proceedings collaterally, 606.

COLLEGES. (See Educational Institutions.)

COLORADO,

constitutional provisions of, 18.

COLOR OF TITLE, (See Prescription.)

defective condemnation proceedings may be, 300b.

COMMERCIAL RAILROADS, (See Railroads.)

definition of, 110a.

COMMISSIONERS, (See Jury, Practice, Proceedings, Report or Verdict.)

summoning, selecting and appointing, 400-404.

mandamus to compel appointment of, 404.

setting aside order of appointment, 404a.

qualifications of, 405.

what the record should show as to their qualifications, 406.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

COMMISSIONERS—Continued.

- waiver of objections, to commissioners, jurors, etc., 407.
- vacancies, effect of and how filled, 408.
- must take the oath required, 411.
- form and sufficiency of the oath, 412.
- waiver of defective oath, 414.
- what the record should show as to oath taken, 413.
- time and place of meeting, 415.
- right of, to hear evidence, 416.
- mode of procedure by, 416.
- what questions may be considered by, 417.
- adjournments of, 418.
- whether a majority may act or decide, 419.
- receiving ex parte communications, 420.
- receiving entertainment, 421.
- other improprieties, 422.
- irregularities of, effect upon report, 522.
- power of, to reconsider or amend report, 423.
- may not reserve easements or require things to be done in lieu of giving money, 505.

COMMON LAW,

- action for damages when proper, 607-608.
- action for value of lands appropriated without proceedings, 623.
- rule of, as to surface water, 88.

COMPENSATION, (See Just Compensation.)

COMPLAINT, (See Petition.)

CONDEMNATION, (See Appropriation of Property, Authority to Condemn, Proceedings.)

CONDEMNATION PROCEEDINGS, (See Proceedings.)

- though defective, may be color of title, 300b.

CONDITIONS, (See Contracts.)

- As to conditional awards, 516.

CONFIRMATION, (See Report or Verdict.)

- form and effect of the order of, 532.
- setting aside order of, 534.

CONGRESS,

- exercise of eminent domain power by, 261b.

CONNECTICUT,

- Constitutional provisions of, 19.
- statutes of, giving damages for change of grade, 206b.

CONSEQUENTIAL DAMAGES, (See "Damaged," etc., Taking.)

- whether a taking, 151a.
- statutes imposing liability for, 246.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

CONSOLIDATION OF CASES, 427.

CONSTITUTIONAL LAW, (See Constitutional Provisions.)

- validity of eminent domain statutes generally, 261c.
- validity of statutes barring right to compensation, by lapse of time, 664, 665b.
- validity of laws imposing additional liabilities upon corporations, 246.
- taking for other than a public purpose violates fourteenth amendment of Federal Constitution, 206a.
- questions under Federal Constitution, 558a.

CONSTITUTIONAL PROVISIONS,

- of the different States, 14-52a.
- States with no provisions, 10.
- not declaratory, but limitations, 10.
- impliedly forbid taking for private use, 157.
- ambiguities of, 53.
- whether they execute themselves or await legislation, 12.
- change of constitution giving right to jury trial is self-executing, 311.
- as to compensation apply only to the power of eminent domain, 13.
- provision in Federal constitution does not apply to the States, 11.
- to be liberally construed in favor of private rights, 341.
- effect of change in, upon works in progress and pending proceedings, 12.
- changes imposing additional liabilities, 12, 246.
- value of English precedent in construing, 93.
- benefit of, may be waived, 167.
- meaning of the word property in, 55.
- construction of, as to what constitutes a taking, 53-156. (See Taking.)
 - a public use, 157-206. (See Public Use.)
 - just compensation, 451-508. (See Assessment of Damages, Just Compensation.)
 - damage or injury to property not taken, 221-236. (See "Damaged," "Injured," etc.)
 - as to whether benefits may be considered, 464-476. (See Benefits.)
- application of, to the right of trial by jury, 311-313.
 - to the question of notice, 341, 363-368. (See Notice, Parties.)
 - to the question of costs, 559. (See Costs.)
 - to the question of possession pending proceedings, 578-583.
 - to the right of appeal, 536.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

CONSTRUCTION, (See Constitutional Provisions, Contracts, Statutes.)

of contracts granting land for public use, 299.

statutes giving authority to condemn are strictly construed, 254.

provisions as to compensation and remedy are liberally construed, 254a.

CONSTRUCTION OF WORKS,

damages by, whether included in the assessment, 567.

damage by, on land to which the assessment does not relate, 568.

damages from changes in plan of, 575.

will be enjoined until compensation paid, 633.

in a particular manner when enjoined, 639.

CONTRACTORS,

cannot exercise power of eminent domain vested in principal, 243.

power to take material, etc., 243.

CONTRACTS,

are subject to power of eminent domain, 264, 265.

power to obtain property by, 288.

parties must be competent to make, 289.

validity of deeds and contracts,—fraud, public policy, etc., 289a.

delivery and acceptance, 289b.

sufficiency of description in, 290.

the title acquired by, 291.

effect of words in, as creating a condition precedent or subsequent, 292, 292a.

construction of, and compliance with conditions, 292a.

reservations, restrictions, exceptions, etc., 292b.

effect of conveyance as to damages to other property, 293.

evidence of oral stipulations cannot be received to modify written, 295.

may be enforced by specific performance, 296.

may be enforced, by and against whom, 297.

oral, validity and effect of, 298.

particular contracts construed, 299.

notice of unrecorded deeds and contracts, 297a.

with promoters, 297b.

reserving right of way in grants by railroads and others, 299a.

relating to property, how affected by taking for public use, 483.

CONVEYANCE, (See Contract.)

of land taken is subject to claim for compensation, 621.

of property, when competent evidence of value, 444.

CORPORATION,

foreign or domestic, may be authorized to condemn, 242.

may condemn, though all its property and franchises leased, 244.

property and franchises of, may be taken, 274.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

CORPORATION—Continued.

- power of, to obtain property by agreement, 288.
- legal incorporation of, how questioned and proved, 391.

COST,

- of property, when competent evidence of value, 444.

COSTS,

- general principles in regard to, 559.
- in the absence of special statutory provisions, 560.
- under particular statutes, 561.
- in case of appeals, reviews, etc., 562.
- items of costs allowable, attorneys' fees, expert witnesses, 562a.
- miscellaneous cases as to, 563.

COURTS, (See Supreme Court.)

- power of, to amend or modify report of commissioners or confirm in part, 529.
- of United States, jurisdiction of, 315.

COUNTY COMMISSIONERS,

- action of, upon report, 519.

COVENANT, (See Contract, Landlord and Tenant.)

- of city for quiet enjoyment not broken by itself taking, 264.

CRANBERRY CULTURE,

- whether a public use, 183a.

CROPS,

- whether value of, to be considered in estimating damages, 486.

CROSSINGS,

- of highway by railroad, right to compensation, 118.
 - may be done under a general authority, 270.
- of one railroad by another under a general authority, 268.
 - measure of damages, 489.
 - injunction to prevent, 644.
 - construction and application of statutes regulating right and manner of crossing, 268a.
- of commercial railroad by street railroad, whether a taking, 121c.
- proper description, in proceeding to condemn, 352a.
- of railroad by highway, measure of damages, 491.
- specific performance of agreements to build, 296.
- expense of constructing, as an element of damage, 496.
- right to private crossing over railroad, 588a.
- remedy for failure to construct or maintain private crossing, 653a.
- duty of railroad crossing highway to restore, 270a.
- remedy to compel restoration of crossing by railroad company, 653.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

CROSS-PETITION,

when proper, 360.

CUL DE SAC,

land may be taken for, 166.

DAM, (See Mills and Water Power.)

suit to abate, unless damages paid, 619.

no liability for repairing dam and making it tight though effect is to raise water and increase flooding, 67, note 15.

DAMAGES,

as to assessment and measure of. (See Assessment of Damages.)
as to right to recover. (See "Damaged," etc., Just Compensation, Taking.)

measure of, for railroad in street, 121, 493.

for water taken, 62, 13.

for breach of agreement to fence, 296.

to build crossing, 296.

to build depot, 296.

to business by change of grade, 109, 487.

release of, 294.

acceptance and payment of as an estoppel, 606. (See Estoppel.)

conveyance of one tract does not bar claim for damages to a different tract, 293.

opinions of witnesses as to amount of, 436.

what is a sufficient finding as to, in report or verdict, 512.

inadequate or excessive, as ground for setting aside report or verdict, 524, 553.

statutes giving a remedy for damages not foreseen or estimated, 577.

right to, as between grantor and grantee, 318, 319, 625, 627, 627a.

as between heirs, devisees and personal representatives, 320, 627, 627a.

as between mortgagor and mortgagee, 324, 627, 627a.

as between husband and wife, 322, 323.

when vested are beyond legislative control, 612.

when the right to, accrues, 653b, 665-669.

right to recover, when proceedings abandoned, 658, 659.

right to recover additional damages, 564-577. (See Award or Verdict.)

are a lien until paid, 620.

special, what are, 227, note 32, 653e.

"DAMAGED," "INJURED," "INJURIOUSLY AFFECTED," (See Taking.)

the terms synonymous, 222.

statutes giving damages for change of grade, 206b-218i.

Connecticut, 206b.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

"DAMAGED," "INJURED," "INJURIOUSLY AFFECTED"—Cont'd.

- Indiana, 207.
- Iowa, 208.
- Kansas, 208a.
- Maine, 208b.
- Massachusetts, 209.
- Minnesota, 210.
- Missouri, 211.
- New Jersey, 212.
- New York, 213.
- Pennsylvania, 214.
- Rhode Island, 215.
- South Carolina, 215a.
- Tennessee, 216.
- Washington, 216a.
- Wisconsin, 217.
- other States, 218.
- statutes giving damages for railroads in streets, 219.
 - in other cases, 220.
- constitutional provisions giving compensation for property
 - "damaged," "injured," etc., 15, 16, 17, 18, 22, 23, 27, 28, 34, 35, 35a, 36, 41a, 44, 46a, 48, 50a, 50b, 51, 52a.
- comments thereon, 221.
- construction of, as applied to damages caused by change of
 - grade, 223, 224.
 - by railroads in streets, 225.
 - by other uses of streets, 226.
 - by vacation of street, 226a.
 - by interfering with ways not in front of property, 227.
 - by competing ferries and bridges, 228.
 - by impeding access by water, 229.
 - by operation of railroad, 230.
 - by vibrations, dust, smoke, cinders, etc., 230.
 - by obstructing light, 231.
 - miscellaneous cases, 231.
- the words intended to enlarge the right to compensation, 232.
- should be liberally construed, 232a.
- and include any physical injury not held to be a taking, 233.
 - any interference with rights appurtenant to property, not held to be a taking, 234.
 - and generally any damage arising from an interference with a right public or private not held to be a taking, 235.
- when claim based on interference with public right, plaintiff's damages must be special, 235a.
- different views regarding the proper construction of the words "damaged" or "injured," 235b.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

- "DAMAGED," "INJURED," "INJURIOUSLY AFFECTED"—Cont'd.**
damages not embraced by the words in question, 236.
remedy to recover for property "damaged," injured, etc., 624.
measure of damages in such cases, 625.
injunction to prevent damaging before compensation, 645.
whether one action or successive actions for damage or injury to property, 653b.
property may be damaged though it has increased in value, 493a, 503b.

DAMNUM ABSQUE INJURIA. (See "Damaged," etc., Taking.)

DEBT, (See Remedies.)

action of, will lie on award or judgment, 609.

DEDICATION,

- definition of, 300c.
to what public uses it applies, 300c.
railroad cannot take by, 300c.
statutory dedications, 300d.
construction of map or plat as to public use intended, 300e.
common law dedications, 300f.
who may make dedication, 300g.
intent of the owner, 300h.
acceptance by the public, 300i.
miscellaneous matters relating to dedication, 300j.
not a, to recognize a street by map or deeds after proceedings to establish it, 610.
property dedicated for one purpose cannot be used for a different purpose, 140.

DEED, (See Contracts.)

- of right of way, sufficiency of description, 290.
of one tract does not bar recovery of damages to a different tract, 293.

DEFENCES, (See Practice.)

- to application, 386-399.
to suit on an award or judgment, 610-612.

DEFENDANT. (See Parties.)

DEFINITION,

- of "abutting owners," 91d.
of "certiorari," 542.
of "commercial railroads," 110a.
of "dedication," 300c.
of "due process of law," 365.
of "elevated railroads," 115b, note 24.
of "due process of law," 365.
of "eminent domain," 1, 2.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

DEFINITION—Continued.

- of a "franchise," 135.
- of "good cause," 520.
- of the phrase "just compensation," 462.
- of "local authorities," 116, note 64.
- of "market value," 478.
- of "navigability," 76a.
- of "market value," 478.
- of "owner," 335.
- of "the police power," 6.
- of "property," 54, 58.
- of a "stream," 60.
- of "street," "road," "highway," 91b.
- of "street railroad," 110a.
- of "sufficient cause," 520.
- of a "tax," 4.
- of the words "to," "from," "at" or "near" in statutes relating to location, 257.
- of the "war power," 8.

DELAWARE,

- constitutional provisions of, 20.

DELEGATION,

- of the authority to condemn, 243.

DEMURRER,

- to the petition or application, 389.

DEPOSIT,

- as security for just compensation, 458.
- of damages for the purpose of obtaining possession, 579, 580.
- at whose risk, 580.
- right of owner to immediate possession of, 581.
- proceedings by owner to obtain, 616.

DEPOT,

- land may be taken for, 170. (See Public Use.)
- specific performance of agreements to build, 296. (See Specific Performance.)
- may not be built in street, 117.

DESCRIPTION,

- in petition, of property taken or location, general requisites, 350.
 - descriptions held sufficient, 351.
 - descriptions held insufficient, 352.
- sufficiency of, in deeds and contracts, 290.
- in proceedings to condemn joint use of property, 352a.
 - or to take rights or easements, 352a.
- in report or verdict generally, 510.
 - in case of highways, 511.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

DESTRUCTION, (See Necessity.)

- of building, to prevent spread of fire, not a taking, 7.
- of property in war not a taking, 8.

DEVISEES,

- when proper parties, 320.
- when entitled to the compensation, 320.

DIKES. (See Levees, Dikes, etc.)

DISCONTINUANCE, (See Abandonment.)

- of proceedings, right to, before completion, 655.
 - whether absolute, 655.
 - as affected by possession, 655.
- on appeal; appellant may dismiss appeal, 541.
- petitioner may dismiss petition, 541.

DIVERTING,

- of stream a taking, 62.
- of public waters, a taking, 84d.

DOWER, (See Parties.)

- nature of, in its different stages, 323.
- whether owner of, should be made a party, 323.

DRAINS,

- referred by some to police power, 186.
 - but properly to eminent domain power, 187.
 - the question of public use, 185-199.
 - decisions of California, 189.
 - of Illinois, 189a.
 - of Indiana, 190.
 - of Iowa, 191.
 - of Kentucky, 191a.
 - of Michigan, 191b.
 - of Nebraska, 192.
 - of New Jersey, 193.
 - of New York, 194.
 - of North Carolina, 195.
 - of Ohio, 196.
 - of Oregon, 197.
 - of Washington, 197a.
 - of Wisconsin, 198.
 - of other States, 199.
 - description of location in petition for, 350-352.
 - cannot be laid along right of way of railroad, 269.
 - interference with, on farms an element of damage, 496.
- DUE PROCESS OF LAW,**
- what is, 341, 365.
 - requires notice in condemnation proceedings, 365.
 - requires compensation for property taken for public use, 10.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

DWELLINGS,

construction of statutes prohibiting the taking of, 281, 284.

EASEMENT,

destruction or impairment of, a taking, 142.

are subject to eminent domain power, 262a.

EDUCATIONAL INSTITUTIONS,

property of may be taken, 265.

EJECTMENT,

when it lies, 647.

when owner estopped to maintain, 648.

when execution will be stayed to enable defendant to condemn, 647.

in case of wrongful occupation of street, 647a.

ELECTRICITY, (See Telegraph and Telephone; Street Railroads.)

apparatus for distributing may be laid in streets, 130.

electric wires over land, a taking, 149.

electric light wires, whether a proper street use, 131a.

wires for other purposes, 131a.

electrical interference, when a taking, 139a.

priority of right to use street in case of grants to different companies, 306a.

compelling electric wires to be placed underground, not a taking, 156e.

electric wires in streets, injunction to prevent, 637.

ELECTRIC RAILROADS, (See Electricity, Street Railroads, Taking.)

whether a legitimate street use, 115f.

ELECTRIC WIRES, (See Electricity, Street Railroads, Taking, Telegraph and Telephone.)

ELEVATED RAILROADS, (See Damaged, etc., Railroads, Street Railroads, Taking.)

what constitutes, 115b, note 24.

whether may be built under general railroad laws, 115b, note 25, 256b.

in streets, not a legitimate use, 115b.

right of abutting owner to compensation, 115b.

measure of damages, 493.

injunction to prevent, 635a.

EMINENT DOMAIN, (See Appropriation of Property, Authority to Condemn, Taking.)

origin of the phrase, 3, note 7.

definitions of, 1.

definitions of, considered, 2.

nature of the power, 3.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

EMINENT DOMAIN—Continued.

- not a reserved right or estate, 3.
- not limited to a taking for public use, 1.
- a necessary attribute of sovereignty, 3, 237.
- not possessed by territorial governments unless by grant, 237.
- distinguished from taxation, 4.
 - from special assessment or betterments, 5.
 - from the police power, 6.
 - from the destruction of property in case of necessity, 7.
 - from the war power, 8.
- power of, delegated by the people to the legislature, 9.
- but limited by the constitution, 10.
- constitutional limitations of the different States respecting, 14-52a.
- power of, vested in the legislature, 237.
- and can only be exercised by virtue of legislative enactment, 237.
- the time and manner of its exercise in discretion of legislature, 237.
- the necessity of its exercise for the legislature, 238.
- those vested with the power the sole judges of when it shall be exercised, 239.
- and of the extent and propriety of exercising it, 239.
- all property subject to the power of, 262 et seq.
- power of, cannot be bargained away, 261a.
- exercise of, by Congress, 261b.
- statutes conferring power must be strictly pursued, 253.
- and strictly construed, 254.
- mill acts an exercise of, 182, 183.
- drainage laws an exercise of, 187.

ENTRY,

- what constitutes, 583, 662.
- before complying with the law enjoined, 631.

EQUITY, (See Injunction, Specific Performance.)

- jurisdiction of, in matter of joint use of railroad tracks, 267d.
- no remedy in, for correction of errors in proceedings, 557.
- relief in, on account of error, mistake, new evidence, etc., 652.
- bill to make costs a lien on land taken sustained, 563.
- bill to compel an assessment of damages, 615.
- remedy in, for just compensation by suit to enjoin construction or use of works, 625a.

ERROR, (See Appeal, Certiorari, Estoppel, Waiver, Writ of Error.)

- when it vitiates the proceedings collaterally, 601, 603.
- no defence to suit on award, 610.
- no relief in equity on account of, 652.

ESTATE, (See Appropriation of Property.)

- what estate may be taken, 277, 278.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

ESTOPPEL, (See also Acquiescence, Waiver.)

- to claim damages for railroad in street, 120.
- to claim damages for change of grade, 218h.
- to complain of want of culvert in railroad embankment, 89a.
- by conveyance of one tract to claim damages to another, 393.
- to deny title, 441.
- to recover damages for property taken or affected, 508.
- to insist upon irregularities in the proceedings, 514.
- to object to the report or verdict, 531.
- to obtain writ of certiorari, 545.
- to prosecute an appeal or certiorari, 556.
- to question the proceedings collaterally, 606.
- to recover the damages awarded, 610.
- to maintain ejectment, 648.

EVIDENCE, (See Assessment of Damages.)

- the general rules of, apply, 430.
- competency of, generally, 431.
- the burden of proof, 426, 432.
- competency of witnesses generally, 433.
- disqualifications at common law, 433.
- limiting the number of witnesses, 434.
- opinions as to value, 435.
 - as to amount of damages or benefits, 436.
 - who competent to give such opinions, 437.
 - value of such opinions, 437.
 - opinions as to other matters, 438.
- admissions and declarations, 439.
- whether owner must prove title, 440.
- what is sufficient proof of title, 442.
- estoppel to deny title, 441.
- sales of similar property, 443.
- proving effect upon other property, in suits for depreciation, 443a.
- cost of the property or of improvements thereon, 444.
- sale of property damaged after the damaging, 445.
- offers to buy or sell, 446.
- purchases by the party condemning, 447.
- assessment for taxation, 448.
- reports of commissioners, 449.
- value for particular uses, 479.
- miscellaneous points in regard to evidence, 450.
- erroneous rulings in regard to, as grounds for setting aside the report or verdict, 523.
- parol, to aid or impeach the record, 605.
- right of commissioners to hear, 416.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

EXCEPTIONS,

to the petition or application, 389.

EXCLUSION,

any interference with right of, a taking, 149.

EXCLUSIVE RIGHTS AND PRIVILEGES, (See Franchises.)

grant of, held against public policy, 289a.

EXECUTION,

on award or judgment, when proper, 533.

stay of, in ejectment to enable defendant to condemn, 647.

EXECUTORS,

deed by when valid, 289.

as parties, 320.

EXPERT TESTIMONY, (See Evidence, Opinions.)**FARM CROSSINGS, (See Crossings.)**

injunction to prevent railroad closing, 296.

FEDERAL CONSTITUTION, (See Appeals, Constitutional Law, Constitutional Provisions.)

provisions of as to eminent domain do not apply to States, 11.

FEE,

may be taken, 277.

whether acquired under particular statutes, 278.

rights of owner of, in land taken for railroad purposes, 584-588.

for streets and highways, 589-590.

for turnpikes, 591.

for flowage by dam, 592.

for other public uses, 592.

when taken land does not revert, 596.

rights of condemnor when fee of property taken, 593.

of streets, when in public is in trust for street uses only, 91k.

distinction based on, as to rights of abutting owners, 911,
113-115a.

measure of damages for the taking of, 500a.

FENCES,

cost of as an element of damage, 498.

specific performance of agreements to build, 296.

FERRY, (See Bridges and Ferries.)

exclusive right to maintain protected by injunction, 642.

FILING,

of the petition, necessity of, 345.

FIRE,

danger from, an element of damage, 497.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

FIRE LIMITS,

establishing of, not a taking, 156.

FISH CULTURE,

whether a public use, 183a.

FISHERY,

interfering with, held not a taking, 85.

FIXTURES,

questions in regard to, in estimating damages, 488.

FLOODING, (See Mills, Taking.)

of land is a taking, 67, 71, 87.

when owner of fee may not prevent by filling, 592.

FLOOD WATERS. (See Surface Water.)**FLORIDA,**

constitutional provisions of, 21.

FORCED SALES,

of property held for public use, effect of, 595.

FORCIBLE ENTRY AND DETAINER,

when it will lie, 654.

FORDING,

destroying of, held not a taking, 85.

FORECLOSURE,

of property held for public use, 594, 595.

of railroad, effect upon property and franchises, 596.

FORFEITURES, (See Contracts.)

for breach of condition, 292a.

of grant by delay, 292c.

FOREIGN CORPORATIONS, (See Corporations.)

may be vested with power to condemn, 242.

may acquire right to land by prescription, 300.

FRANCHISE,

definition of, 135.

may be taken or impaired for public use, 136-139, 274, 275.

what amounts to a taking of, 136-139.

when not exclusive, 136.

when exclusive,—bridges and ferries, 138.

railroads, turnpikes, etc., 139.

forfeiture of, not a taking, 139.

exclusive, power of municipality to grant, 116.

remedy in equity to protect franchise in street, 645d.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

FRANCHISE—Continued.

- damage to, connected with property taken, 484.
- infringement of exclusive, prevented by injunction, 642.

FRAUD,

- effect of, in obtaining release, 294.
- consent of municipality procured by, invalid, 116.
- impeaching contracts for, 289a.

FREEHOLDERS,

- who are, within statutes as to qualifications of jurors, etc., 405.

FREIGHT-HOUSES,

- land may be taken for, 170.

GARDENS,

- construction of statutes prohibiting the taking of, 283, 284.

GAS,

- works to supply, a public use, 173.
- pipes for, in streets, when a taking, 129.
 - when enjoined, 637.
- works, when may be taken for other public uses, 272.
- what a violation of exclusive right to furnish, 139.

GAS PIPES,

- damage to by grading or improving streets, 121e.
 - by building sewers, 121f.

GEORGIA,

- constitutional provisions of, 22.

“GOOD CAUSE,”

- definition of, 520.

GRADE, (See Change of Grade.)

- duty of city to establish, 109.
- power to establish, a continuing one, 107.
- what constitutes an establishment of, 207, 208, 209, 211, 215, 216, 218b.

GRAIN ELEVATORS,

- when a public use, 172a.

GRANTEE,

- cannot exercise grantor's power to condemn, 243.

GRANTOR AND GRANTEE,

- which the proper party, 318, 319.
- which entitled to the compensation, 318, 319, 334, 625.

GRASS, (See Herbage.)

GRIST-MILL, (See Mills and Water Power.)

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

GROUND,

meaning of, in statutes giving authority to condemn, 285.

GUARDIAN,

deed by, without order of court, void, 289.

GUARDIAN AD LITEM,

should be appointed for infants, 328.

HARBOR LINES,

establishing of, not a taking, 84b.

HEALTH,

works to promote, a public use, 201.

HEIRS,

when proper parties, 320.

when entitled to the compensation, 320.

HERBAGE,

right to on railroad right of way, 587.

on streets and highways, 590.

HEIGHT OF BUILDINGS,

limiting height of buildings, whether a taking, 156.

HIGHWAYS, (See Streets and Highways.)**HOMESTEAD,**

whether husband may convey right of way through, 289.

how divested by proceedings, 322.

HORSE RAILROADS, (See Railroads, Street Railroads.)

whether a legitimate use of a street, 115c.

whether the abutting owner is entitled to compensation, 115c.

cannot occupy streets without authority, 115c, 116.

authority, how given and construed, 115c, 116.

crossing of by other railroads, 268, 268a, 644.

injunction to prevent the laying or operating of, in streets, 636.

to prevent the crossing of, by other railroads, 644.

to prevent use of tracks of, by other roads, 643.

to protect exclusive right of, in street, 642.

HUSBAND AND WIFE,

as parties, 322.

husband's deed of separate property of wife invalid, 289.

inchoate dower of wife, how divested, 323.

power of husband to convey homestead, 289.

notice to husband does not bind wife, 380.

IDAHO,

constitutional provisions of, 22a.

ILLINOIS,

constitutional provisions of, 23.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

IMPROVEMENTS,

- right to make, pending proceedings, 144, 663.
- how described in notice, 376.
- right to, when land reverts, 598.

INDIANA,

- constitutional provisions of, 24.
- statutes of, giving damages for change of grade, 207.

INDIANS,

- lands of, may be taken for public use, 264a.

INDICTMENT,

- against a railroad for failure to restore highway, 653.

INFANTS,

- as parties, 328.
- appointment of guardian ad litem for, 328.

INJUNCTION,

- to prevent entry or interference under invalid statute, 452.
- to prevent the further use of property until damages paid, 618, 634.
 - when withheld to enable a condemnation to be had, 634.
- to prevent entry or construction before complying with the law, 631.
 - grounds of jurisdiction, 632.
 - when refused, 633.
 - plaintiff's title must be clear, 633.
- to prevent entry under unconstitutional law, 631.
- to prevent laying or operating steam railroads in streets, 635.
- to prevent the construction or operation of elevated railroads in streets, 635a.
- to prevent laying or operating street railroads in streets, 636.
- summary as to injunctive relief in case of railroads in streets, 636a.
- some questions of practice in bills to enjoin railroads in streets, 636b.
- to prevent other uses of streets, 637.
- to prevent a change of grade, 638.
- on behalf of public authorities to prevent unlawful use of street, 119, 645e.
- to prevent misuse or diversion of public streets and grounds, 645b.
- to prevent vacation of street, 637a.
- to prevent the construction of works in a particular manner, 639.
- to prevent the removal of materials or trees from a street, 637.
- to prevent the use of adjacent property not included in the condemnation, 640.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

INJUNCTION—Continued.

- to prevent an interference with water rights, 63, 641.
- to prevent pollution of stream by sewerage, 65, note 72.
- to prevent erection of unauthorized bridge, 67a.
- to prevent the infringement of a franchise or exclusive right, 642.
- to prevent taking property already devoted to public use, 643.
- to prevent one railroad crossing another, 644.
- to prevent injury or damage to property not taken, 645.
- to prevent the prosecution of proceedings, 646.
- order should not be too broad, 634.
- right to, when barred by conduct of owner, 633.
- questions of practice in suits to enjoin the taking or damaging of property, 645a.
- to restrain action of owner for possession, 296.

INJURIOUSLY AFFECTED, (See "Damaged," etc.)

INJURY, (See "Damaged," etc., Taking.)

INSTRUCTIONS, 410, 428.

INTEREST,

- the question of interest generally, 499.
- allowance for, in estimating damages, 499.
- on the award or judgment, 499.

IOWA,

- constitutional provisions of, 25.
- statutes of, giving damages for change of grade, 208.

IRRIGATION,

- works for, a public use, 169, 202.

IRREGULARITIES,

- in proceedings, no defence to suit on the award, 610.

JAIL,

- use of street for, may be enjoined, 133, 637.

JARRING. (See Vibrations.)

JOINDER,

- of parties, 336, 337.
- of different improvements in one proceeding, 359.
- of different owners or different tracts in one appeal, 537, 538.

JOINT TENANTS AND TENANTS IN COMMON,

- as parties, 327, 538.

JOINT USE OF TRACKS, (See Railroads, Street Railroads.)

- right of one company to condemn the use of another's tracks, 207a, 267d.
- cannot be taken without express authority, 141b.
- whether may be provided for under police power, 141b.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

JOINT USE OF TRACKS—Continued.

- description in proceeding to condemn, 352a.
- measure of damages when one company takes the use of another's tracks, 490.
- jurisdiction of equity to regulate, 267d.

JUDGMENT,

- nature of the lien of, 325.
- in condemnation proceedings, form of, 533.
- interest on, 499.
- action on, 609, 610.
- when final as respects an appeal, 551.

JUDGMENT CREDITOR,

- whether a necessary party, 325.
- may enforce lien if not made a party, 629.

JUDICIARY,

- what constitutes a public use, a question for, 158.

JURISDICTION, (See Venue.)

- of U. S. courts, 315.
- what essential to, 602.
- notice essential to, 365, 369, 602.
- when acquired, errors do not vitiate the proceedings collaterally, 601.

JURORS, (See Commissioners.)

- qualifications of, 405.

JURY, (See Practice, Report or Verdict.)

- right to, in condemnation cases, 311, 312.
- special, disagreement of, 409.
- presiding officer of, his qualifications, duties, etc., 410.
- view of premises by, 424.
- effect to be given the view, 425.
- trial by, right to open and close, 426.
- instructions to, 428.
- not bound by the opinions of witnesses as to value, 435.

JUST COMPENSATION, (See Assessment of Damages, Taking.)

- meaning of the phrase, 462.
- right to compensation when the constitution is silent, 451, 608.
- statutes which authorize a taking must provide for compensation, 452.
- what constitutes a sufficient provision for compensation, 453a.
- taking for public roads without compensation in N. J. and Penn., 453.
- time of making compensation under express constitutional provisions, 454.
- when the constitution is silent on the subject, 455, 456, 608.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

JUST COMPENSATION—Continued.

- distinction between a taking by the public and by private parties as to securing the compensation, 457.
- what is sufficient security when taking by private parties, 458.
- conclusions as to time of making compensation, 459.
- must be made in money, 460, 505.
- the legislature cannot fix nor prescribe rules for its computation, 461.
- measure of damages and elements to be considered, 463-508.
(See Assessment of Damages.)
- the question of benefits, 465-476. (See Benefits.)
- whether part not taken may be assessed or taxed to pay damages awarded, 476a.

KANSAS,

- constitutional provisions of, 26.
- statutes of, giving damages for change of grade, 208a.

KENTUCKY,

- constitutional provisions of, 27.
- doctrine of as to damage by change of grade, 99.

LACHES, (See Acquiescence, Waiver.)

- as a bar to relief by injunction, 635.

LAKES AND PONDS,

- title to bed of, 76.
- rights of riparian owners on, 76 et seq., 84c.
- rights of owners upon outlets of, 62, note 51.
- may not obstruct subterranean outlet of, 67, note 14.

LAND,

- meaning of, in statutes giving authority to take, 285.
- land and all rights and easements appurtenant thereto are subject to eminent domain power, 262a.

LANDLORD AND TENANT,

- apportionment of damages between, 483, 627, 627a.
- effect of taking upon covenants of lease, 483.
- apportionment of rent, 483.
- one cannot recover from the other on ground of error in division, 627, 627a.
- both necessary parties, 326.
- may be joined in the same proceeding, 336.
- lessee cannot exercise lessor's authority to condemn, 243.

LATERAL RAILROADS,

- when a public use, 171. (See Public Use.)
- construction of statutes as to power to build, 256a.

LEADING CASES,

- as to what constitutes a taking, 58, 59.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

LEGISLATURE, (See Authority to Condemn, Statutes.)

- not limited except by the constitution, 10.
- is vested with the eminent domain power, 237.
- has plenary power with reference to time and manner of its exercise, 237.
- may confer authority to condemn on whom it pleases, 242.
- power to impose additional liabilities, 246.
- power to legalize defective proceedings, 261.
- cannot surrender or preclude itself from the exercise of the eminent domain power, 261a.
- may determine what estate or interest may be taken, 277.
- power of, over inchoate dower, 323.
- cannot declare waters public so as to destroy riparian rights without compensation, 68, 85a.
- power to regulate and control railroads and corporations, 156-156f.
- power of, to remove disqualifications of interest in commissioners, etc., 405.
- cannot fix the compensation or prescribe rules for its computation, 461.
- may authorize confirmation of report or verdict to be set aside, 534.
- has plenary power in granting and regulating appeals unless limited by constitution, 537.
- may open proceedings for review after their final termination, 558.
- cannot take away vested right to damages, 612.

LEVEES, DIKES, ETC.,

- whether a public use, 200.
- easement of, in Louisiana, 150.

LIABILITY, (See "Damaged," etc., Taking.)

- additional, created by change in constitution, 12.
- imposed by statute, 246.

LICENSE,

- oral, effect of, 298.
- to hunt and fish, not an interest requiring compensation, 332.

LIEN, (See Judgment Creditors, Parties.)

- how enforced, when owner not made a party, 629.

LIFE ESTATE,

- how valued, 483, 627.

LIFE TENANT,

- deed from does not affect reversioner, 289.
- may authorize use of land, 289.
- is a necessary party, 326.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

LIFE TENANT—Continued.

- may be joined with reversioner, 336.
- held entitled to use of damages for life, 627.

LIGHT,

- obstruction of, actionable under word damaged in constitution, 231.
- right of abutting owner to, 91e-91l.
- interference with, by change of grade, 100a.

LIGHTHOUSE,

- in aid of navigation, may be built in bed of stream without compensation to riparian proprietor, 71, note 56.

LIMITATIONS,

- to exercise of powers, 247.
- to claim for damages by change of grade under statute, 215.
- to common law suits for damages to property, 665d.
- in respect to taking appeals, 555.
- within which to make the claim for compensation, 664.
- when the statutory remedy accrues, 665.
- when the remedy accrues for consequential damages, 666.
- when, for a change of grade, 215, 667.
- when for wrongful injury to property, 653b.
- whether general statute of limitations applicable, 665a.
- limitation when compensation must be first made, 665b.
- miscellaneous questions as to limitations, 667a.

LOCAL AUTHORITIES,

- who are, 116, note 64.

LOCATION, (See Authority to Condemn, Appropriation of Property.)

- meaning of words "to," "from," "at" or "near," in respect to, 257.
- construction of statutes as to, 255-258.
- power to change, 258.
- priority of, 305, 306.
- what constitutes a completed, 306.
- description of, in petition, 350-352.
 - in notice, 376.
 - in report or verdict, 510, 511.

LOUISIANA,

- constitutional provisions of, 28.
- easement of levee in, 150.

MAINE,

- constitutional provisions of, 29.
- statutes of, giving damages for a change of grade, 208b.

MANDAMUS,

- to compel the appointment of commissioners, 387, 404.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

MANDAMUS—Continued.

- to compel a new assessment on account of errors, 557.
- to compel an allowance for costs, 563.
- to compel an assessment of damages, 614.
- to compel the levy and collection of an assessment of benefits, 611.
- to compel payment of award, 613.
- to compel the opening of highways, 650.
- to compel a tribunal to act, 650.
- to compel railroad to restore highway at crossing, 653.

MAP, (See Preliminary Surveys, Taking.)

MARKETS,

- a public use, 174.
- in streets, not a legitimate use, 132.
- and may be enjoined, 637.

MARKET VALUE,
definition of, 478.

MARRIED WOMEN, (See Dower, Husband and Wife.)

MARYLAND,

- constitutional provisions of, 30.

MASSACHUSETTS,

- constitutional provisions of, 31.
- statutes of, giving damages for a change of grade, 209.

MATERIALS,

- right to in railroad right of way, 587.
- in streets and highways, 590.
- construction of statutes giving authority to take materials for repair of roads and bridges, 256d.

MEASURE OF DAMAGES, (See Assessment of Damages, Damages.)

MICHIGAN,

- constitutional provisions of, 32.

MILL PONDS,

- crossing of by railroad or highway, 271.
- right of owner of fee to fill, 592.

MILLS AND WATER POWER,

- whether a public use, 178-183.
- early laws in regard to, 178, note 76.
- mill acts an exercise of the eminent domain power, 183.
- contrary decisions, 182.
- priority of right to appropriate a particular site, 305.
- proper parties in proceedings for, 334.
- measure of damages for flowage, 506.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

MINERALS,

whether value of, to be considered in estimating damages, 486.

MISTAKE,

as ground for setting aside report of verdict, 523.

in making assessment, remedy for, 576.

relief in equity on account of, 652.

MINING,

works for, whether a public use, 169, 184.

MINNESOTA,

constitutional provisions of, 33.

statutes of, giving damages for a change of grade, 210.

MISJOINDER,

of parties, 337.

MISSISSIPPI,

constitutional provisions of, 34.

MISSOURI,

constitutional provisions of, 35.

statutes of, giving damages for a change of grade, 211.

MONEY,

may be taken under eminent domain power, 263.

compensation must be made in, 460.

MONTANA,

constitutional provisions of, 35a.

MORTGAGE,

purchasers under, cannot exercise authority to condemn, 243.

by party condemning is subject to claim for compensation, 621.

MORTGAGEES,

are necessary parties, 324.

claims of, upon the damages awarded, when not made parties,
324.

remedies of, against the land, when not made parties, 628.

not affected by deed from mortgagor, 289.

may be joined with mortgagor, 336.

MOTION TO DISMISS,

when proper, 389.

MUNICIPAL CORPORATIONS,

liability of, for change of grade, 92-109.

for damages caused by surface water, 103.

for interfering with natural stream, 104.

for an unlawful change of grade, 105.

for negligence in making change of grade, 106.

for neglect to establish grades, 109.

for damage to railroads, water and gas pipes by grading and

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

MUNICIPAL CORPORATIONS—Continued.

- improving streets, 121e.
 - by building sewers, 121f.
- for removing or injuring trees in street, 132a.
- for ditch in street enlarged by erosion, 109.
- for permitting railroad in street, 625.
- power of, to establish grades a continuing one, 107.
 - to make compensation for change of grade, 108.
 - to authorize railroads in streets, 116.
 - to grant exclusive franchise to railroad, 116.
 - to impose conditions in grant to railroads, 116.
 - to grant right to joint use of tracks in street, 267d.
 - to obtain property by agreement, 288.
- may regulate manner of constructing tracks in street under legislative authority, 121d.
- right of, to compensation for railroads in street, 119.
- whether they may enjoin use of street by railroads, 119, 635.
- cannot condemn property beyond limits without express authority, 240.
 - nor map territory into streets and blocks and forbid improvements on streets, 144.
 - nor bargain away eminent domain power, 261a.
- may take property which it has granted with covenant for quiet enjoyment, 264.
- whether motives of may be inquired into judicially, 134.
- motives of, in exercising power of eminent domain immaterial, 239.
- sufficiency of ordinance or resolution involving a taking, 308.
- effect of change in form of government on pending proceedings, 249.
 - of giving different corporations power to make improvements in the same territory, 250.
 - of making the provisions in the charter of one apply to another corporation, 260.

NATURAL BARRIERS,

- against waters, right to protection of, 58, 59, 91.
- interfering with, a taking, 58, 91.

NAVIGATION, (See Streams, Waters.)

- improvement of, is a public use, 177.
- right to improve, paramount to rights of riparian owners, 71.
- private works which obstruct, a nuisance, 69.
- States may not impair navigation, 91a.
- what constitutes navigability, 76a.

NEBRASKA,

- constitutional provisions of, 36.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

NECESSITY,

- injury or destruction of property in cases of, 7.
- entries in case of, justifiable, 145.
- for exercising power of eminent domain for the legislature, 162, 238.
- as affecting question of public use, 162.
- lack of, as a defence to the application, 393.
- what is a sufficient finding as to, in the report or verdict, 513.
- stating necessity of taking in the petition, 354.
- question of, distinct from that of public use, 238.
- authority to a railroad to use street when necessary, how construed, 116.

NEGLIGENCE,

- in bridging stream, 66, 67, 571.
- in constructing or maintaining sewers, 86.
- in making change of grade, 106.
- by interfering with surface water, 89, 89a, 572.
- damages caused by, not a taking, 154.
 - not to be considered in the proceedings for just compensation, 482.
- damages by, in construction or use of works; not included in award, 574.
- remedy for, 651.

NEIGHBORHOOD ROADS, (See Private Roads and Streets and Highways.)

NEVADA,

- constitutional provisions of, 37.

NEW HAMPSHIRE,

- constitutional provisions of, 38.

NEW JERSEY,

- constitutional provisions of, 39.
- statutes of, giving damages for a change of grade, 212.

NEW YORK,

- constitutional provisions of, 40.
- statutes of, giving damages for a change of grade, 213.

NORTH CAROLINA,

- has no constitutional provisions as to eminent domain, 41

NORTH DAKOTA,

- constitutional provisions of, 41a.

NOISE, (See Assessment of Damages, Nuisance, Taking.)

- injury by, whether a taking, 151a.
 - whether a damage or injury, within constitutions, 230.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

NOTICE,

- constitutional requirements as to, 363-368.
- cases holding that notice need not be given, 363.
- cases holding that notice must be given, 364.
- due process of law requires notice, 341, 365.
- what the notice should contain, 366.
- how to be given, 367.
- by publication or posting, whether sufficient, 367.
- personal, when required, 367.
- giving of, when not required by statute, 368.
- the statutory notice is jurisdictional and must be given, 369.
- meaning of "reasonable notice" in statutes, 370.
- form of, 371.
- specifying time and place, 372.
- how signed, 373.
- describing the property taken, 374.
- stating the nature or purpose of the proposed action, 375.
- describing the location or improvement, 376.
- meaning of the terms "owners," "occupants," etc., in statutes as to, 377.
- serving, publishing, posting, etc., 378.
- waiver of, by appearance or otherwise, 379, 541.
- actual, not equivalent to legal, 379.
- record must show a compliance with the statute as to, 382.
- who is bound or affected by a particular notice, 380.
- proof of, how made, 381.
- who may take advantage of a want or defect of, 383.
- of adjournments and other steps in the proceedings, 384.
- parties once in court must take notice of subsequent proceedings, 384.
- to one tenant in common not good as to others, 327.
- one entitled to, not bound if not notified, 385.
- in case of appeals, 539.
- waiver of, by taking an appeal or otherwise, 541.
- of application for certiorari, 544.
- defective, when ground for quashing proceedings on certiorari, 549.
- essential to jurisdiction, 602.
- when necessary before instituting proceeds, 310.
- of unrecorded deeds and contracts, 297a.
- to treat, under English statutes, effect of, 660.

NUISANCE,

- abating of, not a taking, 156d.
- resulting from exercise of statutory authority, whether actionable, 151a-152b.
- which obstructs navigation may be abated, 69.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

NUISANCE—Continued.

when a private wharf in public waters is not, 80.
damages from noise, smoke, cinders, etc., 493.

OATH,

of commissioners, failure to take, renders proceedings invalid,
411.
its form and sufficiency, 412.
what the record should show as to the oath taken, 413.
waiver of defective oath, 414.

OBJECTIONS,

to the application, 386-399. (See Practice.)
to the report or verdict, time and manner of presenting, 527.
practice in hearing, 528.

OCCUPANTS,

who are, within statutes as to notice, 377.

OFFERS,

to buy or sell, whether competent evidence, 446.

OFFICERS,

public officers as parties, 329.
presiding over special juries, their qualifications, duties, etc., 410.

OHIO,

constitutional provisions of, 42.
doctrine of, as to change of grade, 98.

OIL,

pipe lines for, a public use, 172.

OPEN AND CLOSE,

right to, 426.

OPINIONS,

of witnesses as to value, 435.
as to amount of damages or benefits, 436.
as to other matters, 438.
who competent to give, 437.

ORAL AGREEMENT,

inconsistent with written contract, invalid, 295.
waiving damages, when valid, 298.
validity and effect of, 298.

ORCHARDS,

construction of statutes prohibiting the taking of, 283, 284.

ORDER, (See Award or Judgment.)

when final so as to permit an appeal, 551.

ORDINANCE OF 1787,

provisions of, as to eminent domain, 14.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

ORDINANCES,

involving the taking of property, when sufficient, 308.
certiorari to set aside, 653f.

OREGON,

constitutional provisions of, 43.

OWNER,

meaning of, in statutes as to parties and notice, 335, 377.
how described in petition, 349.
in report or verdict, 514.
right of, to recover from one to whom damages have been
awarded and paid, 627.

OYSTER BEDS,

property in, 85.

PARKS,

a public use, 175, 175a.
may be established over railroad property subject to use by rail-
road, 269.
when may be taken for other public uses, 140, 272.
what is proper use of land taken or dedicated for parks, public
squares and the like, 591a.
diversion of land taken for, 591a.
injunction to prevent diversion of, 645b.

PAROL,

evidence, when received to aid or impeach the record, 605.

PARTIES,

in general, 317.
grantor and grantee, 318.
when contract executory, 319.
persons in possession under oral contract or gift, 319, 331.
heirs, devisees and personal representatives, 320.
persons in adverse possession, 331.
trustees and cestui que trust, 321.
husband and wife, 322, 323.
mortgagees, 324.
judgment creditors, 325.
other lienors, 325.
life tenants, lessees and reversioners, 326, 653d.
tenants in common and joint tenants, 327.
infants, 328.
towns and public officers, 329.
persons in possession of public lands, 330.
persons holding by unrecorded instruments, 332.
licensees, 332.
the proper plaintiff, 333.
when initiative in owner, 334.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

PARTIES—Continued.

- who are "owners," "occupants," "persons interested," etc., 335.
- joinder of, 336.
- misjoinder of, 337.
- new parties, 337, 338.
- effect of death or change of title pending proceedings, 338.
- effect of omitting a necessary party, 339.
- what constitutes making a person a party, 340.
- general conclusions in regard to parties, 341.
- the owner of any right or interest should be made a party, 341.
- statement of, in petition, 349.
- in case of appeal, 538.
- owner may sue on award to unknown owners, 609.
- in suits to recover for property damaged or injured, 625, 653b.
- in actions of trespass, 649.
- who proper plaintiff in case of transfer of title after construction of works causing the damage, 653c.

PARTNERSHIP,

- an award in name of, invalid, 514.

PENALTY,

- for cutting timber, held not to apply to party entering under eminent domain power, 654.

PENDING PROCEEDINGS, (See Proceedings, Practice.)

- how affected by change in constitution or laws, 12, 245.

PENNSYLVANIA,

- constitutional provisions of, 44.
- statutes of, giving damages for a change of grade, 214.

PENT ROADS, (See Private Roads, Streets and Highways.)

PERCOLATION,

- taking water of stream or pond by, 62.
- damage by, a taking, 87.

PERSONAL PROPERTY,

- may be taken under power of eminent domain, 263.
- what is a taking of, 53.
- nothing can be allowed for removal of, from land taken, 488.

PERSONAL REPRESENTATIVES,

- when proper parties, 320.
- when entitled to the compensation, 320.

"PERSONS INTERESTED,

- meaning of, in statutes as to parties, 335.

PETITION,

- when necessary, 343.
- when not, 344.
- in whose name it should be, 333.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

PETITION—Continued.

- addressing, signing, verifying, filing, 345-347.
- when required to be signed by a certain proportion of the property or of its owners, 346.
- right of signers to withdraw, and effect, 346, 347.
- when required to be signed by persons of a particular description, 347.
- general requisites as to form and substance, 348.
- statement of parties, owners and persons interested, 320, 349.
- description of the property or location, 350.
- descriptions held sufficient, 351.
- descriptions held insufficient, 352.
- descriptions when object is to condemn joint use of property or tracks, or to acquire rights or easements, 352a.
- stating the purpose of the taking, 353.
- when should show necessity of the taking, 354.
- statement of title, 355.
- stating the nature of the injury or damage, 356.
- must show inability to agree, 301, 304, 357.
- when the neglect or refusal of some other tribunal to make the improvement should be shown, 358.
- joinder of improvements in, 359.
- amendment of, 361.
- waiver of defect in, 362.
- surplusage does not vitiate, 353.
- insufficient, is ground for quashing proceedings on certiorari, 549.
- when sufficient to give jurisdiction, 602.
- cross petition when proper, 360.
- for certiorari, 544.

PETITIONERS,

- disqualified to act as commissioners, etc., 405.

PETROLEUM TUBES,

- open to public, are a public use, 172.

PIER, (See Wharf.)

PLAINTIFF, (See Parties.)

PLANS, (See Preliminaries, Surveys.)

PLEA,

- propriety of, 390.

PLEASURE DRIVES,

- a public use, 166 175.

POLICE POWER,

- definition of, 6.
- distinguished from eminent domain, 6.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

POLICE POWER—Continued.

- compensation need not be made for damages caused by exercise of, 13.
- cannot be bargained away, 156.
- limitations of the power in respect to property, 156.
- what attempted exercises of it amount to a taking, 156-156f.
- decisions referring drainage laws to, 186.
- whether mill acts are exercise of, 182, 183.
- whether joint use of tracks may be provided for under, 267d.

POLLUTION,

- of water a taking, 65, 90.
- of the atmosphere a taking, 152.
- of waters, when enjoined, 641.

PONDS, (See Lakes and Ponds.)

POOR FARM,

- taking part for school purposes, 272a.

POOR HOUSE,

- a public use, 174.

POSSESSION,

- general principles in regard to obtaining, 578.
- pending proceedings, 578.
- upon a tender or deposit of the damages awarded, 579.
- pending an appeal, 580.
- upon giving security, 582.
- what constitutes a taking of, 583.
- miscellaneous cases as to obtaining or keeping possession, 583c.
- remedy of condemnor to obtain possession, 583a.
- remedy of owner to prevent an unlawful possession, 583b.
- of right of way by railroad, whether exclusive, 586.
- as affecting the right to abandon proceedings, 655.
- what is sufficient, to save the rights acquired by proceedings, 662.

POSTING,

- of notice, what is sufficient, 378.

POUND,

- use of street for, when enjoined, 637.

POWER OF EMINENT DOMAIN, (See Eminent Domain.)

POWER OF THE STATE,

- over private property, 2.
- respecting public property, 2.

PRACTICE, (See Appeal, Amendment, Assessment of Damages, Award, Commissioners, Courts, Jurisdiction, Notice, Parties, Petition, Report or Verdict.)

- may be changed at pleasure of legislature, 245.
- right to a jury, 311-312. (See Jury.)

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

PRACTICE—Continued.

what tribunal is sufficient, 313.

venue of proceedings, 316.

when the proceedings are before a court, 423.

joinder and misjoinder, 336, 337.

objections going to right of petitioner may be raised though not provided for by statute, 390, note.

effect of combining a public and private use in same proceeding, 206.

courts cannot dictate order in which condemnor shall acquire rights or property, 395.

objections to the application.

general considerations, 386.

when the application is to a ministerial officer, 387.

when to a court, 388.

manner of raising objections apparent upon the face of the papers, 389.

manner of raising other objections, 390.

propriety of a plea or answer, 390.

questioning the legal incorporation of the petitioner, 391.

controverting a compliance with the conditions imposed by statute, 392.

denying the necessity of the proposed taking, 393.

prior proceedings for the same purpose as a bar, 394.

other objections, 395.

defences when proceedings instituted by the owner, 396.

practice in hearing, 397.

obviating objections by amendment, 398.

waiver of objections by going to a hearing, 399.

securing the tribunal to assess damages, 400-410.

appointment of commissioners, 400-404.

order or warrant for commissioners or jury, 401.

the writ of ad quod damnum, 402.

mandamus to compel the appointment of commissioners, 404.

setting aside order of appointment, 404a.

what the record should show as to the qualification of commissioners, etc., 406.

waiver of objections to commissioners, jurors, etc., 407.

qualifications of commissioners, etc., 405.

vacancies in the tribunal, effect of and how filled, 408.

disagreement of special juries, effect of, 409.

the presiding officer of special juries, his qualification, duties, etc., 410.

the oath required, 411-414. (See Oath.)

by and before commissioners, 415-423. (See Commissioners.)

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

PRACTICE—Continued.

before a jury:

- view of the premises, 424.
- effect to be given thereto, 425.
- right to open and close, 426.
- as to consolidation and separate trials, 427.
- instructions, 428.

when issues may be submitted to arbitration, 429.

of the report or verdict and action thereon, 509-534. (See Report or Verdict.)

in case of appeals, 535-558. (See Appeals.)

the question of one action or successive actions in tort, 653a.

some questions of practice in suits to enjoin the taking or damaging of property, 645a.

in case of bill to enjoin railroad in street, 636b.

when appeal or error lies to Supreme Court of United States, 558a.

PRELIMINARIES, (See Attempt to Agree.)

designating the property, 307.

maps, plans, surveys, etc., 307.

when an ordinance, resolution or vote of a corporate body is required, 308.

when a previous refusal of some other tribunal is essential, 309.

petition or recommendation when required, 310.

an estimate of cost when required, 310.

miscellaneous decisions, 310.

PRELIMINARY SURVEYS,

entry for, not a taking, 145.

PRESUMPTION,

as to damages included in the award, 564-575. (See Award or Judgment.)

PRIORITY OF RIGHT,

to appropriate specific property, 305-306. (See Appropriation of Property.)

PRIVATE ROADS,

whether a public use, 167.

authority to open strictly construed, 256, 256c.

cannot be laid along a public road, 270.

cannot be made public without compensation, 141.

PRIVATE STREAMS, (See Streams.)

PRIVATE USE, (See Public Use.)

taking for, unauthorized, 157.

taking for, violates federal constitution, 206a,

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

PROFITS,

of business, whether may be considered in estimating damages, 487.

PROMOTERS, (See Contracts.)

effect of contracts made with, 297b.

PROOF,

burden of, 426, 432.

of notice, how made, 381.

of attempt to agree, 301, 304.

PROPERTY,

powers of the State over, 2.

definition of, 54, 58.

meaning of the word in the constitution, 55.

right to flow of streams is, 61.

right of riparian owners on public waters is, 77-83.

in building erected in public waters, 85.

in oyster-beds, 85.

of all descriptions subject to the power of eminent domain, 262.

PROCEEDINGS, (See Assessment of Damages, Award or Judgment, Practice.)

power to change mode of, 245.

effect of repeal or amendment of statutes, 245-247.

effect of change in constitution, 12.

effect of change in municipal government, 249.

cannot be had under acts of one State for damages caused by works in another, 251.

when different authorities have power to lay out roads in same territory, 250.

when one statute is adopted by another or extended to another jurisdiction, 260.

objections to the application and practice in regard to same, 386-399.

the question of notice, 363-385.

matters preliminary to the institution of, 301-310.

effect of death of party or change of title pending proceedings, 338.

by United States, in what court should be taken, 315a.

defective, when may be legalized, 261.

right to jury trial in, 311-312.

what tribunal is sufficient, 313.

nature of, generally, 314.

whether a "suit," "action," "special proceeding," etc., 314, 536.

jurisdiction of U. S. courts, 315.

removal to U. S. courts, 315.

venue of, 316.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

PROCEEDINGS—Continued.

- when quashed on certiorari, 549.
- right to discontinue before completion, 655.
- right to abandon after completion, 656.
- what constitutes an abandonment, 657.
- right to improve pending proceedings, 663.
- when enjoined, 646.

PRESCRIPTION,

- right to land for public use may be acquired by, 300.
- requisites of prescription, 300a.
- prescriptive right of railroad to occupy street, 120.

PROHIBITIVE LEGISLATION,

- not a taking of private property, 156-156f.

PROSPECT,

- whether abutting owner has right of, 91i.

PROSPECTIVE DAMAGES,

- principles with reference to, in making the assessment, 566. (See Assessment of Damages.)

PUBLICATION,

- of notice, what is sufficient, 378.

PUBLIC, THE,

- rights of, in navigable streams, 69, 71.

PUBLIC LANDS,

- persons in possession of, when entitled to compensation, 143, 330.
- are subject to State's power of eminent domain, 264.

PUBLIC POLICY,

- grant of exclusive right of way held against, 289a.

PUBLIC USE,

- the question of, a judicial one, 158.
- confusion existing as to the meaning of the words, 159.
- use may be public though local or limited, 161.
- the question of, not affected by the agency employed, 160.
- nor by the necessity or lack of necessity for the taking, 162.
- the words "public use" a limitation, 163.
- doctrines of the cases stated, 164.
- proper construction of the words, 165.
- highways of all kinds are, 166.
- when private roads are, 167.
- toll roads, bridges and ferries, 168.
- canals to be used as highways, 169.
- canals for irrigation and mining, 169.
- railroads and their necessary appurtenances, 170.
- tenement houses for employes not, 170.
- lateral railroads, switch and spur tracks, 171.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

PUBLIC USE—Continued.

- railroads held not a public use, 170.
- telegraph and telephone lines, 172.
- petroleum tube lines, 172.
- other means of transportation, 172.
- public grain elevators, 172a.
- sewers, gas and water supply, 173.
- buildings for the transaction of the public business, 174.
- public schools, markets, alms-houses, 174.
- parks and pleasure drives, 175, 175a.
- cemeteries, 176.
- improvement of navigation, 177.
- booms, 71, note 51, 177.
- whether mills and water power are, 178-183.
- works to promote fish culture, cranberry culture and the like, 183a.
- whether development of mines is, 184.
- drainage of wet and overflowed lands, 185-199.
- levees, dikes, etc., to prevent the overflow of land, 200.
- promotion of the public health is, 201.
- works for irrigation are, 202.
- property taken for the use of the United States is, 203.
- miscellaneous cases of taking held not for public use, 205.
- combination of public and private use in the same act or proceeding, 206.
- taking for private use violates fourteenth amendment of federal constitution, 206a.

PUMPING WORKS,

- may not be placed in street, 133.

QUALIFICATIONS,

- of commissioners, etc., 405.

RAILROAD, (See Horse Railroads, Street Railroads.)

- classification of railroads, 110a.
- rights of, as a riparian proprietor, 62, note 39.
- cannot be constructed below high water mark without compensation, 84.
- rights of, as an abutting owner, 91e, note 24.
- regulating construction and operation of, whether a taking, 156a.
- power of legislature to impose new liability upon, 156a.
- liability of, for interfering with surface water, 89, 89a.
 - for consequential damages to property, 151a, 152a, 152b.
 - for damages caused by noise, smoke, cinders, vibrations, etc., 151a.
 - for nuisance resulting from repair shops, coal chutes, stock yards, etc., 151a-152b.
- in streets, not a legitimate use, 111, 115i.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

RAILROAD—Continued.

- right to compensation generally, 112.
 - when fee in abutting owner, 113.
 - when fee in public, 115.
 - when fee in third party, 115a.
- authority to occupy, how granted, 116, 125.
 - and construed, 117.
- cannot occupy street under general power to make location, 116.
- right to use street may be granted on conditions, 116.
- rights as to manner of constructing and operating road in streets, 117.
- may not use street for switch yard or for depot or for storing cars, 117.
- may not make unreasonable or excessive use of streets, 117a.
- if unlawfully in street, municipality may enjoin, 119.
- constructed without authority, remedy of abutters, 117b.
- liability of railroad for change of grade, 105, 121a.
- additional track in street, right of abutter to compensation, 121b.
- gate fixtures in street held not an additional burden on fee, 121d.
- damage to railroad by grading or improving streets, 121e.
 - by building sewers, 121f.
 - measure of damages for, 121.
 - when owner estopped to claim damages for, 120.
 - liability to municipality for, 119.
 - statutes giving damages for, 219.
 - depreciation caused by, is damage or injury within constitutions, 225, 230.
- duty of companies having rights on same street, 117.
- whether one action or successive actions for railroad in street, 653b (7).
- remedy in equity to obtain just compensation for railroad in street, 625a.
- miscellaneous questions growing out of, 121d.
- across highways, right to compensation, 118.
- exclusive right to maintain, how violated, 139.
- may be compelled to execute works for the public safety and welfare, 156c.
- are a public use, 170, 171.
- so necessary appurtenances, such as depots, freight houses, yards, gravel pits, etc., 170.
- lateral railroads, spur tracks, etc., whether a public use, 171.
- public use of, not dependent on length of road, 170.
- when not a public use, 170.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

RAILROAD—Continued.

- construction of acts as to location of, 255-256b, 257.
- construction of acts as to power to condemn for branch or lateral railroads, 256a.
- power to change location, 258.
- power to make additional appropriations, 259.
- when property of, may be taken for highways, 266.
 - for another railroad, 267-267d.
 - for railroad crossing, 268.
 - for canal, ditch, park, telegraph, etc., 269.
- right of one company to take the tracks of another company or the joint use of same, 267a, 267d.
 - to take part of the right of way of another company, 267b.
 - to take land used for depots, yards, shops, etc., 267c.
- street railroads crossing commercial railroads, whether a taking, 121c.
- construction of statutes giving power to intersect, join, connect or unite with other roads, 268b.
- when may take property already devoted to public use, 270, 272.
- contracts for right of way,
 - sufficiency as to description, 290.
 - who competent to make, 289.
 - construction of, 299.
- whether bound by, or liable on, agreements of grantor or lessor, or predecessor, 297.
- effect of reserving right of way in grants by, 299a.
- priority of right to appropriate specific property, 306.
 - to use street, 306a.
- what constitutes a completed location, 306.
- may acquire right by prescription, 300.
- cannot acquire property by dedication, 300c.
- measure of damages when one road crosses another, 489.
 - when one road takes use of another's tracks, 490.
 - when a highway crosses a railroad, 491.
 - when laid across or along a turnpike, 492.
 - when laid along a public street, 493.
- liability for additional damages, 564-577. (See Award or Judgment.)
- rights in property condemned, 584.
- must not interfere with rights of adjoining proprietors, 584.
- subject to maxim sic utere tuo ut alienum non laedas, 585.
- whether its possession of right of way exclusive, 586.
- right to trees, herbage, materials, etc., on right of way, 587.
- right to lay additional tracks on right of way, 141a.
- whether may grant use of tracks to other companies as against owner of fee, 141a.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

RAILROAD—Continued.

- whether may grant to another company part of right of way, 141a.
- what are new burdens on fee of right of way, 141a.
- right to transfer property and franchise, 594.
- effect of repeal of charter of, 594.
- abandonment and reversion of lands acquired by, 596-598.
- right to remove improvements in case of abandonment, 598.
- no right to encroach beyond land taken, 599.
- when enjoined from laying or operating tracks in streets, 635-636b.
 - from using street for depot or platform, 637.
 - from infringing another company's exclusive right, 642.
 - from crossing another road, 644.
- when ejectionment will lie against railroad in street, 647.
- may be compelled to restore highway at crossing, 270a, 653.
- duty and liability as to private crossing, 588a, 653a.

REASONABLE USE,

- of stream, what is, 61a.

RECEIVER,

- when may exercise power to condemn, 242.

RECOMMITTALS,

- of the reports of commissioners, etc., 530.

RECORD,

- what it should show generally, 518, 604.
 - as to notice, 382.
 - as to the qualifications of commissioners, 406.
 - as to the oath taken, 413.
- when sufficient collaterally, 600-606. (See Collateral Attack.)
- parol evidence to aid or impeach, 605.

RECORDING,

- of the report or verdict, what constitutes, 518.

REFERENCE,

- to ascertain rights in damages deposited, 616.

REHEARING,

- before commissioners, etc., 423, 530.

RELEASE,

- of damages, what amounts to, 294.
 - by married woman, 289.
 - by owner, effect of, 294, 396.

REMEDIES,

- of abutting owners, how dependent on ownership of fee, 911.
- for the unlawful occupation of street by a railroad, 116, 117b, 119.
- under statute giving damages, 207, 208, 218d.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

REMEDIES—Continued.

- for a change of grade, 210, 213, 218e.
- on contracts with parties condemning, the usual remedies lie, 296.
- when the statutory remedy is exclusive, 607, 624.
- when not exclusive, 608.
- for the recovery of just compensation,
 - by action on the award or judgment, 609.
 - defences to such action, 610.
 - when the damages are payable from an assessment of benefits, 611.
 - in case of non-entry or abandonment of the taking, 612.
 - by mandamus to compel payment, 613.
 - to compel an assessment of damages, 614.
 - by bill in equity for the same purpose, 615.
 - by enjoining use or possession until damages are paid, 318, 631, 634.
 - assessment of just compensation in an equitable proceeding
 - to enjoin the construction or use of works, 625a.
 - by suit to abate dam unless damages paid, 619.
 - by enforcing claim as a vendor's lien, 620.
 - or against those claiming under the party condemning, 621, 622, 622a.
 - by common law suit for value of land appropriated, 623.
 - by execution on judgment for compensation, 630a.
 - by bill for specific performance to compel condemnor to complete purchase under English acts, 630a.
- of condemnor, to protect its possession or rights, 645a.
- to obtain damages which have been deposited, 616.
- upon bonds given to secure damages, 617.
- for property damaged, injured or injuriously affected, 624, 625.
- for damages by negligence, 651.
- in case of conflicting claims to the damages awarded, 627, 627a.
- of mortgagees of the land taken, 628.
- of the owners of other liens and interests, 629.
- of an assignee of the damages awarded, 630.
- of condemnor, to obtain possession of the property, 583a.
- of owner to prevent an unlawful possession, 583b.
- to have award applied to the payment of claims of mortgagees or lienholders, who were not made parties, 629a.
- of public authorities to prevent unlawful use of street, 645e.
- in equity on account of error, mistake, new evidence, etc., 652.
- by injunction for a wrongful interference with private rights, 631-646. (See Injunction.)
 - by ejectment, 647, 648.
 - by action on the case, 654.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

REMEDIES—Continued.

- by action of trespass, 649.
- by action of forcible entry and detainer, 654.
- by mandamus when proper, 650.
- to protect franchise in public streets, 645d.
- to compel restoration of highway crossing, 653.
- for failure to construct and maintain private crossings, 653.
- by certiorari to set aside ordinance, 653f.
- the question of one action or successive actions in tort, 653b.

RENT, (See Landlord and Tenant.)

- apportionment of, where part of leased property taken for public use, 483.

REMOVALS,

- right of, to U. S. courts, 315.

REPEAL, (See Statutes.)

- of railroad charter, effect upon right of way, 694.
- by implication, 248.

REPORT OR VERDICT,

- power of commissioners to reconsider or amend, 423.
- not competent evidence of value, 449.
- extending time for making report, 415.
- requisites generally, 509, 513.
- should not reserve easements or require things to be done in lieu of money, 505.
- describing the property taken or location of the improvement, 510, 511.
- what is a sufficient finding on the question of damages, 512.
 - on the question of necessity or public utility, 513.
- describing the owners of property taken or affected, 514.
- whether the award should be joint or several, 515.
- conditional and alternative awards, 516.
- time of making, extensions, etc., 517.
- filing or recording of, 518.
- confirmation of, by non-judicial bodies, 519.
 - by courts, general principles, 520.
 - what are sufficient grounds for setting aside, in general, 520, 521.
 - irregularities on the part of the commissioners, 522.
 - accident, mistake or error of judgment, 523.
 - inadequate or excessive damages, 524.
 - departure from the petition in laying out a highway, 525.
 - miscellaneous grounds of objection, 526.
- the time and manner of presenting objections, 527.
- practice in hearing objections, 528.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

REPORT OR VERDICT—Continued.

- when objectors are estopped, 531.
- the order confirming, its form and effect, 532.
- power of court to amend or modify or confirm in part, 529.
- when order of confirmation may be set aside, 534.
- form of judgment to be entered on the verdict of a jury, 533.
- rehearings, recommittals, reviews, etc., 530.
- effect of delay in asking for confirmation, 526.

RES ADJUDICATA,

- doctrine of, in suits for damages to property, 653b.
- whether former proceedings a bar to new proceedings, for the same purpose, 394, 661.

RESERVOIR,

- injury by percolation from, a taking, 87.

RESOLUTION. (See Ordinance.)

REVERSION,

- of lands taken for public use, 596, 597.
- right to improvements in case of, 598.

REVERSIONERS,

- as parties, 326.

REVIEW OF PROCEEDINGS. (See Appeals, Certiorari.)

REVIEWS, 530.

RHODE ISLAND,

- constitutional provisions of, 45.
- statutes of, giving damages for a change of grade, 215.

RIGHT OF WAY. (See Railroads, Telegraph, etc.)

RIGHTS IN THE PROPERTY CONDEMNED,

- in land taken for railroad right of way, 584, 586.
 - maxim sic utere tuo ut alienum non laedas applies, 585.
 - right to trees, herbage, materials, etc., 587.
 - right to private crossings, 588a.
- in land acquired by contract for railroad right of way, 292a, 292b.
- in property taken for other railroad uses, 588.
- in land taken for highways, right of the public, and owner of the fee generally, 589.
 - right to trees, herbage, materials, etc., 590.
- in land of turnpike companies, 591.
- in lands taken or dedicated for parks, public squares and the like, 591a.
- in land taken for other uses, 592.
- when fee taken, 593.
- transfers by the party condemning, 594.
- effect of forced sales by creditors, 595.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

RIGHTS IN THE PROPERTY CONDEMNED—Continued.

- reversion when public use abandoned, 596.
- what amounts to an abandonment, 597.
- rights limited to land taken, 599.
- right to take possession, 578-583. (See Possession.)
- right of condemnor to limit or qualify its use of the property, 481.
- what riparian rights attach to property condemned, 61b.

RIPARIAN RIGHTS,

- in private navigable streams, 69.
- are subject to right of public to improve navigation, 71.
 - and to right to establish harbor lines, 84b.
- in public navigable streams, 73.
- in public waters, 77-83.
 - enumeration of, 83.
 - are property, 78.
 - injury to a taking, 81, 84, 85.
- cannot be abolished without compensation, 85a.
- may be taken for public use, 262a.
- interference with, a damaging within constitution, 229.
- injunction to prevent an interference with, 641.
- of city, in a stream, 62.
- of railroad company in stream crossed, 62, note 39.
- right to construct booms, 71.
- whether one action or successive actions for interference with, 653b.
- miscellaneous cases of interference with, 85.

RIVER, (See Streams.)

SALES,

- proof of, when competent, 443, 445.

SCALES,

- not proper use of street, 133.

SCHOOLS,

- a public use, 174.
- when property of, may be taken for other uses, 272.

SECURITY,

- what is sufficient, to satisfy the constitution, 458.
- possession upon giving, 582.

SEEPING, (See Percolation.)

- injury by, a taking, 87.

SERVICE,

- of notice, how made, 378.

SET-OFF,

- of assessment of benefits in suit on an award of damages, 610.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

SEWER, (See Taking, Waters.)

damages from insufficient, 86.

city may not discharge upon private property, 86, 641. (See Injunction.)

may be constructed in streets without compensation, 127.

but not unless for use of abutting property, 127.

a public use, 173.

right to discharge into stream, 65.

SIC UTERO TUO UT ALIENUM NON LÆDAS,

applies to proprietors of lands taken for public use, 566, 585.

as respects surface water, 88.

SIGNING,

of petition, 345-347.

of notice, 373.

SMOKE, (See Assessment of Damages; Nuisance; Taking.)

injury by, is damage within constitution, 230.

injury by, whether a taking, 151a.

SOUTH CAROLINA,

constitutional provisions of, 46.

statutes of, giving damages for a change of grade, 215a.

SOUTH DAKOTA,

constitutional provisions of, 46a.

SPECIAL ASSESSMENTS,

distinguished from eminent domain, 5.

are an exercise of the taxing power, 5.

SPECIAL DAMAGE,

what constitutes, 227, note 32, 653e.

SPECIAL LAWS, (See Statutes.)

SPECIFIC PERFORMANCE,

of agreements to convey, 296.

to build depots, fences, crossings, etc., 296.

of oral agreement when partly performed, 298.

bill in nature of, to compel assessment of damages, 615.

will lie under English acts to compel condemnor to go on and complete taking and pay compensation, 630a.

STAND-PIPE,

not a legitimate street use, 133.

STATUARY,

use of street for, 133.

STATUTE OF FRAUDS,

applies to agreements for right of way, etc., 298.

STATUTES, (See Authority to Condemn, Legislature.)

constitutionality of eminent domain statutes generally, 261c.

making railroads liable for stock killed not a taking, 156a.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

STATUTES—Continued.

- construction of, giving damages for change of grade, 206b-218i.
 - giving damages for railroads in streets, 219.
 - in other cases, 220.
 - as to authority to condemn, 240-254.
 - as to location, 255-258.
 - as to power to condemn for branch or lateral railroads, 256a.
 - as to power of street railroads to condemn, 256b.
 - as to power to condemn for roads and streets, 256c.
 - as to the estate or interest which may be taken, 278.
 - as to how much may be taken, 279, 280.
 - for vacation of street, 134a.
 - as to power to take property already devoted to public use, 266, 276.
 - as to what may be taken thereunder, 287.
 - regulating right and construction of railroad crossings, 268a.
 - giving power to intersect, join or unite with other railroads, 268b.
 - provisions as to compensation and remedy are liberally construed, 254a.
 - when the provisions of one statute are adopted by another or extended to another jurisdiction, 260.
 - as to appeals, 552.
 - as to parties, 317-341.
 - as to notice, 369 et seq.
 - as to costs, 561-563.
- relating to procedure and practice may be changed at pleasure of legislature, 245.
- imposing additional liabilities, validity of, 246.
- effect of repeal of, after damages assessed, 247.
 - on pending proceedings, 247.
- expiration of, effect on pending proceedings, 247.
- repeal of, by implication, 248.
- conflict between general and special laws, 248.
- have no extra territorial effect, 251.
- giving a naked authority to condemn whether available, 252.
- giving authority to condemn must be strictly pursued, 253.
 - must be strictly construed, 254.
 - must provide for compensation, 452.
 - what is sufficient provision for compensation, 453a.
 - must provide for notice, 368.
- legalizing defective proceedings, 261.
- as to benefits and measures of damages, 473.
- making decision final and conclusive, effect of as to appeals, 536.
- opening proceedings for review, 558.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

STATUTES—Continued.

- giving a remedy for damages not foreseen and estimated, 577.
- giving a right to recover damages by proceedings which have been abandoned, 659.
- permitting possession upon a tender or deposit of the damages awarded, 579.

STEAM,

- pipes for distribution of, may be laid in streets, 130.

STEAM-MOTOR RAILROADS, (See Street Railroads.)

- whether a legitimate street use, 115e.

STOCK,

- shares of stock may be taken for public use, 263.

STOCKHOLDERS,

- whether disqualified to act as commissioners, 405.
- disqualified to act as councilman, where corporation interested, 116, note 65.

STOCK KILLING,

- making railroads liable for, not a taking, 156a.

STREAMS, (See Riparian Rights, Taking, Waters.)

- definition and classification of, 60.
- title to the bed of, 60.
- rights in the flow of, 61.
- artificial, rights in, 62, note 53.
- abstracting or diverting water of, a taking, 62, 70, 73.
- increasing flow of, a taking, 63.
- rights in water added to, 63.
- reasonable use of, a question of fact, 64.
- no right to render current irregular, 64.
- pollution of, a taking, 65.
- prescriptive right to foul, 65.
- changing current by works in, upon or across, 66, 104.
- embankment preventing overflow on one side, 66.
- effect of authority to bridge, 66, 67a.
- damages by extraordinary floods, 67, note 7.
- works which set back the water, 67.
- making private stream public or navigable, 68.
- rights in private navigable streams, 69.
 - closing one of two channels of, 71, note 45.
- public, what are, 72.
 - rights of riparian owners on, 73. (See Riparian Owners.)
 - interfering with flow of, a taking, 74.
 - damage to authorized works in, 75.
 - right to protection of natural barriers against overflow of, 91,
 - what constitutes a reasonable use of, 61a.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

STREAMS—Continued.

- what constitutes navigability, 76a.
- flood waters of stream, whether surface water, 88a.
- damages by interfering with, when presumed to be included in the award, 571.
- right of railroad to take water from stream crossed, 585.
- State may not impair navigability, 91a.
- some miscellaneous cases of interference with, 91a.
- whether one action or successive actions for interfering with flow of, 653b. (1)
 - for diverting or polluting the waters of, 653b. (2)

STREETS AND HIGHWAYS, (See Private Roads, Railroads, Taking.)

- nomenclature of, 91b.
- distinction between rural and urban highways, 91b.
- rights of abutting owners, 91e-91l.
- where fee in public, it is in trust for street uses only, 91k.
- distinctions based on ownership of fee as to rights and remedies of abutting owners, 91l.
- rights of public not dependent on ownership of fee, 91l.
- damage from change of grade, 92-109. (See Change of Grade.)
- railroads not a legitimate use of, 111.
- right to compensation for railroads in, 112-125. (See Railroads.)
- elevated railroads in, not a legitimate use, 115b.
- horse railroads in, whether a legitimate use, 115c.
- street railroads in, whether a legitimate use, 115h, 115i.
- cable railroads in, whether a legitimate use, 115d.
- steam motor railroads, whether a legitimate street use, 115e.
- electric trolley railroads in, whether a legitimate use, 115f.
- underground railroads in, whether a legitimate use, 115g.
- unreasonable or excessive use of, by railroads, 117a.
- remedy of abutters for railroad constructed without authority, 117b.
- rights of railroad in street as to manner of constructing and operating road, 117.
- railroad may not use, for switch yard, or storing cars, 117.
- control of, may be vested in park board, 133.
- traffic teams, may be excluded from, 133.
- what uses of, are legitimate, 126.
- may be used, and without compensation, for sewers and drains, 127.
 - otherwise, when sewer is not for use of abutting property, 127.
 - for water pipes, 128.
 - for gas pipes, 129.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

STREETS AND HIGHWAYS—Continued.

- for distributing steam, electricity, etc., for general consumption, 130.
- for cistern for sprinkling, 133.
- for stationary street lamps, fire plugs, drinking fountains, etc., 133.
- may not be used without compensation for telegraph or telephone lines, 131.
- for markets, 132.
- for a jail or lock-up, 133.
- for a pound or hack stand, 133.
- for pumping works, 133.
- for a canal, 133.
- for pipe for conveying salt water, 130.
- injury to shade trees in, whether a taking, 132a.
- use of, for electric light wires, whether a taking, 131a.
- damages from tunnel or causeway in, 100b.
- liability for changes in relative width of sidewalk and roadway, 133.
- vacation of, whether a taking, 134.
- when taken for turnpike, owner of fee not entitled to compensation, 141.
- highway adjacent to, but not taking one's land, whether a taking, 148.
- a road of one class cannot be changed to another more onerous without compensation, 141.
- rights and duties of different electrical companies using street, 139a.
- priority of right to use under different grants, 306a.
- are a public use, 166.
 - though they accommodate but one family, 166.
 - or are cul-de-sacs, 166.
 - or are for pleasure driving, 166.
 - or though expense is paid by private parties, 166.
- whether they shall be laid out, not a judicial question, 166, 239.
- statutes giving damages for railroads in streets, 219.
- depreciation caused by railroads in, is damage or injury within constitution, 225.
- damage by use or improvement of streets, when within constitution giving compensation for property, damaged, injured, etc., 223-226.
- construction of acts as to location of, 255-258.
- construction of statutes as to power to condemn for, 256c.
 - as to taking materials for repairs of, 256d.
- when railroad property may be taken for, 266.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

STREETS AND HIGHWAYS—Continued.

- opening of, across railroads, 270a.
 - duty of company to restore crossing, 118.
 - when they may be taken for other public uses, 270.
- sufficiency of ordinance, or resolution to open or widen, 308.
- petition for, when sufficient as to signatures, 346, 347.
 - as to description of location, 350-352.
- joinder of different improvements in one proceeding, 359.
- description of location in the report or verdict, 510, 511.
- the way laid out must correspond with the petition, 525.
- measure of damages in various proceedings connected with, 491, 493, 493a, 494. (See Assessment of Damages.)
- measure of damages where fee of existing street taken, 500a.
- damages by bringing street to grade to be included in assessment for land taken, 570.
- rights of the public and owner of the fee generally, 589.
- right to trees, herbage, materials, etc., 133, 590.
- injunction to prevent illegal use of, 635-638. (See Injunction.)
 - to prevent change of grade, 647.
- injunction to prevent vacation of street, 637a.
- when owner of fee may maintain ejectment, 647.
 - when trespass, 649.
- remedy by ejectment in case of wrongful occupation of street, 647a.

STREET RAILROADS, (See Elevated Railroads, Horse Railroads, Railroads, Streets and Highways, Street Railroads, Taking.)

- definition of, 110a.
- cable roads, whether a legitimate street use, 115d.
- steam motor railroads, whether a legitimate street use, 115e.
- electric trolley railroads, whether a legitimate street use, 115f.
- underground street railroads, whether a legitimate street use, 115g.
- general conclusions as to abutters' right to compensation, 115h, 115i.
- rights of, as to manner of constructing and operating road, 117.
- liability for change of grade, 121a.
- over commercial railroads, whether a taking, 121c.
 - who liable for expense of crossing, 121c.
- damage to, by grading or improving streets, 121e.
 - by building sewers, 121f.
- construction of statutes as to power of, to condemn, 256b.
- what a violation of exclusive right to maintain, 139.
- rights of electric roads, as against other electric companies using street, 139a.
- on toll bridge, held not a taking, 141.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

STREET RAILROADS—Continued.

- tracks of are private property, 141b, 267d.
- questions as to joint use of tracks, 267a, 267d.
- injunction to prevent use of street by, 636.
- whether enjoined from crossing steam railroad, 644.

SUBTERRANEAN WATERS, (See Streams, Taking, Waters.)

- rights respecting, 90.
- damages by interfering with, whether a taking, 90.
 - whether included in the award, 572.
- may not obstruct subterranean outlet of lake, 67, note 14.

SUFFICIENT CAUSE,

- definition of, 520.

SUIT,

- whether condemnation proceeding is a suit, 314.

SUPERSEDEAS,

- when writ of certiorari operates as, 546.

SUPPORT, RIGHT OF,

- abutting owner has, in soil of street, 101.
- interference with, a taking, 101, 151, 585.
- damages by interfering with, whether presumed to be included in the award, 569.

SUPREME COURT,

- when appeals lie to, in condemnation proceedings, 550.
- practice in, 553.

SURFACE WATER,

- what constitutes, 88a.
- whether flood waters of stream are, 88a.
- rights respecting, 88.
- interfering with such rights, a taking, 88, 89, 89a.
- damages by, from grading streets, 103.
- interference with, whether a damage or injury within constitution, 229.
- damages by interfering with, whether included in the award, 572.
- railroad must not interfere with adjacent owner's rights respecting, 585.
 - and may be enjoined from so doing, 641.
- whether one action or successive actions for interfering with flow of, 653b (3).

SURPLUSAGE,

- in petition, does not vitiate, 353.

SURVEYORS. (See Commissioners.)

SURVEYS, (See Preliminary Surveys.)

- when required as preliminary to proceedings, 307.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

SWITCH YARDS,

land may be taken for, 170.

TAKING, (See Appropriation of Property, "Damaged.")

what constitutes, general principles, 53-56.

changes which the law has undergone, 57.

leading cases, 58, 59.

the question considered with reference to the following points:

interfering with flow of stream, 61, 70, 74, 104, 571.

increasing flow of stream, 63.

interfering with regularity of flow, 64.

polluting water of stream, 65.

changing current of stream, 66.

flooding land, 67, 87.

making a private stream public or navigable, 68.

damages by improving navigation, 71.

damage to authorized works on public stream, 75.

injury to riparian rights, 84, 85.

cutting off access to public waters, 81, 84a-85.

interfering with fishery, 85.

making a private wharf public, 85.

destroying a fording, 85.

interfering with flow of surface water, 89, 89a, 103, 572.

interfering with or pollution of subterranean waters, 90, 572.

injury to land by seeping or percolation of water, 87.

discharging water upon land, 87.

act declaring waters of stream public, 85a.

establishing harbor lines, 84b.

miscellaneous cases of interference with riparian rights, 85.

interfering with riparian rights upon lakes and ponds, 84c.

abstracting or diverting public waters, 84d.

miscellaneous cases as to waters, 91a.

interfering with natural barrier against water, 91.

interfering with right of support, 101, 151, 569.

change of street grade, 94-109, 570.

railroads in streets, 110-125.

elevated railroads in streets, 115b.

horse railroads in streets, 115c.

cable railroads in streets, 115d.

steam motor railroads in streets, 115e.

electric trolley railroads in streets, 115f.

underground railroads in streets, 115g.

street railroads, whether a legitimate street use, general conclusions, 115h, 115i.

unreasonable or excessive use of streets by railroads, 117a.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

TAKING—Continued.

- railroads across street, right of those on either side to compensation, 117.
- change of grade to accommodate railroad in street, 121a.
- whether laying additional track in street is a taking, 121b.
- street railroads crossing commercial railroads, 121c.
- damage to railroads, water and gas pipes by grading and improving streets, 121e.
 - by building sewers, 121f.
- sewers and drains in streets, 127.
- water pipes in streets, 128.
- gas pipes in street, 129.
- other pipes and conduits, 130.
- telegraph or telephone lines in streets, 131.
- wires for lighting and other purposes, 131a.
- use of street for markets, 132.
- injury to shade trees, 132a.
- interfering with access by obstructing street at a distance from plaintiff's property, 132b.
- other uses of streets, 133.
- vacating streets, 134.
- impairing franchises, 136.
- impairing exclusive franchise, 137.
 - in case of bridges and ferries, 138.
 - in case of turnpikes, railroads, etc., 139.
- damage by competition, 135-139.
- electrical interference, 139a.
- a ferry landing on a highway, 141.
- a railroad over a turnpike, 141.
 - or over a canal bank, 141.
- a line of telegraph on a railroad right of way, 141.
- laying out turnpike as a public way, 141.
- change of use or additional use, 140-141.
- imposing a different or additional burden on land, 141.
- street railroad on toll bridge, 141.
- new burdens on fee of railroad right of way, 141a.
- joint use of tracks, 141b.
- impairing or destroying easements, 142.
- interfering with one in the wrongful possession of public lands, 143.
- mapping into streets and blocks for future improvement, 144.
- establishing building lines, 144a.
- entry for preliminary surveys, 145.
- necessary entries, 145.
- entry for U. S. coast survey, 145.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

TAKING—Continued.

- injuries by blasting, 146.
- injury to business, 147.
- highways laid out adjacent to, but not taking one's land, 148.
- interfering with right of exclusion, 149.
- passing under land by tunnel, 149.
 - or over by wires, etc., 149.
- levees in Louisiana, 150.
- consequential damages, whether a taking, 151a.
- damage by noise, smoke, cinders, vibrations, etc., 151a.
- damage by nuisance resulting from exercise of statutory power, 151a-152b.
- injury to adjacent land by pressure, vibration, flooding, percolation, etc., 152a.
- polluting the atmosphere, 152.
- damages from negligence, 154.
- damages by construction of works, 567, 568.
- various exercises of the taxing power, 155.
 - of the police power, 156.
- establishing fire limits, 156.
- abating nuisances, 156.
- prohibiting noxious trades, 156.
- regulating use of property, 156.
 - railroads and corporations, 156a.
 - business, occupations and contracts, 156b.
 - rates and charges, 156c.
- destroying property made, kept or used in violation of law, 156d.
- damage by construction of works, 567, 568.
- various miscellaneous cases, 153.
- by the State, what constitutes, 454.
- taking more than necessary for the public use, 169.
- construction of statutes conferring authority to take, 237-261.

TAX,

- definition of, 4.
- distinguished from exercise of eminent domain, 4.
- whether a taking in any case, 155.

TAX-PAYERS,

- whether disqualified to act as commissioners, 405.

TELEGRAPH AND TELEPHONE,

- a public use, 172.
- in streets—whether a taking, 131.
 - whether a damage within constitution, 226.
 - injunction to prevent, 637.
- on railroad right of way, whether a taking, 141a, 269.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

TELEGRAPH AND TELEPHONE—Continued.

- when may be laid along turnpike, 271.
- rights of owner of fee of land taken for, 592.
- proper description in proceeding to condemn for, in street or on railroad right of way, 352a.
- measure of damages when telegraph erected on railroad right of way, 490a.
- interference with by electric street railroad, 139a.

TENANTS IN COMMON, (See Joint Tenants.)

TENNESSEE,

- constitutional provision of, 47.
- statutes of, giving damages for a change of grade, 216.

TERMINI, (See Location.)

TERRITORY,

- does not possess power of eminent domain, unless by grant, 237.

TEXAS,

- constitutional provision of, 48.

TIDE WATERS, (See Riparian Rights, Streams, Waters.)

TIME, (See Limitations.)

- how specified in the notice, 372.
- of making compensation, 454-459.
- with reference to which damages should be estimated, 477.
- of making the report or verdict, 517.
- for making objections to report of commissioners, viewers, etc., 527.
- within which to take appeal or certiorari, 555.

TITLE,

- to the bed of streams, 60.
- to lakes and ponds, 76.
- to bed of navigable waters, 72.
- to bed of navigable streams and waters, a question of state law and policy, 76b.
- nature of public title to bed of, navigable waters, 76c.
- acquired by deed or contract, 291.
- effect of change of, pending proceedings, 338.
- statement of, in petition, 355.
- whether owner must prove, 440.
- what is sufficient proof of, 442.
- estoppel to deny, 441.

TOLL BRIDGE, (See Bridges and Ferries.)

TOWNS,

- as parties, 329.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

TOWN MEETINGS,

action of, in laying out highways, 519.

TOWNSHIP ROADS, (See Private Roads and Streets and Highways.)

TRACT,

what constitutes an entire tract with reference to the question of damages and benefits, 475, 493a.

TRANSFER,

of property held for public use, 594.

not an abandonment of the public use, 597.

by party condemning is subject to claim for compensation, 621.

TREES,

injury to trees in street, whether a taking, 132a.

whether value of, to be considered in estimating damages, 486.

right to, on railroad right of way, 587.

in streets and highways, 590.

removal of, from street, when enjoined, 637.

TRESPASS,

action of, for damages under invalid statute, 452.

damages by, whether may be included in assessment of just compensation, 482a, 508.

beyond land condemned, actionable, 574.

action of, when it will lie, 649.

TRIBUNAL, (See Commissioners, Jury, Practice, Proceedings.)

must be fair and impartial, 313.

TRUSTEES,

as parties, 321.

with power of sale entitled to damages awarded, 616.

TUNNEL,

in street, whether a taking, 100b.

under land a taking, 149.

in street, a damage within constitution, 223a.

TURNPIKE,

liability of, for change of grade, 109.

owner of fee entitled to compensation for railroad on, 113.

exclusive right to maintain, how violated, 139.

protected by injunction, 642.

a public use, 168.

cannot be taken for highway without express authority, 271.

when made a public road owner of fee not entitled to compensation, 141.

measure of damages when a railroad is laid on, 492.

rights of the owner of the fee and of the franchise, 591.

right to transfer property and franchises, 594.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

UNDERGROUND RAILROADS, (See Street Railroads.)

whether a legitimate street use, 115g.

UNITED STATES,

constitutional provisions of as to eminent domain, 14.

do not apply to the States, 11.

jurisdiction of the courts of, 315.

proceedings by, in what court should be taken, 315a.

state may exercise power of eminent domain in behalf of, 203.

may prevent state from impairing navigability of stream, 91a.

UNITED STATES SUPREME COURT,

questions reviewable in, 558a.

USE OF THE PROPERTY TAKEN, (See Rights in the Property
Condemned.)

UTAH,

constitutional provisions of, 50a.

UTILITY, (See Necessity.)

VACANCIES,

in the tribunal, effect of and how filled, 408.

VACATION,

of streets, right of abutting owners to damages, 134, 226a.

injunction to prevent, 637a.

statutory authority to vacate streets, application and construction, 134a.

VALUE, (See Assessment of Damages, Market Value.)

VENDOR'S LIEN,

enforcing claim for damages as, 620, 621.

VENUE,

of proceedings, 316.

VERDICT, (See Report or Verdict.)

VERIFICATION,

of the petition, 345.

VERMONT,

constitutional provisions of, 49.

VIADUCTS, (See Streets and Highways.)

in streets, right to recover for damages by, 100b, 223a.

measure of damages for, 495.

VIBRATIONS,

whether a recovery may be had for damages by, 151a, 152, 230.

VIEW OF THE PREMISES,

when granted and how conducted, 424.

effect to be given thereto, 425.

VIEWERS, (See Commissioners.)

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

VILLAGES, (See Municipal Corporations.)

VIRGINIA,

constitutional provisions of, 50.

WAIVER, (See Estoppel.)

of defective oath, 414.

of defects in petition, 362.

of notice by appearance or otherwise, 379.

of plea in bar by tender of damages, 396.

of objections by going to a hearing on the merits, 301, 399.

of objections to commissioners, jurors, etc., 407.

of defective notice by taking an appeal, 541.

of attempt to agree, 303.

of prepayment of just compensation, 454.

WAR POWER,

definition of, 8.

distinguished from eminent domain, 8.

destruction of property in war not a taking, 8.

WARRANT,

to summon commissioners or jury, 401.

WASHINGTON,

constitutional provisions of, 50b.

statutes of, giving damages for a change of grade, 216a.

WATER PIPES,

damage to by grading or improving streets, 121e.

by building sewer, 121f.

WATER POWER, (See Mills and Water Power.)

WATERS, (See Lakes and Ponds, Mills, Riparian Rights, Streams,
Surface Waters, Subterranean Waters.)

taking of, by percolation, 62.

flooding with, is a taking, 67.

rights of riparian owners in public, 77-83. (See Riparian Rights.)

right to protection of natural barriers against overflow of, 91.

nature and limitations of title to bed of navigable waters, 76c.

rights of riparian owners upon lakes and ponds, 84c.

abstracting or diverting public waters, whether a taking, 84d.

what constitutes surface water, 88a.

whether flood waters of stream are surface water, 88a.

rights respecting surface water, 88.

rights in subterranean waters, 90.

what interference therewith is a taking, 90.

miscellaneous cases arising out of injuries by water or interference with water rights, 91a.

what a violation of exclusive right to furnish, 139.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

WATERS—Continued.

interference with, when a damage or injury within constitution, 229.

whether navigable waters may be taken or interfered with under particular statutes, 273.

when trespass will lie for diverting waters of stream, 649.

whether one action or successive actions for interference with, 653b.

injunction to prevent an interference with, 641. (See Injunction.)

WATER WORKS,

pipes for, may be laid in streets without compensation, 128.

a public use, 173.

cannot occupy street for reservoir, 270.

may be taken for other public uses, 272.

one water company cannot condemn property of another, 272.

may be taken by city, 272.

proper description in proceeding to condemn right to lay pipe, 352a.

transfer of property and franchises of, 594.

WAYS, (See Canals, Railroads, Streets, Highways, Turnpikes.)

WEST VIRGINIA,

constitutional provisions of, 51.

WHARF,

right to construct to navigable waters, 79, 80, 83.

converting a private wharf into a public one held not a taking, 85.

interference with by harbor lines, whether a taking, 84b.

WHAT CONSTITUTES A TAKING. (See Taking.)

WHAT MAY BE TAKEN, (See Appropriation of Property.)

under particular acts, 255, 256e.

how much may be taken, 393.

WIFE, (See Husband and Wife.)

WISCONSIN,

constitutional provisions of, 52.

statutes of, giving damages for a change of grade, 217.

WITNESSES, (See Evidence.)

competency of, generally, 433.

who disqualified, 433.

limiting number of, 434.

opinions of, as to value, 435.

as to amount of damages or benefits, 436.

who competent to give such opinions, 437.

may be asked how many times they have testified for the party calling them, 450.

fees of expert witnesses, whether allowable as costs, 562a.

[The references are to the sections: Vol. I, §§ 1-287; Vol. II, §§ 287a-667a.]

WRIT,

of ad quod damnum, 402.

WRIT OF CERTIORARI, (See Certiorari.)

WRIT OF ERROR,

when it lies in condemnation proceedings, 554.

WYOMING,

constitutional provisions of, 52a.

YARDS AND ENCLOSURES,

construction of statutes prohibiting the taking of, 283, 284.

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